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**PASTE ON INSIDE OF FRONT COVER OF VOL. 233 S. W.**

**State Report Citation of Cases in the SOUTHWESTERN REPORTER, VOL. 233.**

The left-hand column shows the page of this volume on which a case begins and opposite at the right is shown where same case is to be found in the State Report.

Illustration: The case of *Dennis v. Gorman*, is in S. W. Rep., vol. 233, p. 50. This table shows that the same case is reported in "238 Mo. 1."

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VOLUME 233

PERMANENT EDITION

COMPRISING ALL THE CURRENT DECISIONS OF THE  
SUPREME AND APPELLATE COURTS OF ARKANSAS  
KENTUCKY, MISSOURI, TENNESSEE  
AND TEXAS

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF SOUTHWESTERN CASES IN WHICH REHEARINGS  
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<sup>1</sup> Resigned, effective October 3, 1921.<sup>2</sup> Elected Presiding Judge to succeed William M. Taylor.<sup>3</sup> Appointed to succeed French Spencer.<sup>4</sup> Resigned, effective October 3, 1921.<sup>5</sup> Appointed to succeed Norman G. Kittrell, Sr.<sup>6</sup> Appointed October 1, 1921.



# AMENDMENTS TO RULES

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## SUPREME COURT OF TEXAS<sup>1</sup>

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It is ordered (November 16, 1921) by the Supreme Court that rule 34 of the amended rules governing the preparation of briefs in the Court of Civil Appeals, heretofore made effective September 1, 1921, be, and it is, amended so as to hereafter read as follows:

### Rule 34.

The brief of either party may be written or typewritten. If written, it shall not exceed fifteen pages of manuscript. If typewritten, it must be with double space between the lines.

<sup>1</sup> For other rules, see 159 S. W. viii, 211 S. W. vii, 230 S. W. vii.



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# THE SOUTHWESTERN REPORTER VOLUME 233

## CITY OF ST. LOUIS v. CLEGG. (No. 21118.)

(Supreme Court of Missouri, Division No. 2.  
July 19, 1921.)

**1. Dedication ¶14—Construction may designate public as grantee of dedication.**

The absence of a grantee in a dedication may be supplied by construction designating the public as the grantee.

**2. Estoppel ¶97—General public can avail itself of estoppel.**

Though an estoppel in pais can operate only when representations have been made to a legal person who has relied upon them, it can arise in favor of the general public, or the general public can avail itself of an estoppel in favor of a legal person.

**3. Dedication ¶18(2)—Conveyance of lot described as bordering on street indicates intention to dedicate street.**

Where an owner of premises conveyed a portion thereof by a deed describing it as a lot bordering on a designated street, the deed indicates an intention of the grantor to dedicate the designated street to the public.

**4. Dedication ¶31—Formal acceptance of dedicated street used by the public held unnecessary.**

Where a deed unequivocally described one boundary of the property conveyed as a street, and it was accepted by the grantee, and the use and dominion over the property was regulated in accordance therewith, a formal acceptance of the dedication of the street was unnecessary.

**5. Dedication ¶38—Subsequent contracts between parties cannot destroy dedication by deed.**

Where a dedication of a street by a deed to property bordering thereon had been completely effectuated and the street used, a subsequent contract between the parties to the original deed, or a subsequent conveyance of other property to a different grantee, in which the street was described as a private street, cannot affect the consummated dedication.

**6. Dedication ¶38—Cannot be revoked after use is established.**

A dedication of the street, though made for the direct benefit of the grantee of lands bordering thereon, but intended for the public,

cannot be revoked after the public use is established.

**7. Dedication ¶53—Ownership of fee is immaterial on the question of dedication, so long as use continues.**

In controversies respecting dedication of street to public use, the ownership of the fee and the fact that it may revert on vacation of the highway does not militate against the conclusion that there was a dedication, so long as the public use continues.

**8. Eminent domain ¶85—Dedicator of streets not entitled to compensation.**

An owner of land who had dedicated it as a public street is not entitled to compensation upon the taking of the fee for a street by the city.

**9. Eminent domain ¶149—Owner of fee subject to private street can recover only nominal damages.**

The owner of the fee of property subject to use as a private street can recover only nominal damages for the taking of such property for a public street by the city.

Appeal from St. Louis City Court; Kent K. Koerner, Judge.

Proceedings by the City of St. Louis against Emma Clegg and others to appropriate certain property for street purposes. From a judgment of the circuit court authorizing the appropriation and awarding only nominal damages to the named defendant, that defendant appeals. Affirmed.

W. B. & Ford W. Thompson, of St. Louis, for appellant.

Chas. H. Daues, H. A. Hamilton, and G. Wm. Senn, all of St. Louis, for respondent.

**WALKER, J.** This is an appeal from a judgment of the circuit court of the city of St. Louis, appropriating certain property for street purposes.

A petition to establish, open, and widen Glades avenue, in the city of St. Louis was filed by the city in the circuit court. Among other defendants named was the appellant. Commissioners were appointed, who awarded appellant nominal damages for her property taken, and assessed her benefits at \$210.60. She had owned the property here

involved many years. Prior thereto it had belonged to her husband, now deceased, who, on the 3d day of September, 1886, had a survey made of it. This survey was filed in the office of the recorder of deeds of the city of St. Louis, on July 24, 1909. It designates the property as located "on Glades avenue." The filing of this survey was subsequent to the making and delivery of a deed by appellant to one Chas. P. Heil, on July 18, 1909, "for a lot on Forest avenue, extending along the south line of Glades avenue." On July 12, 1915, the grantee, Heil, made a contract in writing with appellant, with reference to Glades avenue, which, omitting superscription and the signatures of the parties, is as follows:

"This is to certify that I, Mrs. Emma Clegg, residing at Garner and Prather avenue, in the city of St. Louis, agree to sell to Mr. Chas. P. Heil, residing at Garner and Forest avenues, city of St. Louis, a strip of ground laying between his property on the southeast corner of Glades avenue and Forest avenue and for a depth of 200 feet eastwardly on said Glades avenue. Said part or parcel of property 5 feet more or less that may be left between his property and said contemplated 40 foot street, to be opened by the city of St. Louis as petitioned for by said Mr. Chas. P. Heil, Mrs. Emma Clegg and others, for a consideration of (\$10.00) ten dollars per front foot on Forest avenue and a depth of 200 feet on Glades avenue."

Signed by both parties and witnessed.

A deed was also introduced in evidence, dated January 29, 1917, from the appellant to Walter W. Corey and wife, recorded May 28, 1917, which called for a lot of ground having a front of 100 feet "on the south line of Glades avenue, a private street 50 feet wide, by a depth southwardly of 174 feet and 7½ inches to a private alley 15 feet wide, the same being east of the property of Heil." This deed was made and filed for record after the commencement of this suit and the filing of the commissioner's report.

There was also offered in evidence a plat of a sewer district which shows that the strip of land in controversy on the north line of the property of appellant had been assessed for a sewer. A plat was also introduced in evidence showing an assessment district between Forest and Prather avenues and an assessment for the paving of Forest avenue against appellant including one lot adjacent thereto the property of Charles P. Heil, and also assessing against her 100 feet further east to the end of the assessment district, and for the paving of the alley along the rear of said property.

It was admitted that the assessor of the city of St. Louis had assessed city and state taxes against appellant, including the property as described on the Cozen's survey and the property in controversy, during each year of her ownership down to the date of

the judgment in this case, and that she had paid the taxes thereon. It was also shown that the assessor of special taxes had made out the assessment district for the sewer tax, and that he had assessed appellant's property, because there was no deed to Heil, nor was the Cozen's survey of record in 1908; that when he came to make the assessment for the paving of Forest avenue he followed the Cozen's survey in assessing the cost of the paving of same against the appellant; that he made the assessment for the paving of that avenue against appellant's property by following the description found in the deed made by her to Heil, but made no assessment against the city for any part of Glades avenue; that the assessment was made in such a way that the property north of Glades avenue, as well as the property belonging to appellant south of this avenue, absorbed the entire assessment of the area contained in the avenue. The plat accompanying this statement shows the location of Forest avenue on the west and Prather avenue on the east of Glades avenue, the property of appellant and of Heil lying south of same. The particular area involved in this appeal is the southern part of the street defined by ordinance, designated as Glades avenue, and extending from Prather to Forest avenue, a distance of 530 feet.

I. The complaint of the appellant is on account of the alleged inadequacy of the commissioner's awards, in that they should have been substantial and not nominal in amount. The issue as thus presented requires for its determination the status of Glades avenue, as a public or private highway. The appellant contends: That no act of hers can be construed as a dedication. That the recorded plat of this property, while it may have indicated a proposed survey, bore upon its face no evidence that it was the act of the owners, or that its recording had been authorized. That it possessed none of the requisites of a statutory dedication. *Coberly v. Butler*, 68 Mo. App. 556; *Downer v. St. Paul, etc.*, R. R., 23 Minn. 271. That a map or plat to constitute a dedication must be more than the drawing of lines along property designated as a street. *College v. Cedar Rapids*, 120 Iowa, 541, 95 N. W. 267. That the passive permission of owners that the public may use lands, although continued for a term of years, does show an intent to dedicate to public use. *Postal v. Martin*, 4 Neb. (Unof.) 534, 95 N. W. 8; *Hartley v. Vermillion* (Cal.) 70 Pac. 273. Thus the leaving of a lane through a farm to accommodate the owner and his neighbors is a revocable license, but not a dedication. *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004; *Balmat v. City of Argenta*, 123 Ark. 175, 184 S. W. 445. Furthermore, that there was no acceptance on the part of the city, and that the strip of land at the time of the report of the com-

missioners was private property, and, if so, that more than a nominal allowance should have been made for its taking. Specific reasons, based upon the testimony, are urged in support of these contentions, which will receive consideration later.

II. In the determination of the question as to whether there was a dedication of this property to a public use, the deeds from appellant to Hell and the Corey's merit more attention in the determination of the matter at issue than has been given to them. Conceding the correctness of the rules above stated, as to the requisites of a dedication under appropriate facts, do the facts in evidence render these rules applicable in the instant case? In the deed to Hell, the property conveyed was described as follows:

"A lot in block forty-six hundred twenty-four, A, of the city of St. Louis, beginning at a point in the east line of Forest avenue at its intersection with the south line of Glades avenue, thence southwardly along said east line of Forest avenue one hundred twenty-four feet seven and five-eighths inches, more or less, to the north line of property now or formerly owned by C. Moore, thence eastwardly along the north line of lot now or formerly owned by C. Moore one hundred twenty-five feet, thence southwardly along the east line of lot now or formerly owned by C. Moore, and parallel with said east line of Forest avenue fifty feet, more or less, to a private alley fifteen feet wide, thence eastwardly on north line of said private alley seventy-five feet, thence northwardly and parallel with said east line of Forest avenue one hundred seventy-four feet seven and five-eighths inches, more or less, to the south line of Glades avenue, thence westwardly along said south line of Glades avenue two hundred feet to the point of beginning."

In the deed to the Corey's made and executed after this suit was brought, we find the following description of the property conveyed:

"A lot in block No. four thousand six hundred twenty-four A (4624A), having a front of one hundred feet (100') on the south line of Glades avenue, a private street fifty feet (50') wide, by a depth southwardly of one hundred seventy-four feet (174') seven and five-eighths inches (7 $\frac{5}{8}$ ") to a private alley fifteen feet (15') wide; bounded west by a line two hundred feet (200') east of and parallel to the east line of Forest avenue. Also all right, title and interest in and to that part of the private street known as Glades avenue which immediately adjoins the above-described property on the north."

[1] A dedication to the public in so many words is rendered difficult on account of the absence of a grantee. However, this has been obviated in some instances by construction. For example, a deed to "the present and future owners of town lots" is construed to be a dedication to the public (*Mayo v. Wood*, 50 Cal. 171), as is also a covenant in a grant which gave the citizens of a town

"the free privilege of drinking water" from a spring on a tract of land adjacent to the town and owned by the grantors (*Corbin v. Dale*, 57 Mo. 297); likewise a deed "to the inhabitants" of a town has been held to be a dedication. *Brown v. Bowdoinham*, 71 Me. 144. Further than this to effectuate the purpose of the grantor at the time, as indicated by the language employed, it has been held that a dedication may be made in a deed from one individual to another, if sufficiently explicit in terms to indicate the grantor's purpose. *Barney v. Lincoln Park*, 203 Ill. 397, 67 N. E. 801; *Jersey City v. Morris Canal*, 12 N. J. Eq. 547; *Trerice v. Barteau*, 54 Wis. 99, 11 N. W. 244. In such a case while the grantee acquires an easement by the grant, the deed at the same time constitutes an offer of the use declared. *Fulton v. Dover*, 6 Del. Ch. 1, 6 Atl. 633. An illustration of a dedication of this character is found in a case where a party sells property within the limits of a city, and in the deed bounds the same by certain designated streets. The implication following this designation, which is in the nature of a covenant, is that the purchaser, and as a consequence the public, is to have the use of such streets. *Moale v. Baltimore*, 5 Md. loc. cit. 321, 6 Am. Dec. 276. To hold otherwise, says, in effect, the Supreme Court of Pennsylvania, would enable the proprietor of a body of lands sold in lots to perpetrate a gross fraud. When he sells and conveys the lots according to a plan which shows them to be on the streets, he must be held to have stamped upon them the character of public streets. Not only can the purchasers of lots abutting on such streets thus assert their character, but all others. In re *Opening Pearl Street*, 111 Pa. loc. cit. 565, 5 Atl. 430.

[2] While the Pennsylvania case seems to contravene the rule that an estoppel by deed, including an implied covenant, can operate only in favor of the grantee or his privies in estate (*Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63; *Sunderlin v. Struthers*, 47 Pa. 411), and although an estoppel in pais can operate only when representations have been made to a legal person, who has relied upon them to the extent that it would be inequitable to allow them to be withdrawn (*Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210), there are numerous cases full of references to estoppel that seem to recognize that it can arise in favor of the general public, or that the general public can avail itself of an estoppel in favor of a legal person (13 Cyc. p. 478 and notes). Our own rulings affirm this doctrine. For example, in *Moses v. St. Louis Sec. D. Co.*, 84 Mo. loc. cit. 247, we held that the call for a street in a deed is more than a mere description, but is an implied covenant that there is such a street. The rule announced in the *Moses Case* has, under a like state of

facts, never been questioned, but, on the contrary, has been frequently approved.

In the recent case of *St. Louis v. Barthel*, 256 Mo. 255, 166 S. W. 267, where commissioners in partition, as shown by their report and accompanying plats, reserved a strip of ground 30 feet wide for a street, and described the property abutting thereon as allotted to the heirs, which did not include any part of said strip, and the report of said commissioners was confirmed by a judgment, not appealed from, and various lots were thereafter sold to parties who improved them in the belief that the street was a public street, the fact that the commissioners used the words "reserved for street purposes," instead of expressly stating that it was set aside for that purpose, did not deprive their act of the character of a dedication.

In *Hatton v. St. Louis*, 264 Mo. 634, 175 S. W. 888, where a plat was made by commissioners in partitioning land which bounded the respective allotments by certain streets and alleys designated as dedicated to the city, followed by an exchange of deeds between the allottees, in accordance therewith, though not acknowledged or recorded, it was held to constitute a common-law or non statutory dedication as efficacious as if legally accepted by the city in any recognized manner, or the owners had, by any act recognized by law, estopped themselves to question the dedication. 264 Mo. 644, 175 S. W. 890, citing cases.

In *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735, we held that rights acquired under an incomplete or defective dedication by third parties will operate in favor of the public and such third parties so as to render the dedication valid, although lacking statutory requisites.

[3] The deed from appellant to Hell designates Glades avenue as the northern boundary of the property, and terminates the description of same by metes and bounds as "on the south line of said avenue." These references eliminated and the description would be insufficient to locate the property. It is evident, therefore, that in the mind of the grantor the designation of the avenue was intended as something more than the arbitrary naming of a limit, but rather as a reference to a permanent line of demarcation, which was to constitute, as stated, the boundary of the property conveyed. Designated as a street, it must be held that the grantor intended it to be a street. Construed otherwise, the words become meaningless, and the effectiveness of the transfer fails on account of imperfect description.

A fact persuasive of the correctness of this conclusion is the survey of this property, made for the husband of the appellant in 1886, and filed and recorded in the recorder's office in the city of St. Louis in 1909. It declares Glades avenue to be the northern

boundary of the property in controversy, and designates it as a proposed highway. The presumption is not unreasonable that the plat of this survey was held at the time of its filing for record by the appellant, and that its recording was at her instance. If so, its entry upon the record about 10 days after the deed from appellant to Hell may, in the absence of any evidence to the contrary, be presumed to have been her act, and as such declaratory of her purpose to dedicate that part designated as an avenue to the public for the use indicated by the term. In any event, it remained upon the record unchallenged at least seven years before this suit was brought. In addition, Charles P. Hell, to whom appellant made the deed to the property, testified as to user, in that Glades avenue had been opened since 1902, and that he had several times driven through it.

[4] In harmony with the cases cited, we hold that appellant's deed to Hell, aided by the facts stated, constituted a dedication to public use of that portion of her property designated therein as Glades avenue. The terms of the deed are unequivocal, it was accepted by the grantee, and the use of, and dominion over the property has been regulated in accordance with those terms. A formal acceptance to render the dedication complete was, under such circumstances, unnecessary.

For example, we have held that a road opened by a landowner, with the consent of an executor of an estate owning adjoining lands, which road is to be located on the landowner's land and that of the estate, constitutes, without more, a dedication. *Borchers v. Brewer*, 271 Mo. 137, 196 S. W. 10. To a like effect is the ruling that by deed the owner of ground may dedicate the same to the public for a street. *Duckworth v. City of Springfield*, 194 Mo. App. 51, 184 S. W. 476.

[5, 6] The writing between the appellant and Hell six years, or, in fact at any other time, after the dedication became complete, in which the former for a consideration agreed to sell the ground to the latter therefore described in the deed, will not suffice to effect a revocation of the grant theretofore made, nor can it be construed, in the face of the terms of the deed, as indicative of another purpose than that expressed in such deed. Besides, the grant, although made for the direct benefit of the grantee, and probably as an inducement to him to buy the land, was intended for the public, and when this use was established the right of revocation ceased.

[7] The fact that at common law the fee in the soil over which a public highway is established remains in the original owner does not militate against this conclusion. While the fee may revert upon the vacation of the highway, until this occurs the use of same by the public is absolute, and can in no wise be affected by any act of the original



owner. If it were otherwise, the grant would lose the characteristic of a dedication. The permanent use by the public is the matter of prime importance. Second Street Imp. Co. v. K. C. Ry., 255 Mo. 519, 164 S. W. 515; Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483; Marsh v. Fairbury, 163 Ill. 401, 45 N. E. 236.

Incidentally it may be said that if this had been a statutory dedication the fee would have vested in the city upon the recording of the deed. Section 9287, R. S. 1919; Laddonia v. Day, 265 Mo. 383, 178 S. W. 741. The possibility of the ownership reverting adds nothing to the rights of the original owner, so long as there is no vacation of the grant.

Eight years after the dedication of this property, and after this suit had been brought, the appellant, in a deed to Corey and wife, attempts to give color to the Heil deed not warranted by its terms, and thereby change its nature by designating Glades avenue as a private street. For the reasons stated in discussing the contract between the appellant and Heil, this attempt is ineffectual for the purposes intended.

[8, 9] Supplemental to the conclusion that it was the evident purpose of the appellant to dedicate the property comprised within the limits of Glades avenue for public use, we come to the question of her right to damage as sought to be maintained in this proceeding. This demands the consideration of her legal status from another point of vantage. The effect of her deed to Heil was to divest her of title to the strip of land lying north of and adjacent to the property conveyed and constituting a part of Glades avenue. Having parted with the fee in this property, she was entitled to no damages for its appropriation. By her deed to the Coreys, she transferred her title to the continuation of this strip lying along the north of the boundary line of the property conveyed and constituting a part of Glades avenue. Although designated as a private street in this transfer, so far as she is concerned the same rule applies as to her damages as in the case of a public street, as was held in Restetsky v. Railroad, 106 Mo. App. loc. cit. 387, 85 S. W. 665.

Whatever damages she is entitled to, therefore, is for the appropriation of such portion of Glades avenue lying north of and adjacent to the property she has not conveyed, and comprising the remainder of the avenue between Forest and Prather avenues.

Where the area included within a proposed public street is burdened in favor of adjacent lots with easements in the nature of a street, public or private, the owner is entitled, upon condemnation for the formal establishment of a highway, to recover only nominal damages. We so ruled in McKee v. City of St. Louis, 17 Mo. loc. cit. 191, in which we held that, if a lot in a city is sold, bounded by a

street designated as such on a map made by the owner of the lands, a reference to which sales are made, although the street remains unopened under the authority of the corporation, the owner, when the street is subsequently opened on the application of the corporation, will be entitled only to nominal damages.

In Bartlett v. Bangor, 67 Me. 460, it is held that where land is taken for a public way, which is already burdened with a private way, the owner is entitled to no more than nominal damages.

In Olean v. Steyner, 135 N. Y. 341, 32 N. E. 9, 17 L. R. A. 640, the opening of a street as affecting the value of property adjacent thereto is discussed, and it is held that the advantages accruing are such as to entitle the owner to no more than nominal damages for the property appropriated.

In conformity with these rulings, which, in our opinion, properly state the measure of damages, the judgment of the trial court is affirmed. It is so ordered.

All concur.

#### KUEHN et al. v. RITTER. (No. 22042.)

(Supreme Court of Missouri, Division No. 1. July 11, 1921. Motion for Rehearing and Motion to Transfer to Court in Banc Overruled July 28, 1921.)

1. Wills  $\Rightarrow$  163(2)—Proponent with whom testator lived held to have burden of disproving undue influence.

A daughter of testator with whom testator was living when he made his will, and who took care of him and had control and management of his property, has the burden of disproving undue influence in the execution of a will which gave her the bulk of testator's property.

2. Wills  $\Rightarrow$  166(2)—Evidence held not to show fiduciary relationship between testator and daughter.

Evidence merely showing that testator lived with his daughter, who took personal care of him, held not to establish a fiduciary relationship between testator and the daughter, which imposed on the latter the burden of disproving undue influence in the execution of a will whereby the daughter received the bulk of the father's estate.

3. Wills  $\Rightarrow$  163(8)—Undue influence not presumed from mere opportunity to exercise it.

The court is not authorized to conclude the existence of undue influence as affecting a will upon evidence of the beneficiary's opportunity to exercise such influence unsupported by other evidence showing its actual existence.

4. Wills  $\Rightarrow$  165(4)—Letters of testator held admissible to show natural state of affections.

Where a will was contested for undue influence, letters written by testator several

years before the execution of the will are admissible on behalf of proponent as declarations which were external manifestations of the state of his natural affections, though not admissible to disprove undue influence when the will was executed.

**5. Appeal and error ¶206(1)—Limitation of evidence to purpose for which it was competent must be requested below.**

Appellant cannot complain that evidence which was competent for one purpose was not limited to that purpose where he did not ask an instruction so limiting its competency.

**6. Evidence ¶237—Letters written by proponent's daughter held not admissible against proponent.**

Letters written by proponent's daughter to one of the contestants are not admissible to show undue influence by proponent unless authorized or ratified by her, and the mere fact that she mailed the letter with knowledge of its contents was not a ratification of the daughter's acts.

**7. Evidence ¶478(1) — Nonexpert witness cannot give opinion as to mental condition.**

In proceedings to contest a will for incapacity and undue influence, it was not error to exclude testimony of nonexpert witnesses as to the mental condition of testator before and at the time of the execution of the will on the objection that they had not qualified to express an opinion.

Graves and James T. Blair, JJ., dissenting in part.

Appeal from St. Louis Circuit Court; Frank Landwehr, Judge.

Suit by Otto Kuehn and others against Cora Ritter, to contest the validity of a will. From a judgment sustaining the will, contestants appeal. Reversed and remanded.

The plaintiffs brought this suit in the circuit court of the city of St. Louis to contest the validity of the will of Louis Kuehn, deceased, on the grounds of mental incapacity and undue influence exercised over his mind by the respondent. The trial resulted in a judgment sustaining the will, and the plaintiffs duly appealed the cause to this court.

The record is unusually long, which makes it practically impossible to set out the evidence or its substance in the statement of the case. All we can do in that regard is to say that there was ample evidence tending to show that the testator was of unsound mind, and that the defendant exercised undue influence over his mind in the execution of the will, on the plaintiffs' side, and that the evidence for the defendant was equally strong, clear, and convincing that the testator was mentally sound, and that he was not influenced by the defendant in the execution of the will.

A little more in detail the plaintiffs' evidence tended to show that:

The will was made on the 23d of May, 1916,

in the testator's eighty-fourth year, while he was feeble in mind and body by reason of the inroads of hardening of the arteries, Bright's disease, and senile dementia, and while he was living at the home of the defendant, where all his physical wants were ministered to by her; and in addition she attended to his business and personal affairs. The will named the defendant the executrix and the residuary legatee of his estate, and decreed to each of the plaintiffs the sum of \$1,000.

Kuehn died on October 7, 1917, possessed of the premises numbered 2116 Morgan street, worth \$3,000, and No. 1436 Mississippi avenue, worth \$3,500, both in the city of St. Louis, and producing a net rental of \$40 per month, and a certificate of deposit in the Liberty Bank for \$19,493.89, payable to himself or Cora Richmond, and a savings account in said bank of \$428.54, standing in the name of himself or Cora Richmond. The defendant thereby secured a devise and bequest 23 times as large as any of her brothers.

This proceeding was commenced on December 27, 1917. The questions of undue influence and mental incapacity were submitted to the jury, and the jury sustained the will, and the plaintiffs appeal. The evidence clearly made a case for the jury.

Henry A. Baker and E. T. & C. B. Allen, all of St. Louis, for appellants.

Robert M. Zeppenfeld, of St. Louis, for respondent.

WOODSON, P. J. (after stating the facts as above). [1] I. Counsel for appellants assign numerous errors committed by the circuit court in the trial of this cause, and asks this court to reverse the judgment of that court on that account.

The first error complained of is the action of the trial court in refusing instructions numbered 8, 9, and 10 asked by counsel for appellants. In substance they told the jury that, if they believed from the evidence that the respondent was the daughter of the testator, that at the time of the execution of the will the testator was over 80 years of age, and that he was weak in body and mind, and that at said time, and for some time prior thereto, he resided with the respondent, and was under her care, and continued to reside so with her until his death, that during said time she gained control of the greater part of the testator's property, and that she was given the bulk of his property under said will, then the law presumes that the said purported will was the result of undue influence exercised over his mind by his said daughter, and, unless such presumption of undue influence is rebutted by a preponderance of the evidence, then they should find for the appellants.

Under the light of the evidence introduced

in this case, these instructions should have been given—rather one instruction embodying the substance of the three should have been given—and that not having been done, the action of the court in refusing to have done so was reversible error.

[2] II. Counsel for appellants contend that the burden of overcoming the presumption that the alleged will was the result of undue influence exercised over the mind of the testator by the respondent rested upon her. This contention is hypothesized upon the supposition that the evidence showed that there was a confidential relation existing between the testator and his daughter, the respondent. If that fact had been established by the evidence, then unquestionably the legal proposition announced would have been correct; but the trouble with that contention is the evidence does not show the facts so to be; in fact, counsel for appellants do not contend that the evidence shows the existence of any such confidential relation existing between the testator and the defendant, but in their own language, as expressed in paragraph II of their brief, they only insist that they (the appellants)—

“having shown the interest, the disposition, and the opportunity of the defendant to substitute her will for her father’s, the burden of proof was upon the defendant to show by the greater weight of the evidence that the will was not the result of her undue influence.”

[3] This court has expressly held in the case of *Kleinlein v. Krauss*, 209 S. W. 933, that a court is not authorized in concluding the existence of undue influence, as affecting the validity of the testator’s will, upon evidence of the beneficiary’s opportunity to exercise same, unsupported by other evidence showing its actual existence. We therefore rule this contention against the appellants.

[4] III. Counsel for appellants next insist that the trial court erred in admitting the unsigned and undated memo. of letters of the testator to Otto, made years before the date of the will, because they were incompetent and immaterial on the question of undue influence of the defendant in the year 1916, and incompetent and immaterial upon the issue of mental capacity of the testator in 1916.

That insistence in a broad and general sense states a correct proposition of law, but in a more limited sense it does not; or in other words, there is an exception to the proposition stated in the insistence, namely: The declarations of a testator are admissible when made before the execution of the will as external manifestations of the state of his natural affections and to disprove the undue influence charged. *Coldwell v. Coldwell*, 228 S. W. 95; *Borland on Wills & Admr.* (1915) p. 276, 277; *Crowson v. Crowson*, 172 Mo. loc. cit. 703, 72 S. W. 1065; *Selbert v. Hatcher*, 205 Mo. 83, 102 S. W. 962; *Lindsey v.*

*Stephens*, 229 Mo. loc. cit. 618, 129 S. W. 641; *McFadin v. Catron*, 120 Mo. loc. cit. 271, 25 S. W. 506.

[5] If this evidence was not limited for the purpose for which it was competent, then it was the duty of counsel for appellants to have asked an instruction so limiting its competency, and not having done this the appellant is in no position to complain; and we therefore decide this point against the appellants.

[6] IV. It is next insisted by counsel for appellants that the court erred in refusing to admit in evidence two letters written by Elsie Richmond to Louis Kuehn, dated respectively July 12, 1916, and July 26, 1916. Writer of these letters was the daughter of the defendant, and they were sent by the daughter from Kansas City to the mother in St. Louis, who mailed them to Louis Kuehn, who testified that the defendant knew the contents of the letters. The main tenor of the letters was that the writer insisted that Louis Kuehn stay away from her home because he worried and mistreated her mother and grandfather, the testator. If I correctly understand the position of counsel, it is that these letters tend to show that defendant was trying to keep Louis from seeing and talking with his father, the testator, and thereby drew the inference that the testator was under the control and influence of the defendant, and that he was without outside and independent counsel and advice.

In our opinion these letters were not admissible for the purposes for which they were offered. They might have been competent for the purpose of impeaching the witness, the daughter of the defendant, had they been offered for that purpose, but clearly not for the purpose of establishing a fact, as an admission binding on the defendant, unless it had been shown that the witness was the agent of the mother, or that she had knowledge of the contents of the letters and ratified the same, neither of which was shown by the evidence; and the mere fact that defendant may have known the contents of the letters, as Louis Kuehn testified she did, and forwarded the same to Louis for her daughter, who was in Kansas City, would not of itself amount to a ratification of what was contained in the letters. But, independent of that, I have carefully read both of said letters, and for the life of me, I am unable to see how in the world they could have been of any benefit to the plaintiffs had they been admitted; it seems to me that their effect would have been against the interests of the appellants, instead of in their favor. But, independent of this, they clearly were not admissible for the purposes offered, and the court did not err in their exclusion.

[7] V. The appellants offered nonexpert witnesses and asked them the mental con-

dition of the testator before and at the time of the execution of the will. This testimony was objected to, because they had not qualified to express an opinion upon that subject, and the court sustained the objection, which ruling is assigned as error here. In our opinion this ruling was correct. *Heinbach v. Heinbach*, 274 Mo. 301, loc. cit. 316, 202 S. W. 1123; *Wigginton v. Rule*, 275 Mo. 412, loc. cit. 448, 205 S. W. 168.

For the error mentioned the judgment is reversed and cause remanded for a new trial.

All concur; GRAVES, J., in separate opinion, in which JAMES T. BLAIR, J., concurs.

GRAVES, J. (concurring). I concur in the result reached in this opinion. The judgment is reversed and cause remanded, and properly so, but I do not agree that there is no evidence tending to show fiduciary relation between father and daughter. My learned Brother in his statement of the case says:

"The will was made on the 23d of May, 1916, in the testator's eighty-fourth year, while he was feeble in mind and body by reason of the inroads of hardening of the arteries, Bright's disease, and senile dementia, and while he was living at the home of the defendant, where all his physical wants were ministered to by her, and *in addition she attended to his business and personal affairs.*"

The italics are ours, and this italicized portion of the statement of facts makes a case of fiduciary relation. *Mowry v. Norman*, 204 Mo. 189, 103 S. W. 15, and 223 Mo. 476, 122 S. W. 724. The *Mowry* Case was here twice, and the facts in that case were much like this case as to the son and father. The father lived with the son, and his wants were looked after by the son, and in addition the son attended to the business of the father. This last fact, we ruled, created a fiduciary, or confidential relation. So in this case the mere fact that the parties were father and daughter does not preclude the idea that there was a confidential or fiduciary relationship between them. Upon this question, see, also, *Smith v. Williams*, 221 S. W. loc. cit. 363; *Kleinlein v. Krauss*, 209 S. W. loc. cit. 936; *Wendling v. Bowden*, 252 Mo. loc. cit. 687, 161 S. W. 774; *Maddox v. Maddox*, 114 Mo. loc. cit. 46, 21 S. W. 499, 35 Am. St. Rep. 734.

My Brother may be a little emphatic in his statement of the facts quoted supra, but an examination of the record discloses evidence from which the jury could conclude that defendant very largely managed the business affairs of the father. In fact his money was kept in a joint account, so that she could do therewith as she pleased.

Appellant asked instruction No. 9, which reads:

"The Court instructs the jury that if you find and believe from the evidence that the defendant was the daughter of Louis Kuehn, the testator, that at the time of the making of the paper purporting to be his will, and for some time prior thereto, he resided with her, and continued to reside with her until his death, and that she had complete control of the household affairs, that she had control and management of her father's property, and that she gets the bulk of his property under said will, then the law presumes that the said purported will is the result of undue influence of said defendant, and, unless such presumption of undue influence is rebutted by a preponderance of the evidence, you should find that the paper writing read in evidence is not the last will and testament of Louis Kuehn, deceased, and the burden of overcoming such presumption is on the defendant."

Under the facts this instruction upon fiduciary relations should have been given. For this reason I can only concur in the result of the majority opinion.

JAMES T. BLAIR, J., concurs in these views.

#### ALBRECHT v. SLATER et al. (No. 21406.)

(Supreme Court of Missouri, Division No. 2, June 23, 1921. Rehearing Denied July 19, 1921.)

##### 1. Gifts §4 — Delivery and acceptance with intent to transfer title is essential to gift inter vivos.

To make an effective gift inter vivos, there must be both a delivery of the property with intention to transfer possession and title thereto immediately, and an acceptance by the donee.

##### 2. Gifts §22—Constructive or symbolic delivery does not sustain gift inter vivos.

A constructive or symbolic delivery is not sufficient for a gift inter vivos.

##### 3. Gifts §49(6)—Evidence held insufficient to sustain claim of gift inter vivos.

Evidence that decedent had declared that he had given a trust deed to plaintiff, who was grantor therein, and that a note was found stating he made plaintiff a gift of \$8,000, the amount secured by the trust deed, without evidence of delivery of the deed and note to plaintiff, or even of her knowledge of such declarations, is insufficient to establish a gift inter vivos in her favor.

##### 4. Gifts §49(1)—Evidence to establish gift after donor's death must satisfy beyond reasonable doubt.

After the alleged donor's death, the burden is on one claiming a gift inter vivos to sustain her claim by evidence of clear and unequivocal force which convinces the court beyond a reasonable doubt of its truthfulness.

Appeal from St. Louis Circuit Court;  
Benjamin J. Klene, Judge.

Action by Lizzie Albrecht against Frank M. Slater, public administrator of the estate of William Dischert, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This suit was begun and an amended petition filed by plaintiff against defendants in the circuit court of the city of St. Louis, Mo., to the October term thereof, 1918.

The action was in equity and sought to have the court decree that certain notes and deed of trust on lands belonging to plaintiff and her husband, Christ Albrecht, as tenants by entirety, had been paid and satisfied, and was no longer a lien on said land; that they constituted a cloud on plaintiff's title, and should be canceled.

The notes and deed of trust were given February 14, 1914, to William Dischert, a brother of plaintiff, who spent a great deal of his time at San Antonio, Tex., to secure the payment to him of a loan made to said plaintiff and her husband of \$8,000, and a number of interest notes of \$240 each, payable at certain stated times. Said Dischert died in San Antonio, Tex., January 26, 1917. Plaintiff alleges that said notes and deed of trust belonged to her on account of an inter vivos gift from said Dischert.

It is further alleged that Frank M. Slater was the public administrator of the city of St. Louis, and, as such, took charge of the estate of said Dischert, deceased, including the note in question, for administration, and did fully administer it; alleged demand was made on said administrator for said note and deed of trust, but he refused to deliver them.

Defendant Slater answered with an admission of the correctness of the allegation that he was public administrator, and as such took charge of the estate of said Dischert and said deed of trust and \$8,000 note to said Dischert; denied each and every allegation pleaded in the petition; and pleaded the following as affirmative matter:

"This defendant states that, when he took charge of the estate of William Dischert, deceased, said principal note for \$8,000 and the last interest note for \$240, with said deed of trust, were found with other assets of said deceased, in his safety deposit box at the North St. Louis Savings Trust Company, in said city of St. Louis, and they were the property of deceased at the time of his death; that plaintiff was present when said safety deposit box was opened, and this defendant took possession of the assets of said deceased, including said principal and interest notes and deed of trust, and that she did not then, nor has she since, made claim to the ownership of said notes and deed of trust; that said principal and last interest note are now long past due, and that plaintiff, on numerous occasions, upon the demand of this defendant, promised and agreed to pay or arrange for the payment of the same, prior to

the filing of this suit, thereby recognizing the validity of said notes and deed of trust.

"Wherefore he says she is now estopped from denying such validity, and that her bill ought to be dismissed."

Augusta Dischert, widow of said William Dischert, entered her appearance and answered in part as follows:

"Admits further that the estate of said William Dischert, deceased, has been finally settled, and that defendant Slater, as such public administrator, on the 15th of April, 1918, turned over said deed of trust and said principal note to this defendant, the widow, and to Anna Flannagan, the daughter of said William Dischert, and that said Anna Flannagan and this defendant are now in possession of said note and deed of trust.

"Further answering, and by way of affirmative defense, this defendant states that said William Dischert was, at the time of his death, the owner of the deed of trust described in plaintiff's petition, and such part of the notes as then remained unpaid."

With the issues thus made up, the court, after hearing the testimony, on December 30, 1918, rendered judgment for defendants, and filed the following memorandum opinion:

"There is no evidence that plaintiff knew that she was the recipient of a gift of \$8,000, deed of trust mentioned in the pleadings; hence no evidence of an evidence of the gift. The proof in this case does not satisfy the judicial mind beyond a reasonable doubt that there was an unconditional gift of the note and deed of trust in the lifetime of Dischert, the putative donor."

Upon the rendition of this judgment, a motion for a new trial was filed, but met with an adverse fate at the hands of the court, whereupon an appeal was duly taken to this court by plaintiff, and a bill of exceptions timely filed.

The testimony will be further adverted to in the opinion which follows.

R. M. Zeppenfeld, of St. Louis, for appellant.

Muench, Walther & Muench, of St. Louis, for respondents Slater and Dischert.

Frank A. Thompson, of St. Louis, for respondent Flannagan.

MOZLEY, C. (after stating the facts as above). 1. It is assigned that—

"The court erred in finding that there was no evidence in the case that plaintiff was the recipient of a gift of \$8,000 deed of trust, mentioned in the pleadings, and hence no evidence of an acceptance of the gift, and that the proof in this case does not satisfy the judicial mind beyond a reasonable doubt that there was an unconditional gift of the note and deed of trust in the lifetime of Dischert, the putative donor."

2. The correct solution of this assignment turns upon two questions: (1) Was there a

gift? and (2) Was said gift accepted by plaintiff? It appears from the testimony that plaintiff and said William Dischert had a joint safety deposit box in the North St. Louis Savings & Trust Company, in said city, and, although they both had keys thereto, plaintiff kept nothing therein, and had never opened it herself, or seen it opened, until a few days after the death of said Dischert, when she, in person and by an attorney, with a number of other persons interested in the matter, assembled, and with plaintiff's key opened the box and inspected the papers and other things belonging to deceased. Plaintiff testified that all of the papers contained in the box were read to her.

The testimony further showed that the note and deed of trust in question was in said box, and that it and all other papers contained therein were taken charge of by defendant Slater, as public administrator, for final disposition under the law. Plaintiff made no objection, at the time, to the administrator's taking said notes and deed of trust, and did not make any claim to them as owner.

There were a number of interest notes in connection with said principal note which her son, William Albrecht, was by her authority paying for her, and he paid one of them 19 days after the death of said Dischert, and it, with others that had been paid by him, was delivered to her.

Upon the question of whether or not said note and deed of trust were a gift from Dischert to plaintiff, William Albrecht testified that Dischert told him several times "he had arranged everything, and that the deed was turned over to her." Donnerberg testified that said Dischert told him the following concerning the alleged provision for plaintiff:

"I have got a deed of trust on this place, and it is my sister's; I give it to her; we have got a joint box; I have got everything fixed."

Hald testified:

"By the Court: Q. What you mean to say there was a deed of trust of \$8,000? A. Made by Mrs. Albrecht and her husband to William Dischert, and, as I recollect it, indorsed by him.

"Q. Found in the box? A. Yes, sir; found in that box, with the note and memorandum attached to it."

He further testified:

"Q. Was there anything else said in the presence of any of the other parties besides you? A. Mr. Zeppenfeld: I think there was something said, but I can't be sure about it. It seems to me that Mrs. Albrecht was disappointed in not finding—we found an envelope, as I recollect it, with the word "Will" on it, but no will in the box, and she was disappointed that the will wasn't there, because, as I now recall, she said in the presence of all of us that her brother had gotten this will from her and told her he was going to put it in the box."

Some other witnesses, including a 22 year old daughter of plaintiff, testified substantially the same as her brother had, respecting the alleged gift of said notes and deed of trust; that is, what Dischert said about it to her mother.

Mrs. Albrecht was manifestly looking for a will in her favor from her brother, rather than for said notes and deed of trust (they were in the box, but the will was not), and hence she made no objection to or claim of ownership of said notes and deed of trust when they were turned over to the administrator. The following note was found in the box:

"St. Louis, June 13/14.

"Sister Lizzie Albrecht: I make you a present or in plain words I give you the amount of eight thousand dollars as a birthday present.

"Your loving brother, Wm. Dischert."

This note was not delivered to plaintiff, and was not discovered by her or any other person until the box was opened. It did not refer to the notes and deed of trust in controversy, but referred to \$8,000 in money, and it, also, was at the same time turned over to said administrator without objection from plaintiff.

[1] 3. A gift inter vivos is defined in 12 R. C. L. 933, par. 10 et. seq., as follows:

"Words are not sufficient to constitute a gift, because mere words, unaccompanied by delivery, could only be a promise, and there being no consideration, the promise could not be enforced, and therefore the gift would be incomplete. To make an effective gift inter vivos there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee. Mere intention to give without delivery is unavailing, and delivery is insufficient unless made with an intention to give. To have the effect of a valid gift, therefore, the transfer of possession and title must be absolute, and go into immediate effect so far as the donor can make it so by intent and delivery, and must be so complete that if he again resumes control over it without the consent of the donee he becomes liable as a trespasser."

In the case of *Thomas v. Thomas*, 107 Mo. 459, 18 S. W. 27, it is held:

"In order to constitute a valid gift of personal property, it is essential that it be delivered by the donor to the donee, or some one for him, with the *intention on the part of the donor to part with his right in and dominion over the subject of the gift, and that it be accepted by the donee, whose ownership must take effect immediately and absolutely*, leaving nothing essential to be done in the future." (Italics ours.)

See *In re Estate of Soulard*, Harney, Adm'r, 141 Mo. 642, 43 S. W. 617; *McCord's Adm'r v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201; *Harris Banking Co. v. Miller*, 190 Mo. 640,

89 S. W. 629, 1 L. R. A. (N. S.) 790; Jones v. Fall, 101 Mo. App. 536, 73 S. W. 903; Brannock v. Magoon, 141 Mo. App. 316, 320, 125 S. W. 535; Reynolds v. Hanson (App.) 181 S. W. 1030 (1, 2); Kansas City Theological Seminary v. Kendrick (App.) 203 S. W. 628, 629; Allen-West Com. v. Grumbles, 129 Fed. 287, 63 C. C. A. 401; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; Knight v. Tripp, 121 Cal. 674, 54 Pac. 267; Pullem v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; Winslow v. McHenry, 93 Minn. 507, 101 N. W. 799, 106 Am. St. Rep. 448; Hawn v. Stoler, Ex'r, 208 Pa. 610, 57 Atl. 1115, 65 L. R. A. 813; Snavely v. Henderson, 204 Fed. 978, 123 C. C. A. 300; 20 Cyc. p. 1231, par. D; Harding v. St. Louis U. T. Co., 276 Mo. 136, 207 S. W. 68.

[2] 4. The case of *Foley v. Harrison*, 238 Mo. 460, 136 S. W. 354, does not sustain the doctrine of a constructive or symbolic delivery of said notes and deed of trust. In that case the exact words of the donor to the donee were as follows:

*"Here are the keys to my safety deposit box; I will give them to you; what is in there belongs to you; you will find Johnnie's money there also."* (Italics ours.)

The court then proceeds as follows:

"She took the keys and put them in a drawer down stairs, and kept them there until after his death. In the box were the money, notes, deeds of trust, and other valuables."

It is plain that this was not a symbolic or constructive gift. It possessed all of the elements of a valid gift inter vivos as set out in the authorities, *supra*.

[3] There was no testimony from plaintiff's witnesses relative to what Dischert is reputed to have said about giving or intending to give said notes and deed of trust to her, or that she ever accepted same. The undisputed testimony was that she was expecting a will from her deceased brother, and was very much dissatisfied when she found it was not in the safety deposit box.

[4] We think, and so rule, that the purported gift was not a valid gift under the authorities, *supra*, and that the testimony was insufficient to establish her acceptance of it. This is true especially in view of the fact that Dischert was dead, and the burden was cast upon her to prove her cause by evidence of clear and unequivocal probative force, which would convince the court beyond a reasonable doubt of its truthfulness. *Foley v. Harrison*, *supra*.

This disposes of all the material contentions made by the plaintiff.

We have carefully reviewed the testimony as disclosed by this record, and we agree with the judgment of the court nisi, which

results in the affirmance of the judgment. It is so ordered.

RAILEY and WHITE, CC., concur.

PER CURIAM. The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court.

All concur.

FIRST NAT. BANK OF LAS VEGAS, N. M.,  
v. FRANKLIN BANK et al.  
(No. 21683.)

(Supreme Court of Missouri, en Banc. April Term, 1921. Rehearing Denied July 8, 1921.)

1. Appeal and error  $\S$  207(4) — Judgment after reversal held to conform to directions of appellate court with certain exceptions.

In a suit against the president of a bank holding bonds of a railway and power company in trust to secure debts due his own and other banks, for wrongful sale of the bonds, after the institution of a foreclosure suit, where a judgment against plaintiff was reversed, with directions to take an accounting, if necessary, and enter judgment for plaintiff, the judgment of the trial court held in conformity with the directions of the Supreme Court as between plaintiff and the trustee, but to go beyond the directions of the Supreme Court in granting relief to other defendants.

2. Appeal and error  $\S$  1198—Trial court cannot depart from directions of appellate court.

Where the Supreme Court reversed the judgment appealed from and remanded the case, with directions to take an accounting and enter judgment for plaintiff, new matter could not be injected into the case, and the trial court could not depart from the Supreme Court's directions.

Appeal from St. Louis Circuit Court; Benjamin J. Klene, Judge.

Suit by the First National Bank of Las Vegas, New Mexico, against the Franklin Bank, William L. Garrels, administrator d. b. n. c. t. a. of the estate of Gerhard W. Garrels, deceased, and others. Judgment for plaintiff, and the defendants named appeal. Affirmed in part, and reversed and remanded in part, with directions.

T. Percy Carr and O'Neill Ryan, both of St. Louis, for appellants.

D'Arcy & Neun and Edward D'Arcy, all of St. Louis, for respondent First Nat. Bank of Las Vegas.

W. B. & Ford W. Thompson, of St. Louis, for respondents Buddecke.

GRAVES, J. This is the second appearance of this case here. When first here it was the case of First National Bank of Las Vegas,

N. M., v. Franklin Bank et al., a suit in equity. First National Bank v. Franklin Bank, 211 S. W. 3. Here the original facts may be found.

The opinion in that case speaks for itself, and with the conclusions there reached we are satisfied. By that judgment we reversed the judgment nisi, but remanded the cause, with specific directions. 211 S. W. loc. cit. 8. These directions read:

"The judgment of the St. Louis city circuit court is reversed, and the cause remanded, with directions that an accounting be had, if necessary, to ascertain how much of the amount arising from the final sale of the property of the Las Vegas Railway & Power Company under the decree of foreclosure was distributed on account of the \$150,000 in bonds heretofore mentioned, and the amount to which plaintiff would have been entitled out of such distribution after payment in full of the claims of the Franklin Bank and the International Bank, for which said bonds, or any part thereof, were pledged as collateral security, and to enter its judgment therefor, not exceeding the sum, and interest, expressed in plaintiff's note for \$9,000, against the defendant Caroline F. Garrels, executrix of G. W. Garrels, deceased."

Pursuant to these directions, the trial court entered a judgment as follows:

"Now on this day, this cause coming on for hearing upon motion filed on the 5th day of May, 1919, by the above-named plaintiff for an accounting against the above-named defendant W. L. Garrels, administrator de bonis non with the will annexed of G. W. Garrels, deceased, come the plaintiff and the said defendant W. L. Garrels, administrator, as aforesaid, and the above-named defendant Franklin Bank, and defendant William A. Buddecke, Clara Buddecke, Hulda Buddecke, and Bertha A. Buddecke, by their respective attorneys, and submit the same to the court upon the plaintiff's said motion for an accounting, the answer and return of said W. L. Garrels, administrator as aforesaid, to said motion for accounting, the mandate and opinion of the Supreme Court of the state of Missouri ordering and requiring an accounting by said W. L. Garrels as such administrator, if necessary, to determine the amount due by said administrator to the plaintiff, and the evidence of record and introduced by plaintiff and defendant W. L. Garrels, administrator as aforesaid; and the court having heard and fully considered the same, as well as the argument of counsel of the said parties, and being now fully advised in the premises, and having ascertained that all necessary facts to take said accounting as ordered by the mandate of the Supreme Court are already incorporated in the bill of exceptions heretofore filed in this court, doth find, adjudge, and decree that the following is a full and true accounting of the amount distributable on the \$150 first mortgage 5 per cent. bonds of the Las Vegas Railway & Power Company, a corporation, on the second foreclosure sale had on April 3, 1911, and the amount due to plaintiff after paying all prior claims thereon of the Franklin Bank and the International Bank of St. Louis, to wit:

"The trustee's report of the first foreclosure

sale held on March 15, 1909 (1 New Mexico Rec. p. 108), which was afterward set aside, shows that he had on hand after the sale the sum of \$4,808.09 in cash, which was not sold at said sale, out of which to pay the costs of said foreclosure.

"The trustee's report was approved by the decree of the district court (1 New Mexico Rec. p. 285) showing a total payment covering all the costs of the first foreclosure sale, of \$1,016.54, leaving a balance of \$3,786.55 in cash, which was distributed on the 300 bonds. The second New Mexico Record (page 81) shows the distribution on this basis of \$474.25 to 38 of said bonds, or \$12.50 per bond, which makes a distribution of \$1,875 to the credit of the 150 bonds involved in this case.

The sale price at the second foreclosure sale, April 3, 1911, was.....	\$128,500 00
The cost of said sale (assuming that such costs should be chargeable against plaintiff) were (2 New Mexico Rec. p. 25):	
Publication of notice of sale:	
To Optic Publishing Co.....	\$ 96 75
To La Voz del Pueblo.....	81 90
To Albuquerque Morning Journal	50 00
To special master.....	300 00
Total .....	\$ 538 65

Net proceeds of second sale.....	\$128,961 25
Distributed after first sale out of cash remaining on hand, as aforesaid.....	3,786 55

Total distribution on 300 bonds.....	\$129,747 90
Total amount distributed on 150 of said bonds held by G. W. Garrels, being 1/4 of said \$129,747.90.....	64,872 95

Prior claims of Franklin Bank. (Record, pp. 78, 80, 101, 438):

Paid on \$5,000 note.....	\$ 5,190 00
Paid on \$4,200 note.....	2,555 54
Paid on \$25,000 note.....	22,254 46
Balance due on above 3 notes on March 15, 1909.....	\$ 3,695 54

\$33,695 54

Prior claims of International Bank of St. Louis:

Paid on \$15,000 note (Rec. p. 81, 438) .....	\$ 7,500 00
Balance due on same on March 15, 1909 .....	7,500 00

\$48,695 54

48,695 54

Balance applicable on plaintiff's claim on March 15, 1909.....	\$ 16,178 41
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The Court doth further find that plaintiff's claim on March 15, 1909, was \$9,000 with interest to that date at 8 per cent. per annum from February 21, 1908 (Rec. pp. 11 and 110), of.....

\$ 2,706 80
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Which sum, together with interest thereon at the rate of 6 per cent. per annum from March 15, 1909, to June 10, 1913, or \$ 5,997 99

Makes a total of.....	\$ 15,768 99
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Plaintiff is further entitled to costs of printing abstract of the record in the Supreme Court, as taxed by said court at .....	426 00
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Making a total sum of.....	\$ 16,189 99
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"On which plaintiff is entitled to judgment against defendant W. L. Garrels, administrator as aforesaid.

"Wherefore, it is ordered, adjudged, and decreed by the court that the plaintiff have and recover of the estate of G. W. Garrels, deceased



ed, in the hands of W. L. Garrels, administrator de bonis non with the will annexed of the estate of G. W. Garrels, deceased, the said sum of \$18,189.99 found to be due as aforesaid, together with interest and costs.

"And the court does further find that the plaintiff is not entitled to the relief prayed for in its fourth amended petition against defendants Franklin Bank, International Bank, William A. Buddecke, Clara Buddecke, Hulda Buddecke, and Bertha A. Buddecke.

"Wherefore, it is ordered, adjudged, and decreed by the court that the petition of plaintiff be dismissed as against said last-named defendants, and that plaintiff take nothing by its said petition against said defendants, and that said defendants be discharged and go hence without day.

"The court doth further find that, as between defendant Franklin Bank and defendants William A. Buddecke, Clara Buddecke, Hulda Buddecke, and Bertha A. Buddecke, G. W. Garrels, deceased, was the agent of defendant Franklin Bank in handling the bonds which were held as collateral by said bank on the notes of the Las Vegas Railway & Power Company, on which said Buddeckes were indorsers and sureties; that as between said bank and said Buddeckes the action of said Garrels in selling the collateral on said notes at private sale at an inadequate price, on March 15, 1909, was the action of said bank; and that said collateral being of a value sufficient to pay off in full all of said notes held by said Franklin Bank on which said Buddeckes were indorsers, said notes are paid so far as said Buddeckes are concerned, and said Buddeckes are discharged from all liability thereon.

"Wherefore it is by the court ordered, adjudged, and decreed that the cross-bill of said William A. Buddecke, Clara Buddecke, Hulda Buddecke, and Bertha A. Buddecke, against said Franklin Bank, be and the same is hereby sustained, and said Buddeckes and each of them are hereby released from all liability to said Franklin Bank of any of said notes.

"And the court doth further find that defendants William A. Buddecke, Clara Buddecke, Hulda Buddecke, and Bertha A. Buddecke are not entitled to the relief prayed for in their cross-bill against defendant International Bank. Wherefore it is ordered adjudged, and decreed by the court that the cross-bill of said defendants be dismissed as against defendant International Bank, and that said bank be discharged and go hence without day as to said cross-bill. Memo. filed.

"June 16, 1919. Approved.

"[Signed] Benj. J. Kleene, Judge Div. 14."

This judgment and accounting was reached by the lower court by a consideration of the full evidence on the former trial, as preserved in the bill of exceptions, a part of which, said court concluded had not been fully abstracted when the case was here on the former appeal. The whole bill of exceptions was before the trial court in this matter of accounting.

There is no question that the judgment rendered accords with our directions, unless it be the latter part thereof which refers to the Buddeckes. Whether this portion of the judgment accords with our direction, or

whether we will recede from our former position in the case, are the questions upon this appeal. Pertinent facts can best follow with the opinion.

[1, 2] I. As to the Garrels estate, the trial court literally followed our directions given upon the previous hearing here. It took the accounting and entered the judgment that we directed. Such court could not do otherwise. Our directions were specific, and, upon this point, it was within the settled law of this state. The accounting taken between plaintiff and the Garrels estate was the one directed by our judgment, and if such accounting, as taken, is within legal rules, that portion of this judgment is good. There is no question as to the faithfulness of the court in following our directions as to the accounting. New matter could not be injected into the case. *McLure v. Bank*, 263 Mo. 136, 172 S. W. 336.

The Garrels estate did not undertake to inject into the case any new matter, but left the issues as between it and the plaintiff to be determined upon the pleadings and evidence involved upon the previous trial. On these issues the trial court heard the evidence, as per our directions, and entered the judgment now before us. This judgment is not different (except possibly as to amount) from what was anticipated by our prior judgment. The only difference is the uncertainty (as to amount) has been made a certainty by the trial court's further hearing and investigation. We have no disposition to recede from our former ruling in this case as to the measure of damage, although we are admonished that such former ruling was wrong. We threshed out that question at the time, and adhere to it now. As between the plaintiff and the Garrels estate, this judgment should be and is affirmed. It was entered in strict conformity with our directions, and a trial court cannot depart from our directions. *McLure v. Bank*, 263 Mo. loc. cit. 136, 172 S. W. 336; *Keaton v. Jordt*, 259 Mo. loc. cit. 190, 168 S. W. 734; *Stump v. Hornback*, 109 Mo. loc. cit. 277, 18 S. W. 37; *Chouteau v. Allen*, 74 Mo. loc. cit. 59.

Of course this court has the right to change its views upon the questions involved in a former appeal, and perhaps in this way avoid its own directions, but in this case we have no desire to change our former ruling. So that the sole question here is the question of whether or not the trial court has gone beyond our directions. As to the rights of plaintiff against Garrels' estate, it has not, and so much of its judgment is affirmed.

II. It is urged here that the accounting taken is wrong. Upon this reference must be made to the case when it was here on the previous appeal. In the original case it was urged that, notwithstanding there was a second sale of the plant at Las Vegas, yet, even considering such second sale, there would be nothing due the First National Bank of Las

Vegas. This contention we found against Garrels' estate. The contention now has the same foundation of the contention then, and is therefore precluded by our former judgment. The only difference is the exact amount of the figures and the present judgment is along the views that we had at the remanding of the cause.

III. When we reach that portion of the present judgment which touches the rights of the Buddeckes, we meet with a new proposition, and this proposition is somewhat complicated by our former judgment in the case. Our judgment, independent of the opinion, reversed and remanded the cause in the following language:

"\* \* \* That the judgment aforesaid, in form aforesaid, by the said circuit court of the city of St. Louis rendered, be reversed, annulled, and for naught held and esteemed, and that the said plaintiff-appellant and defendants-appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said circuit court of the city of St. Louis for further proceedings to be had therein, in conformity with the opinion of this court herein delivered; and that the said plaintiff-appellant and defendants-appellants recover against the said respondents their costs and charges herein expended, and have execution thereof."

These parties filed a motion to modify our original opinion on the line of the claim allowed by the present judgment. This motion (in the original appeal) we overruled, so that the views of this court were complete. The judgment is apparently broader. But all this is covered in the original opinion. We then said:

"We do not think the record shows any liability on the part of either of the St. Louis banks. They got nothing out of the sale of these bonds to which they were not entitled, and there is no showing that either of them knew of or instigated the sale of the bonds of Thorpe, otherwise than the fact that the trustee was president of the Franklin Bank. This dual capacity was known to all parties in interest in the foreclosure suit, and there is nothing in it which constituted a guarantee upon the part of the bank of the faithful execution of the trust in favor of the other beneficiaries. They had all concurred in the appointment of Garrels to the trust."

Under this trust arrangement we found no rights for the Buddeckes. We found no liability against the Franklin Bank, because of the action of Garrels, as trustee. This part of the present judgment is beyond our direction on the original appeal. Under our opinion and directions, there could be no judgment for Buddeckes, against the Franklin Bank. Although our actual judgment remanded their cause, yet, under the opinion and directions, they were out, and the only judgment which could have been entered was

one against them, so far as Franklin Bank is concerned.

The judgment nisi is affirmed so far as the First National Bank of Las Vegas is concerned, and reversed and remanded as to the judgment of the Buddeckes, with directions (as follows from our first directions) to enter a judgment against them as between them and the Franklin Bank.

All concur; JAMES T. BLAIR, J., in result.

#### POLLARD v. WARD. (No. 22098.)

(Supreme Court of Missouri, Division No. 2. June 23, 1921. Motion for Rehearing Denied July 19, 1921.)

1. Husband and wife  $\Leftrightarrow$ 326—Husband's suit for alienation of wife's affections not barred by her decree of divorce.

A decree for divorce, granted to a wife in her suit therefor, not contested by the husband, and in which she alleged false charges by him of infidelity on her part, did not bar a subsequent suit by him against another for the previous alienation of her affections, on the theory that the matters involved were determined by her suit.

2. Estoppel  $\Leftrightarrow$ 68(2)—Husband, not contesting wife's divorce suit, not estopped from suing for alienation of affections.

A husband, by permitting a decree of divorce to be rendered against him on the allegations of his wife's petition, alleging false charges on his part of marital infidelity, was not thereby estopped from bringing an action against another for the previous alienation of her affections.

3. Estoppel  $\Leftrightarrow$ 52—Elements of estoppel stated.

To constitute estoppel in pais, three things must occur: First, an admission, statement, or act inconsistent with the claim afterwards asserted and sued on; second, action by the other party on the faith of such admission, statement or act; and, third, injury to such other party, resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

4. Estoppel  $\Leftrightarrow$ 92(1)—Husband obtaining divorce and property rights held not estopped from suing for alienation of wife's affections.

A husband, by permitting his wife to obtain a decree of divorce against him on the allegations of her petition alleging false charges of infidelity, was not estopped from suing another for the previous alienation of her affections, on theory of benefits obtained in that he obtained the divorce, and in a property settlement therein had obtained a deed from her on payment of certain alimony.

5. New trial  $\Leftrightarrow$ 40(2)—Objections not made at trial cannot be afterwards considered.

Granting of new trial cannot be sustained on ground of admission of improper evidence,

when the objection was not made on the examination of the witness.

Appeal from Circuit Court, Linn County; Fred Lamb, Judge.

Action by Ernest R. Pollard against William N. Ward. Judgment for plaintiff, and from an order granting a new trial, he appeals. Reversed and remanded, with directions to set aside order and render judgment for plaintiff on the verdict returned.

Pross T. Cross, of Lathrop, H. J. West, of Brookfield, and Scott J. Miller, of Chillicothe, for appellant.

Bailey & Hart, of Brookfield, and James L. Farris' Sons, and Lovelock & Kirkpatrick, all of Richmond, for respondent.

WHITE, C. The plaintiff recovered judgment in the circuit court of Linn county, Mo. A motion for new trial filed by defendant was sustained by the trial court, and from that order the plaintiff has appealed.

The petition charges that the plaintiff has been damaged because of criminal conversation of the defendant with the plaintiff's wife, and alienation of her affections. The answer of defendant, after a general denial, pleads estoppel. It alleges that the wife of the plaintiff, Hope Pollard, on February 24, 1917, instituted a divorce proceeding in Ray county, Mo., against the plaintiff herein; that in June, 1917, a decree of divorce was granted to said Hope Pollard, the finding of the judgment being that the defendant therein, Ernest Pollard, was the guilty party and the said Hope Pollard was the innocent party; that the alleged facts recited in plaintiff's petition, as to the unfaithful acts and conduct of Hope Pollard toward her husband, were reported to plaintiff and within his knowledge long before the 24th day of February, 1917, and by reason of plaintiff's acts and conduct his failure to answer the petition of the said Hope Pollard, and by the judgment in the divorce proceeding plaintiff is estopped from maintaining his action herein. The suit was brought in Caldwell county; change of venue was granted to Linn county, where the trial was had, beginning on the 3d day of June, 1919.

At the time of the occurrences complained of the plaintiff, Pollard, 38 years old, lived on his farm in Caldwell county with his wife and four children. He separated from his wife January 29, 1917. Another child was born to his wife two or three months afterward. The defendant, William Ward, then a single man, lived with his parents about a quarter of a mile from the Pollard home.

A volume of evidence was introduced by the plaintiff tending to prove improper intimacy between the plaintiff and the defendant's wife, which ran over a period of 2 or 3 years before the separation January 29, 1917.

A number of witnesses, including neighbors and others, testified that they saw the defendant visit plaintiff's home during plaintiff's absence and apparent secret meetings between Hope Pollard and the defendant. Some of the witnesses swore to seeing acts of a criminal nature between them.

On January 28, 1917, plaintiff became convinced that a clandestine meeting had taken place between his wife and Ward, and procured bloodhounds, which traced the tracks of some one to Ward's house. Plaintiff separated from his wife the next day. It is unnecessary to state the evidence any further than to say it is sufficiently clear and substantial to support the allegations of the petition.

The defendant denied all charges, and introduced evidence to show his good character. He introduced the pleadings and judgment in the divorce proceeding begun by Hope Pollard a short time after the separation from her husband. Other facts necessary in consideration of the points to be determined will be noted later in the opinion.

The jury in their verdict assessed the plaintiff's actual damages at \$5,000 and his punitive damages at \$7,000. The motion for new trial was sustained on the ground that the matters charged and put in issue by the petition in the divorce proceeding "were largely, if not entirely, matters involved in the present trial." The trial judge clearly stated his reason for sustaining the motion thus:

"Under these facts the court is of the opinion that, having failed to deny the allegations of the said divorce petition, and having made a money settlement upon the charges confessed in it, and having confessed the truth by having failed to answer, plaintiff in this case is estopped from further asserting the infidelity of said wife, and ought not in good conscience be permitted to maintain this action."

The petition in the divorce proceeding alleged that the defendant in that suit, Ernest R. Pollard, had offered his wife, Hope Pollard, such indignities as to make her condition intolerable. The indignities enumerated consisted of several specifications of cruel and barbarous treatment, abuse, and villification. The petition then alleged that on the evening of January 28th, the plaintiff, Hope Pollard, left the house for a few minutes, and when the defendant saw his wife coming back he charged her with meeting a man "out there" and " \* \* \* repeatedly said and accused plaintiff of having met the son of Mr. Ward that night, \* \* \* and plaintiff says that the defendant has repeatedly since then accused the plaintiff of improper relations with other men, and has ordered her to leave him."

The judgment in the divorce proceeding recites a finding that during all the time

plaintiff faithfully demeaned herself, and discharged all of her duties to the defendant as his wife, "but that the defendant cursed and abused her at divers times, and did such other and improper conduct towards her as his wife as to render her condition intolerable, as set forth in plaintiff's petition." Alimony to the plaintiff was allowed in the sum of \$4,000, and she was required to execute a quitclaim deed to defendant for all the land of defendant. The acknowledgment of the receipt of such deed is recited in the decree.

[1] I. The general rule is that a decree of divorce does not bar an action for previous alienation of affections, or criminal conversation or seduction. 21 Cyc. p. 1628. *De Ford v. Johnson*, 251 Mo. 244, loc. cit. 253 to 256, 158 S. W. 29, 46 L. R. A. (N. S.) 1083, Ann. Cas. 1915A, 344, and cases there cited. This court, in the opinion by Judge Graves in that case, said, 251 Mo. loc. cit. 255, 158 S. W. loc. cit. 32, 46 L. R. A. (N. S.) 1083, Ann. Cas. 1915A, 344, speaking of cases cited:

"They declare the general doctrine that although the jury may believe that plaintiff's wife obtained a divorce from him, and that she made plaintiff's misconduct ground for obtaining said divorce, yet if the jury believe that, notwithstanding such misconduct on the part of the plaintiff, his wife would not have separated or remained apart from him, or sued him for a divorce if it had not been for the acts, conduct, and influence of defendant toward her; and that defendant purposely and intentionally, by such acts, conduct, and influence, induced her to so separate or remain apart from plaintiff, or sue him for a divorce, then the fact that plaintiff's wife obtained such a divorce on account of plaintiff's misconduct, does not, of itself, constitute any defense to this suit."

This is quoted from *Modisett v. McPike*, 74 Mo. loc. cit. 648. The *De Ford* Case is reported in 251 Mo. 244, 158 S. W. 29, 46 L. R. A. (N. S.) at page 1083 (Ann. Cas. 1915A, 344), with copious notes, citing numerous cases where the subject is illustrated. There is no direct allegation in the petition for divorce which puts in issue the criminal conversation of Ward with the plaintiff's wife alleged in this case so that it could be said to have been adjudicated in that case.

The point made by the defendant, and the point in the mind of the court in sustaining the motion for new trial, is that the plaintiff could have defeated his wife's suit for divorce by proving the facts as to her relations with the defendant; that the very issues presented for determination in this case must have been determined there because plaintiff failed to present a defense to that divorce proceeding which was complete if true. The judgment, therefore, is conclusive that his wife was not guilty of misconduct.

In taking that position the respondent assumes that a judgment in a divorce proceeding is different from other judgments, in that

it is binding upon others than parties to it. There was such a holding in the case of *Gleason v. Knapp*, 56 Mich. 291, 22 N. W. 865, 56 Am. Rep. 388, a case followed in some jurisdictions. That case, however, has been modified and deprived of much of its force by subsequent adjudications by the Supreme Court of Michigan. *Knickerbocker v. Worthing*, 138 Mich. 224, loc. cit. 228, 101 N. W. 540; *Philpott v. Kirkpatrick*, 171 Mich. 495, 187 N. W. 232.

The precise point has never been determined in this state, but it was approached in the *De Ford* Case, supra. A number of decisions in other jurisdictions take a position contrary to that assumed by the trial court. In *Luke v. Hill*, 137 Ga. 159-161, 73 S. E. 345-346, 38 L. R. A. (N. S.) 559-563; it is held that a decree of divorce is a judgment quasi in rem.

"So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers; but, beyond the adjudication of the status, the decree does not conclude strangers."

"A divorce decree will not estop a party thereto from contesting with a stranger the truth of the grounds as affecting his liability in another suit upon a cause of action arising pending the divorce suit, but before the decree."

Leading cases are cited in support of the proposition. The case of *Coney v. Harney*, 53 N. J. Law, 53, 20 Atl. 736, was a suit brought by the plaintiff's wife, and it was held that a decree of divorce in favor of plaintiff's wife was not a bar to his suit for damages for criminal conversation, although he had filed in the divorce proceeding a cross-bill, afterwards dismissed, in which he charged his wife with the very criminal acts alleged as a cause of action in the suit on trial. The court said (53 N. J. Law loc. cit. 54, 55, 20 Atl. loc. cit. 737):

"An estoppel, even by the judgment of a court, must be mutual to be admissible in bar, and such a judgment will bind only those who are party or privy thereto. Here defendant was neither party nor privy. There was no mutuality, for had it been adjudicated that defendant had committed the adultery charged in the cross-petition, such adjudication manifestly could not have been set up against him"

—a statement of the law particularly applicable to this case.

The case of *Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100, was an action for criminal conversation brought by the husband against the seducer of his wife. The defendant set up a decree of divorce granted to her on account of her husband's cruelty. The husband knew of the criminal conduct before the divorce decree was granted. The court held that because the acts complained of occurred while she was still his wife, he had a cause of action, and then used this language (84 Ind. loc. cit. 545, 43 Am. Rep. 100):

"After this discovery, it is not strange that the appellee permitted his wife, without resistance, to obtain a divorce; but he did not thereby waive or lose his right to redress for the injury done. It would not be in the interests of good order and the public morals to permit the seducer of a wife to set up a disagreement, or even a separation, between her and the husband, as a complete defense to an action by the latter for the wrong."

From these authorities and the others reviewed in the notes in 46 L. R. A. (N. S.), to the De Ford Case and the Luke Case, supra, the general rule appears that a judgment of divorce is conclusive upon strangers as determining the status of the parties to it, but not conclusive upon strangers as to the facts litigated. The position taken in the Gleason Case cited from the 56th Michigan is not supported by reason nor by the weight of authority. There was no mutuality, as said in the New Jersey Case, supra. Had the court in the divorce proceeding found the wife guilty of adultery with Ward, Ward would not be bound by it in this suit.

The pleadings and judgment in the divorce proceeding were probably admissible in evidence in this case as showing an admission on the part of the plaintiff. If Pollard, in his wife's divorce proceeding had filed a pleading which admitted any fact, or if by his silence he had failed to controvert the facts alleged there, it would be proper to show it as an admission against him. Such admission would not be conclusive against him here, but, like any other admission, it could go to the jury for what it was worth. See Sickler v. Mannix, 68 Neb. 21, loc. cit. 23, 93 N. W. 1018. Logically it must follow that the plaintiff is not concluded by the judgment in the divorce proceeding.

[2] II. Next, the question arises as to whether the plaintiff is estopped by his conduct. It is true that he permitted a decree of divorce to be rendered against him upon the allegations of his wife's petition. While that petition did not in direct terms allege that he had falsely charged her with illicit relations with Ward, it may be conceded that he was put upon his notice that such charge was intended. As said in the Indiana Case cited above, after he discovered the nature of her conduct, he might very well desire a divorce, and make it as easy as possible for his wife to obtain one. But the proceeding lacks every element of estoppel by conduct, or estoppel in pais.

[3] To constitute estoppel in pais three things must occur: First, an admission, statement, or act inconsistent with the claim afterwards asserted and sued on; second, action by the other party on the faith of such admission, statement, or act; and, third, injury to such other party, resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

First National Bank of Mexico v. Ragsdale, 171 Mo. loc. cit. 185, 71 S. W. 178; Wyatt Adm'r v. Wilhite, 192 Mo. App. loc. cit. 560, 183 S. W. 1107; De Lashmutt v. Teetor, 261 Mo. loc. cit. 441, 169 S. W. 34; Thompson v. Lindsay, 242 Mo. loc. cit. 76, 145 S. W. 472.

It may be conceded that in the divorce proceeding Pollard's conduct was inconsistent with the claim he puts forth here, but it cannot be said that the defendant in this case acted upon the faith of any such conduct. His criminality with the plaintiff's wife occurred before the divorce suit was brought, and before the separation. Likewise, the third requisite does not appear here. The defendant is not injured in any manner by the failure of the plaintiff to contradict or controvert the allegations of his wife's petition. If the plaintiff had asserted and maintained in the divorce proceeding the facts which he alleges in this suit, the defendant here would have been in no better position than he is. Thompson v. Lindsay, 242 Mo. loc. cit. 76, 145 S. W. 472; De Lashmutt v. Teetor, 261 Mo. loc. cit. 441, 169 S. W. 34. Ward did not in any manner nor to any degree rely upon anything plaintiff did in his wife's divorce suit, and is not injuriously affected in any manner by the plaintiff's position maintained here because it happens to be different from what he assumed there. The defendant is in no position to invoke the principle of estoppel in pais.

[4] III. It is further claimed by the respondent that the plaintiff herein has obtained the benefit of a transaction, and seeks to repudiate it in this case, in that he obtained the divorce from his wife, a deed from her, and paid her \$4,000 alimony, and, having obtained that advantage and assumed that position, he has elected so that he cannot assume a different position here. This is another way of attempting to state an estoppel. It is impossible to see how that transaction affects the defendant. The business settlement which the plaintiff made with his wife at the time of the decree consisted simply of the purchase by him of her interest in property, which he had acquired from her father. It may have been worth more than he paid her, but he is not retaining the fruits of another transaction which affects the defendant or bears any relation whatever to the issues to be determined in this case.

[5] IV. Another ground is urged by the respondent in support of the propriety of the ruling. It is claimed that improper evidence was offered, on behalf of the appellant, showing the incident in relation to the bloodhounds. We cannot find that the evidence in the way it arose was incompetent, and, if it was, the point was not raised in time. When the plaintiff in his direct examination related the facts about calling the bloodhounds, no objection was made to his evidence.

The judgment is reversed, and the cause

remanded, with directions to the trial court to set aside the order granting a new trial, and to render judgment for the plaintiff upon the verdict as returned by the jury.

RAILEY and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All concur.

### HAGGARD v. HAGGARD et al. (No. 21496.)

(Supreme Court of Missouri, Division No. 1. July 11, 1921.)

1. Homestead §5—Laws construed as liberally as words and spirit permit.

Homestead laws should be construed as liberally as their words and spirit permit.

2. Homestead §70—Lands constituting "homestead" need not be contiguous if used in connection with dwelling house and appurtenances.

Under the Homestead Act of 1895 (Rev. St. 1919, § 5853), defining the "homestead" as consisting of a dwelling house and appurtenances and the land used in connection therewith, it is not necessary that the lands be contiguous or physically connected so long as they be used in connection with the dwelling and its appurtenances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Homestead.]

3. Homestead §70—Farm contributing to owner's support, though not contiguous with residence lot, held part of homestead.

Where a country doctor owned a farm for which he received rent in hay and corn for his horses and hogs on his residence and barn lot about half a mile distant, and wheat which the mill ground into flour for his family use, such farm, though not contiguous with his residence lot, was such an incident of his home and part of the homestead, which, under Rev. St. 1919, § 5853, passed to the widow on his death; the object of the homestead law being not only to preserve to the widow and children a roof to cover them, but to preserve such means of livelihood as were connected with their home.

4. Appeal and error §878(1)—Errors complained of by respondent need not be considered.

On plaintiff's appeal from a judgment for defendants in a suit for partition, defendants' allegations of errors in the judgment providing for the payment of debts contracted by deceased out of the proceeds of the sale of lands ordered need not be considered.

Appeal from Circuit Court, Texas County; L. B. Woodside, Judge.

Action by Sarah Haggard against Jack Haggard and others. Judgment for defend-

ants, and plaintiff appeals. Reversed and remanded.

Lamar, Lamar & Lamar, of Houston, for appellant.

Barton & Impey, of Houston, for respondents.

BROWN, C. This is an action to partition four separate tracts of land in said county designated in the petition as tracts number 1, 2, 3, and 4. The plaintiff is the widow of R. C. Haggard, a physician, who resided adjoining the little crossroads town of Raymondville with his wife, Sarah, who is the plaintiff in this case. He died childless and intestate on April 19, 1918. The defendants are his collateral kindred.

The petition states that tract No. 1, upon which he resided at the time of his death, contained about half an acre of ground, and that tract No. 2, which was separated from it a quarter of a mile approximately in an air line, and considerably farther by the usual course of travel over the public road to its entrance by gate, was a farm of about 65 acres, under cultivation, which had been rented and occupied by one Dietrick for several years under an arrangement which does not seem to have been reduced to writing, by which he cultivated it or a portion of it for a crop rental. If it was corn or hay, he delivered it to the farm of Dr. Haggard, where it was fed to his horses and hogs. If it was wheat, he delivered it to the mill, which furnished Dr. Haggard with his flour, paying him in cash the remainder of the price. The doctor also pastured his own stock upon the meadow land after the removal of the hay. The farm was worth about \$2,500, and was incumbered by an interest-bearing mortgage of \$1,500. The value of his residence was variously estimated in the testimony at from \$500 to \$800. The doctor was married to plaintiff in 1904.

The plaintiff had duly elected to take one-half the estate in lieu of dower. The prayer of the petition was in substance that the homestead, consisting of tracts Nos. 1 and 2, be set off to the plaintiff as her homestead, that the remaining land be sold, and that the incumbrances mentioned be paid out of the proceeds, and that the remainder be distributed to the respective parties as their interests might appear, and for general relief.

After hearing the evidence the court, of its own motion, made the following declaration of law:

"The court declares the law to be that in order to hold as a part of the homestead lands not contiguous thereto they must be used in connection therewith, and the court finds from the evidence in this case that the 65-acre tract which is continuously rented out to tenants was not used in connection with the land upon which the deceased lived, and is therefore not a part of the homestead."

To which action of the court the plaintiff duly objected and excepted at the time. It then found the issues in favor of the defendant as follows:

"Judgment in partition and sale of land except the homestead, consisting of the lot of ground of about one-half acre held to be the homestead. Balance of land not set apart as homestead to be sold and divided one-half to the plaintiff and balance according to their interests.

"Plaintiff found to have collected \$467.25 from land not part of the homestead as follows:

"Rented 80 Acres.

Wheat .....	\$372 25
Corn .....	35 00
Hay .....	60 00
Total .....	\$467 25

"Plaintiff to account for half of this amount to the defendants."

To all of which the plaintiff at the time objected and excepted, and the court rendered final judgment accordingly, to which plaintiff again excepted. After motion for a new trial overruled and exception thereto saved, this appeal was duly taken. No supersedeas bond was given.

1. The controlling question in this appeal is whether the 65-acre farm included in this case was during the lifetime of Dr. Haggard a part of the homestead which the law transmits to his widow. The facts are before us, and, in so far as they are material to this issue, are undisputed.

The deceased householder was a country doctor who had acquired all the property he owned at the time of his death during the 14 years of his married life with the plaintiff. He was childless, and there was no other person in existence to whom either he or his wife owed any obligation to acquire, hold, or transmit it. The defendants are his adult brothers and sisters, the latter being married and presumably having homes of their own, and depend solely upon the terms of the statute providing for the transmission by inheritance of the property of deceased persons in the absence of heirs having a natural right to such consideration. In the use of the words "natural right" we have in mind children, for whose existence the ancestor is responsible, and who are reared to full maturity under his direction and control, and the wife, who is a factor not only in the accumulation of the estate, but in the making and preservation of the home which is the subject of the title we are considering.

[1] These observations are suggested by the expression of this court in *Balance v. Gordon*, 247 Mo. 119, 152 S. W. 358, that—

"The correct judicial attitude toward homestead laws is one of as great liberality in construction as their words and spirit permit."

[2] The public reasons upon which this rule of construction rests are forcibly stated in that case, which has been approved and followed in that respect in many cases, among which are *Pocoke v. Peterson*, 256 Mo. 501, 517, 165 S. W. 1017, and *Keeline v. Sealy*, 257 Mo. 498, 165 S. W. 1088. The most of these cases have dealt with the rights of creditors, but, there being in this case no equity intervening, we will simply discuss the terms of the statute on which the homestead rests, and by which alone this question must be determined; that is to say, section 1 of the homestead act of 1895, continued in section 5853, Revised Statutes of 1919.

2. A noticeable feature of this law is that the interests of the husband and wife are inseparable. He is debarred from alienating it in any manner whatever unless joined by her. Their interests are coextensive, and include not only the land, but all means of sustenance and income which it affords. Its character and extent are clearly defined as follows:

"The homestead \* \* \* consisting of a dwelling house and appurtenances, and the land used in connection therewith."

It is noticeable that this does not require the lands to be contiguous or physically connected. It only requires that they be used in connection with the dwelling house and its appurtenances.

It will be seen that care was used by the Legislature to avoid the use of any language indicating contiguity. In all cases their connection with the homestead was made to depend upon the use to which the different portions of the lands were devoted by the owner, and in case of the country homestead it was necessary to the reasonable accomplishment of the legislative object that the use should control. There is no evidence in the legislative words that the landowner must, to obtain the benefit of the act, assemble his lands upon the same side of the public road upon which his residence is situated, or that he might not put a stretch of the road between his residence and the land that he worked. Those of us who have been born and raised upon farms are accustomed to the spectacle of the farmer driving or walking such distances as are described in this evidence to his work.

The language we have quoted came directly before this court for construction as early as the May Term, 1876, in *Perkins v. Quigley*, 62 Mo. 493. Judge Napton in his opinion said:

"Contiguity does not seem to enter into our statutory definition. A housekeeper or head of a family may, under our law, own 40 acres in one place, and cultivate 40 more in another by himself, his children, or servants or tenants. It frequently happens that a prairie farm is dependent upon a piece of woodland several

miles distant, and both may constitute the homestead; or the owner of a piece of ground on a bluff, where there is a convenient spring and timber, may cultivate a farm in the valley totally separated from the place of residence by any conceivable distance that would not render the one incapable of being used in connection with the other. The only restrictions named in the act are the quantity of land and its value. The whole cannot exceed 160 acres, and must not be worth more than \$1,500."

This language has been approved by this court in *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354, 78 S. W. 579, and *Adams v. Adams*, 183 Mo. 396, 82 S. W. 66. It was also before the Legislature and had been for many years at the time of the enactment of the homestead law of 1895, which we are considering, and was undoubtedly used with deliberation in view of the judicial interpretation so given it. This interpretation fully accords with the primary and usual meaning of the words in which the law is written, and it only remains to determine whether the admitted facts of this case come within its terms.

[3] 8. The plaintiff's husband was a country doctor. Raymondville, as we have said, was a hamlet situated at a road crossing where a post office was located. The doctor's residence was on a tract of land of little more than half an acre just outside the little village, on which was situated his residence, a house containing five rooms on the ground floor and three in the half story above. He also had a barn on this lot in which he kept his horses and the hay and corn for feeding them, and also kept hogs, which he fed on the same premises. He drove to his farm along the public road, reaching the nearest corner at a distance of between a quarter and half a mile, and the gate leading to the little farmhouse where the tenant lived some distance further on. He received rent for his farm in kind. His share of the hay and corn was hauled by the tenant to his barn, and there fed to his horses and hogs. His wheat, as is the custom with other farmers, was taken to the mill, and the flour necessary for family use was furnished him on that account and the surplus paid for in money. He pastured his horses on the aftermath of his meadow. Like many other country doctors he and the plaintiff seemed to have lived together in comfort on the proceeds of his practice and the products of this land, and to have accumulated during the 14 years of their married life, a little property, the subject of this suit, and a little indebtedness, which she has striven as she could to pay. That this little farm was a principal incident of their home and an important element of their simple support is evident, and that it fed his horses and fattened his hogs was a feature of his home life as much as was his practice of medicine. To be sure, his practice

may have been a means of adding to his support and enabling him to live more liberally, but the homestead is intended for the wife as well as the husband, and there is nothing in the record to indicate that she was a doctor, or that the death of her husband did not relegate her to the little farm as a means of support. We think that one of the principal objects of the homestead law is to meet just such situations. It is intended not only to preserve to the widow and children a roof to cover them, but to preserve to them such means of livelihood as were connected with their home, so that they may have food as well as shelter. If this provision consists of land, they need not extract its products with the work of their own hands, but the statute expressly provides that they may have its rents and profits, and renting it, and receiving its rentals in kind, was only taking advantage of the plain letter of this provision.

[4] It is unnecessary to notice the questions presented in the respondent's brief with reference to alleged error in the judgment of the court providing for the payment of certain debts contracted by the deceased out of the proceeds of the sale of lands ordered.

The respondents took no appeal, and any errors in form and scope of the judgment may be corrected by the trial court.

The judgment of the circuit court is reversed, and the cause remanded for further procedure in accordance with the views herein stated.

SMALL and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of Brown, C., is adopted as the opinion of the court.

All the Judges concur.

STATE ex rel. GREAT AMERICAN HOME SAV. INSTITUTION et al. v. LEE.  
(No. 22590.)

(Supreme Court of Missouri, in Banc.  
July 8, 1921.)

1. Building and loan associations §3—Authority to do business must be obtained before steps are taken toward accumulation of fund.

No steps can be taken toward the accumulation of a fund by a building and loan association until the authority to do business as such has been obtained from the Supervisor of Building and Loan Associations, under Laws 1919, p. 225.

2. Building and loan associations §3—Not objectionable by reason of trustees' certificates being made assignable.

That trustees' certificates issued by an unincorporated building and loan association to



provide an initial guaranty fund by setting aside the major portion of the payments made by subscribers therefor were made assignable *held* not to render the association objectionable on theory that the sale of the certificates terminated the trust, since the trustees did not cease to be such by the mere purchase or sale of such certificates being incident to the ownership.

**3. Building and loan associations ⇨ 3—Not objectionable because of method of doing business where not contrary to statute.**

The Supervisor of Building and Loan Associations cannot refuse to authorize an association to do business on the ground that its plan of doing business and method of electing officers was objectionable, where such methods are not contrary to the statute; the method of doing business being a matter that concerns the contracting parties only.

**4. Pleading ⇨ 8(6)—Allegation that articles of association failed to comply with statutes held a legal conclusion.**

Allegation that articles of association of building and loan association did not comply with certain statutes, without alleging wherein they failed to comply with such statutes, or that such compliance was required, *held* the averment of a plea of conclusion, and not the statement of an issuable fact.

**5. Building and loan associations ⇨ 6(2) — May limit liability of members without complying with statutes as to limited partnerships.**

It was competent for an unincorporated building and loan association organized under Laws 1919, p. 225 (Rev. St. 1919, § 10263), to limit the liability of its members without complying with provisions of sections 9237-9249, relating to limited partnerships.

**6. Building and loan associations ⇨ 3—Need not incorporate.**

A building and loan association doing business as such under Rev. St. 1919, § 10263, need not incorporate, notwithstanding Const. art. 12, § 11, making the term "corporation" include joint-stock companies or associations having power or privileges not possessed by individuals or partnerships.

**7. Building and loan associations ⇨ 3—Not required to comply with statutes as to "bond investment company."**

An unincorporated building and loan association, organized under Rev. St. 1919, § 10263, making other provisions of chapter 90, art. 10, inapplicable to such associations, *held* not objectionable as against contention that it was a bond investment company, not having complied with sections 10333-10338, the association not being a corporation, and not seeking to do a bond investment business within such statutes.

**8. Licenses ⇨ 18½, Now, vol. 12A Key-No. Series—Unincorporated building and loan association not required to obtain permission under Blue Sky Law.**

An unincorporated building and loan association organized under Rev. St. 1919, § 10263, was not required to obtain permission to do

business from the State Banking Commissioner, under the Blue Sky Law.

**9. Building and loan associations ⇨ 3—Permission to do business cannot be denied by reason of unsound surrender values.**

In building and loan association proceeding against Supervisor of Building and Loan Associations to compel the Supervisor to issue certificate authorizing it to do business, the contention that the association was not financially sound by reason of surrender values was not available as an objection thereto, since such considerations are matters of contract, and since the court has no power to pass on the reasonableness of the terms adopted by the contracting parties.

**10. Building and loan associations ⇨ 4—Rejection because name was imitation of existing corporation held unwarranted.**

Supervisor of Building and Loan Associations *held* not warranted in refusing a certificate of authority to do business to an association organized as the "Great American Home Savings Institution" on the ground that the name was an imitation of the "American Home Building & Loan Association" and would be likely to mislead the public; the resemblance, if any, being insufficient to mislead the public.

**11. Associations ⇨ 4—Corporations ⇨ 49(1) —Entitled to exclusive use of name.**

The name of a corporation or of an unincorporated association is a necessary element of its existence, and the right to its exclusive use will be protected on the same principle that persons are protected in the use of trademarks.

**12. Constitutional law ⇨ 240(1)—Statute relating to building and loan associations held not violative of constitutional provision as to equal protection of laws.**

Rev. St. 1919, § 10263, relating to building and loan associations, *held* not to grant an association a special privilege or immunity in violation of Const. U. S. Amend. 14, § 1, guaranteeing to all persons equal protection of the laws, as against contention that it allows the association to be licensed, supervised, and examined without cost to such association in view of section 10230.

**13. Constitutional law ⇨ 42—Organization not party to action cannot intervene to question constitutionality of statute.**

An association not a party to an action cannot intervene for the purpose of questioning the constitutionality of a statute.

**14. Building and loan associations ⇨ 2—Statute held not unconstitutional as permitting business contrary to general well-being.**

Rev. St. 1919, § 10263, relating to building and loan associations, *held* not violative of Const. art. 12, § 5, as against contention that it permits corporations to conduct their business in a manner infringing on the general well-being of the state, since such statute has no reference to corporations, and since it subjects the association provided for to the supervision and examination of the Supervisor of Building and Loan Associations.

15. Lotteries  $\Leftrightarrow$  2—Statute permitting building and loan associations held not unconstitutional as permitting lottery.

Rev. St. 1919, § 10263, authorizing building and loan associations to accumulate the fund or funds for the purpose of enabling contributors to secure loans and forbidding the issue of a certificate authorizing the association to do business if the business is in conflict with the Constitution and laws of the state, held not to permit a lottery in violation of Const. art. 14, § 10.

16. Building and loan associations  $\Leftrightarrow$  26—Making of loans in order of application not objectionable.

A building and loan association organized under Rev. St. 1919, § 10263, could not be denied the right to do business in the state on the ground that the plan for making loans provided for the making of loans in the order of their application, since any other plan would savor of favoritism.

17. Statutes  $\Leftrightarrow$  113(4)—Title of amendatory act held not defective.

Title to Laws 1919, p. 225, reading, "An act to amend article IX, chapter 33, of the Revised Statutes of Missouri for the year 1909, by adding thereto a new section to be known as section 8431a, pertaining to the same subject-matter," held not defective.

18. Building and loan associations  $\Leftrightarrow$  2—Constitutional law  $\Leftrightarrow$  208(4)—Statute relating to not void as class legislation.

Rev. St. 1919, § 10263, relating to building and loan associations, held not void as class legislation.

19. Constitutional law  $\Leftrightarrow$  70(3) — Cannot be declared void on ground that they are against public policy and morals.

Courts cannot declare statutes void on the ground that they are against public policy and morals, and liable to lead to corruption and oppression.

Petition by the State of Missouri, on the relation of the Great American Home Savings Institution, an association and its members, for a writ of mandamus against John A. Lee, Supervisor of Building and Loan Associations. Writ issued.

Wilfley, Williams, McIntyre, Hensley & Nelson and Lee A. Hall, all of St. Louis, for relators.

Jesse W. Barrett, Atty. Gen., and Merrill E. Otis, Asst. Atty. Gen., for respondents.

Alroy S. Phillips, of St. Louis and Lee B. Ewing, of Nevada, Mo., for Missouri State League of Building and Loan Ass'ns, amicus curiae.

HIGBEE, J. The statement of the case by relators, not questioned by the respondent except as to their conclusions, is substantially as follows:

This is a proceeding in mandamus against the Supervisor of Building and Loan Associa-

tions in the state of Missouri, brought by the Great American Home Savings Institution, an unincorporated association of individuals, who are also parties relators, seeking a certificate of authority to do business in this state under a plan set forth in a trust agreement for the formation of the Great American Home Savings Institution heretofore filed with the Supervisor of Building and Loan Associations when an application was made October 27, 1920, for a certificate to do business in this state under the provisions of section 10263, R. S. 1919. The form of the trust agreement for the organization of the Great American Home Savings Institution is what is familiarly known as a common law trust. Attached to said trust agreement were a detailed statement of its plan for doing business, a copy of the contracts proposed to be issued, and other documents.

The Supervisor of Building and Loan Associations refused to issue a certificate authorizing this association to do business in this state, and suit was instituted in this court praying for a writ of mandamus commanding the Supervisor of Building and Loan Associations to issue to petitioners herein a certificate authorizing them to do business in this state under the plan set forth in said trust agreement. The alternative writ of mandamus was granted by this court, whereupon respondent waived the issuance and service of said alternative writ, and afterwards filed his second amended return.

The Great American Home Savings Institution is a voluntary unincorporated association of individuals formed for the purpose of accumulating a fund or funds to be used under the terms of the trust agreement for the purpose of enabling the contributors to such fund or their assigns to secure a loan or loans for the purpose of acquiring a dwelling house or farm, or other income-producing property, or discharging a mortgage or other incumbrance thereon. The business intended to be carried on under said trust agreement is to all practical intents and purposes the same as the business now being conducted by corporations doing a building and loan association business in this state.

Said trust agreement provides for the issuance of trustees' certificates in the amount not exceeding \$100,000 to provide an initial fund which is in the nature of a permanent guaranty fund and furnishes funds to meet immediate loan demands, and is to stand as a guaranty to the maintenance of the loan and trust fund. The trust agreement further provides for the issuance of trust certificates on the monthly installment plan in denominations of \$1,000 and multiples of \$100 in excess thereof. The holders of said trust certificates are to pay thereon in monthly payments the sum of \$6.50 per \$1,000 face value for a period of 132 months. The loan and

trust fund is created from these monthly payments by setting aside \$6.20 per month out of each monthly payment, after the first three payments, and said fund is to be maintained upon a 4 per cent. basis, compounded monthly, which is the liability of the Great American Home Savings Institution on account of said fund. The Great American Home Savings Institution agrees to establish and maintain said loan and trust fund at all times unimpaired. The first three monthly payments of \$6.50 and 30 cents of each subsequent payment of \$6.50 per each \$1,000 face value of certificates shall belong to the general funds of the trust and will be available for overhead and operating expenses.

\*The trust agreement further authorizes the issue of a "full-paid interest-bearing certificate" subject to the approval of the Supervisor of Building and Loan Associations. Hence the Great American Home Savings Institution has three sources available for raising funds to make loans to home builders: First, by the issuance of \$100,000 of trustee certificates which cannot be issued for less than their par value; second, the issuance of the installment trust certificates; and, third, the issuance of full-paid interest-bearing certificates.

The owner of the trust certificate shall be entitled to a loan equal to its face value to be made from the "loan and trust fund" (or from funds created by the issuance of trustees' certificates) in the order of written application made therefor and subject to the rights and priorities of other certificate owners and the security tendered for said loan being satisfactory. The said loan shall be made only for the purpose of the purchase or building of a home, purchase of farm, or other improved income property, or making improvements thereon or paying off mortgage, deed of trust, or other incumbrances existing thereon. In the event a certificate owner does not avail himself of the borrowing privilege, then at the end of 11 years he collects his investment plus his share of the surplus profits earned in the "loan or trust fund," not to exceed \$308 per \$1,000 face value of the certificate, which means the maximum amount to be repaid on the \$1,000 trust certificate held by one who has not exercised the loan privilege and has deposited 132 monthly payments of \$6.50 (or a total of \$858) is \$1,308. However, \$1,000 is the guaranteed liability of the institution.

Loans made from the loan and trust fund under the terms of the trust certificate are to be repaid by the borrower in 132 monthly installments of \$11.19 per \$1,000, which cover both principal and interest on the loan. In other words, any one who borrows \$1,000 from the loan and trust fund repays the Great American Home Savings Institution in 132 monthly payments of \$11.19 each, or an aggregate of \$1,477.08, which is a return of

the principal with interest at the rate of 7.72 per cent. per annum. By reference to the actuarial opinions of Messrs. Harvey and Shepherd, the sum of \$6.20 per month set aside to the loan and trust fund from the \$6.50 monthly payment by the holder of trust certificate for 132 months, less the first three payments, improved with interest at the rate of 7.72 per cent. earned on loans, will equal \$1,248.37 at the end of the time. That is, the individual share of each certificate owner in this fund and its earnings at 7.72 per cent. interest will amount to \$1,248.37 per \$1,000 face value of certificate, and since the liability assumed on the certificate is limited to \$1,000, this actuarial opinion shows a surplus profit earned on the money set aside to the loan and trust fund for the "exclusive benefit and profit of certificate owners" of \$248.37 on each individual certificate of \$1,000. But under the terms of the certificate "all surplus earnings from interest, fines, transfer, and waiver fees, cash surrender, and partial paid-up values" belong to the nonborrowing owners of trust certificates, to the "extent of, but not to exceed, a total surplus of \$308 per \$1,000 face value." So that the Great American Home Savings Institution does not profit by the earnings from these sources on account of the \$6.20 placed in the loan and trust fund unless said earnings exceed \$308 per \$1,000.

The loan privilege provides that—

"When loan is made for any of the purposes defined herein, this certificate may be surrendered, in which event the owner shall be credited with its accrued value, equal to \$6.20 of each monthly deposit made on each \$1,000 face value of this certificate less the first three, with interest at the rate of 6 per cent. per annum, which may be applied as part equity requirements for said loan or withdrawn in cash at the option of the owner."

Trust certificates become nonforfeitable after four monthly deposits have been made; that is, the holder may surrender his certificate and receive in lieu thereof a paid-up certificate for the total amount paid in, less the first three payments, which paid-up certificate matures 11 years from date with interest at 5 per cent. per annum.

The trust certificate gives its owner a cash surrender privilege at the end of 3 years or at the end of any year thereafter equal to \$6.20 of each monthly deposit made, less the first three payments, with interest at the rate of 5 per cent. per annum thereon, plus its share of surplus earned, not to exceed 2 per cent. more, or certificate owner may borrow 80 per cent. of the accrued cash value after one year at 8 per cent. discount by giving certificates as collateral security.

The affairs of the Great American Home Savings Institution are under the general direction of a board of directors selected by the holders of trustees' certificates. The board of directors shall cause a full and ac-

curate set of books of account to be kept in which shall be kept a full record of all of the transactions of the institution, and a full report of the financial condition shall be made by the president of the trust at all annual meetings of the trustees. The board of directors shall be charged with the duty of taking proper action by all proper methods in order to afford a proper and equitable administration of the affairs and business of the trust.

Under the plan of organization and operation and under the law under which relators seek to do business, the trustees or managers of the Great American Home Savings Institution shall from time to time furnish such surety bonds to secure the faithful performance of their trusts as may be required by the Supervisor of Building and Loan Associations of Missouri, and the Great American Home Savings Institution shall be subject to the supervision and examination of the Supervisor of Building and Loan Associations of Missouri, similar, in so far as applicable, to his supervision and examination of building and loan associations.

It is admitted in the pleadings that prior to the time respondent declined to issue to relators certificate of authority to do business in this state or at any time prior to the institution of this suit respondent had not been advised by the Attorney General of Missouri that section 10263, R. S. 1919, was unconstitutional.

It is further admitted in the pleadings that at and prior to the time relators made application to respondent for a certificate of authority to do business in this state relators applied to and were advised by the then Secretary of State of Missouri that the name "Great American Home Savings Institution" was available for their use, and that the same did not conflict with any corporate name then in use in this state.

As suggested above, all issues of fact have been eliminated by the pleadings, and the only issues involved are purely legal ones. Respondent contends that said plan of doing business conflicts with certain of the laws of the state of Missouri, and also contends that section 10263, R. S. 1919 (which is the section under which relators seek to organize), violates certain provisions of both the state and federal Constitutions.

1. The relator's statement sets forth the organization, the plan for doing business, the contracts proposed to be issued, and the business of the association, so that it is unnecessary to recite the articles of association. The respondent does not question the accuracy of the statement. We are only concerned with the legal questions arising on the pleadings.

The Missouri State League of Building and Loan Associations, claiming to have a real interest in this case, has intervened and

filed a brief as *amicus curiae* (adopted by the Attorney General) contending that the relator association is not a common-law trust; that it is a limited partnership; that it is subject to the chapter on corporations and cannot do business without being incorporated; that, not being incorporated, it has no legal entity or artificial personality, and cannot take title to or act as trustee of the loan and trust fund; that it is a bond investment company; that it is a co-operative association not excepted from the operation of the Co-operative Act, and is not a building and loan association; and that it has not complied with the several applicable statutes. Other contentions will be noted in the opinion.

It is admitted that the relator association has not complied with the statutes relative to limited partnerships and other statutes referred to, but it claims it has complied with and is entitled to a license to do business as an unincorporated association under section 10263, R. S. 1919.

This statute was enacted in the year 1919 (Laws 1919, p. 225). Omitting the emergency clause, the act is as follows:

*"Building and Loan Associations.*—That the provisions of article IX, chapter 33, Revised Statutes of Missouri, 1909, shall not be applicable to any unincorporated association of individuals formed for the purpose of accumulating a fund or funds to be used for the purpose of enabling the contributors to such fund, or their assigns, to secure a loan or loans for the purpose of acquiring a dwelling house or farm or other income-producing property or discharging a mortgage or other incumbrance thereon: Provided, however, that no such association shall commence business in this state until it shall first submit to the supervisor of building and loan associations a detailed statement of its plan for doing business and copy of the contracts proposed to be issued, and procure from him a certificate authorizing it to do business, and it shall be the duty of the supervisor of building and loan associations to examine into such association, and if he finds that the business of such association is not in conflict with the laws and Constitution of this state, he shall issue his certificate authorizing such association to do business; and provided further, that the trustees or managers of such association shall, from time to time, furnish such surety bonds to secure the faithful performance of their trust as such supervisor of building and loan associations shall reasonably require, and be subject to his supervision and examination, similar in so far as applicable, to his supervision and examination of building and loan associations; and provided also that one copy of all contracts or trust certificates issued shall be deposited with the bureau of building and loan supervision of this state."

The contentions in the respondent's second amended return are that the organization, plan of doing business, the contracts proposed to be issued, and the business of said association are in conflict with the laws and Con-

stitutions of Missouri and of the United States in the following particulars, some of which we will take up in their order. The articles of association are a mere naked agreement and do not establish a trust. The alleged declarants do not own any trustee certificates and have not invested any money in said enterprise. The specifications under this head cover two pages of printed matter relative to the contention that the plan is contrary to equitable principles, much of which is apparently abandoned in the brief. [1-8] The main contention is answered by the statute itself. This is not a case of a capitalized association seeking incorporation, as a bank or trust company, which must have a certain proportion of its stock paid up. The statute provides "that no such association shall commence business in this state until it shall first submit to the Supervisor of Building and Loan Associations a detailed statement of its plan of doing business and a copy of the contracts proposed to be issued, and procure from him a certificate authorizing it to do business." Under this clear mandate, no steps can be taken towards the accumulation of a fund until the authority to do business has been obtained. The objection that the trustee certificates are assignable and trustees become and cease to be trustees by the mere purchase or sale of trust certificates, without any right in the creators and beneficiaries to object, is without merit. The right to sell is incident to ownership. We are unable to see any valid objection to the plan of doing business or the election of officers. *State ex rel. v. Swanger*, 190 Mo. 561, loc. cit. 570, 89 S. W. 872, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563. It is a matter that concerns the contracting parties, purely a matter of convention, unless contrary to the statute.

"An association being solely a creature of convention between the members, no check exists upon its power to enact such constitution or by-laws as the associates may choose to adopt, so long as they do not provide for the commission of illegal acts, are not in themselves contrary to public policy, or do not affect vested interests. Such constitution and by-laws constitute a contract between the members, and are binding alike on the association and its members. The courts possess no power to pass on the question of the reasonableness of such rules and regulations as are agreed to by associates for the conducting of their joint affairs. It has been uniformly held, however, that the courts may, in a proper case, construe and fix their meaning." 4 Cyc. 305.

Counsel for relators sum up the matter in their brief:

"No valid objection can be made that the trustee certificates are to be assignable. The assignability of such certificates has long been recognized at common law. *King v. Webb*, 14 East, 406; *Warner & Roy v. Beers* (N. Y.) 23 Wend. 102.

"The trust agreement makes full provision for safeguarding the rights of the beneficiaries. It is shown by the best actuarial authority in this state that the plan is financially sound. In fact, this is conceded by the pleadings in this case, and respondent makes no point in that regard. When this is considered in connection with the further fact that the trustees managing this trust are at all times subject to the control of a court of equity and by virtue of section 10283, supra, are under the constant supervision of the Supervisor of Building and Loan Associations of Missouri, it becomes difficult to conceive how stronger safeguards could be made to protect the investing public."

## 2. The return recites:

"The relator parties to the articles of association have failed to comply with any of the provisions of sections 9237-9240, R. S. 1919, relating to limited partnerships."

[4] The pleader fails to allege wherein the articles of association fail to comply with the various sections indicated, or that such compliance is required. The allegation is simply the averment of a legal conclusion, not the statement of issuable facts, and is to be treated as no statement at all. *Mailnckrodt Chemical Works v. Nemnich*, 169 Mo. 388, 69 S. W. 355; *Lappin v. Nichols*, 263 Mo. 258, loc. cit. 291, 172 S. W. 596.

In the brief, however, counsel for the *amicus curiae* contend that the relator association is a partnership, and it cannot limit its liability. This issue is not made by the pleadings. If it were, it would be inconsistent with other contentions in the brief, that it is a bond investment company, a corporation, that it has no legal entity or artificial personality, that it is a co-operative association and a lottery. How can it be all these? How it can assume these protean characters at one and the same time is bewildering. The declaration that it is a corporation is a solemn negation that it is a partnership, or a joint-stock company, or a bond investment company. The pleas are inconsistent and self-destructive. *Wertheimer-Swartz Shoe Co. v. McDonald*, 138 Mo. App. 328, loc. cit. 339, 122 S. W. 5; *Darrett v. Donnelly*, 38 Mo. 492; *Ledbetter v. Ledbetter*, 88 Mo. loc. cit. 62; 31 Cyc. 150. If it is a lottery, it is an outlaw and all contracts made with it are void.

Counsel cite, in support of their contention that it is a partnership, *Laney v. Fickel*, 83 Mo. App. 60. Judge Bond was there considering the liability of a member of a joint-stock company engaged in manufacturing and trading to its creditors. The learned jurist said, at page 63:

"While there is some variance in the authorities as to what steps must be taken before the members become liable in this manner to third parties, all the cases are agreed that such liability is consummate upon a showing that the member joined the association, attended its meetings, and consented to the engagement out

of which the liability arose. *Hunnewell v. Wil-low Springs Canning Co.*, 53 Mo. App. 245. The case at bar presents all these elements of liability in plaintiff's connection with the company. He was therefore liable as a copartner with his other associates for the claim sued upon by him, since they were valid obligations against the joint-stock company itself."

It is thus seen that the liability of the member was bottomed on his consent, while a partner is liable for the acts of the other partners in a trading concern within the scope of the partnership business, whether he consents or not. 30 Cyc. 503 et seq.

The limitations on the liability of members is found in paragraphs B and M of the articles of association, which read:

"(B) That no trustee, director, or officer of said savings institution shall be personally liable for any debts properly chargeable against said institution, or any fund or funds thereof."

"(M) That trustee certificates shall be issued to each trustee evidencing their interest in such form as the directors may provide, and said certificates shall contain a clause providing that when the same has been paid in cash at its par value the liability of said trustee is limited to the funds invested therein."

It must be remembered that this is a non-trading concern. In *Coleman v. Knights of Honor*, 18 Mo. App. 189, 194, Judge Rombauer said:

"Nor can we see how the member or those claiming under him can be heard to assert that the rules established by the corporation in that regard were not reasonable. The member is a voluntary party to the compact, and as such bound by it; unless it is in derogation of some charter right, or is otherwise invalid as contravening some paramount provision of law. A by-law may be void as to strangers, or members who do not assent to it, and yet good as a contract between members of the corporation who do assent to it."

In *State v. Stone*, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388, the defendant represented as agent an association of 100 residents of the state of New York, "who were conducting insurance upon the manner of the ancient Lloyds" (118 Mo. 394, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388) before said individuals had procured a license to do business in Missouri. By the terms of the agreement or articles of association, each of the 100 subscribers agreed to deposit \$1,000, and it was stipulated that each subscriber should be separately liable to the amount authorized by him individually, and not jointly liable with the other subscribers. Judge Burgess said:

"If, then, we are correct in our position in construing the statute as including and meaning individuals, there is no apparent reason why defendant could not have obtained from and why the insurance commissioner could not have issued to him a valid certificate under sections 5910 and 5911 of the statute, if defendant had

shown to him that those whom he represents had complied with the law in regard to insurance companies doing business in this state." 118 Mo. loc. cit. 400, 24 S. W. 166, 25 L. R. A. 243, 40 Am. St. Rep. 388.

In *Hammerstein, Ex'r, v. Parsons*, 38 Mo. App. 332, syllabus 1 reads:

"While the members of an unincorporated association are partners *inter sese*, their rights against each other may be limited by contract, and the constitution and by-laws of the association constitute a contract between them."

[5] So, while the question is not raised by the pleading and need not be considered, it is clear that it was competent for the members to contract as to their liability *inter sese*. See citation from 4 Cyc. 305, *supra*.

[6] 3. It is contended that relator must be incorporated before it can do business; that the power to sue and be sued, to acquire, sell, and convey property, to do business as a legal entity, and the powers incident thereto, are sovereign grants of powers possessed only by corporations, and it is therefore subject to the chapter on corporations.

The answer to this contention is the statute itself. Section 10263, R. S., expressly exempts associations of the character mentioned therein from the other provisions of article 10, c. 90, R. S. The emergency clause of that act declares that "such associations are now prohibited by law and should be encouraged." By that act the Legislature declared the policy of the state.

But it is said that the assumption of corporate powers, without a sovereign grant, brings an unincorporated association within the definition of a corporation. The statute itself is the sovereign grant. But for this enactment, associations of the character authorized thereby could not exist.

4. Respondent contends that these associations are corporations by force of section 11 of article 12 of our Constitution, which reads:

"The term corporation as used in this article shall be construed to include all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships."

In *Williams v. U. S. Express Co.*, 195 Mo. App. 862, 191 S. W. 1087, the defendant contended that, being a joint-stock company, it was not a suable entity. The court held (quoting section 2963, R. S. 1909, now section 9722, R. S. 1919, which is a copy of the section of the Constitution referred to) that:

"A joint-stock company at common law was a hybrid midway between a corporation and a partnership; e. g., it had directors and officers, articles of association, a common capital divided into shares; these shares represented the interest of the members, were transferable without the consent of the other members; hence there was no *delectus personarum*, and the death of the member did not dissolve the com-

pany.' State ex rel. Pearson v. Louisiana & Missouri River R. Co. et al., 196 Mo. loc. cit. 536.

"Construing together sections 2963 and 2990 of article 1, c. 33, Revised Statutes 1909, and section 1760, art. 4, c. 21, Revised Statutes of 1909, we cannot but arrive at the conclusion that the defendant, being a joint-stock company, and therefore having powers and privileges not possessed by individuals and partnerships, must be treated as a corporation for the purposes of said chapters 33 and 21, and as such can 'sue and be sued, complain and defend in any court of law or equity' as a legal entity."

In *Weidtnuechter et al. v. Miller et al.*, 276 Mo. 822, loc. cit. 829, 208 S. W. 89, White, C., referring to *Williams v. U. S. Express Co.*, supra, and other cases, shows that joint-stock companies have been recognized as entities entitled to sue and be sued, and that the "Legislature evidently understood that such associations [voluntary unincorporated associations] could be sued, for by the act of 1915 they provided a method for service of process upon them the same as upon corporations. Laws 1915, p. 225."

In *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842, the court, in construing a similar article in the Constitution of Pennsylvania, said:

"The only effect of that clause is to place the joint-stock companies or associations referred to under the restrictions imposed by that article upon corporations, and not to invest them with all the attributes of corporations." 177 U. S. loc. cit. 456, 20 Sup. Ct. 693, 44 L. Ed. 842.

This contention was made in *Spottswood v. Morris*, 12 Idaho, 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665, and the section of the Idaho Constitution identical with section 11, supra, was cited. In disposing of the point *Sullivan, J.*, said:

"The association under consideration is not a corporation exercising any of the powers or privileges of corporations not possessed by individuals or partnerships. It is a voluntary association. To possess or exercise powers or privileges of corporations requires a sovereign grant—a franchise which said association has not and does not profess to possess." 12 Idaho, 375, 85 Pac. 1099, 6 L. R. A. (N. S.) 665.

The court noted the fact that 18 states, among them Missouri, had practically identical sections defining corporations in their Constitutions.

It is obvious that the article of the Constitution and statute referred to do not by legislative fiat convert joint-stock companies or voluntary associations into corporations or require their incorporation before doing business. At common law voluntary unincorporated associations could not sue or be sued. *Lilly v. Tobbein*, 103 Mo. 477 (8), 15 S. W. 618, 23 Am. St. Rep. 887. By an

amendment to section 1760, R. S. 1909, suits may be brought against any such association "in the name it has selected." Section 1186, R. S. 1919. Respondent will not contend that this amendment required such societies to be incorporated or made them corporations.

[7] 5. The contention that the relator association is a bond investment company and cannot do business without compliance with sections 10333-10338, R. S. 1919, is unsound for the reason that it is not a corporation nor does it seek to do a bond investment business within the meaning of the statute referred to.

[8] Section 10263, R. S. 1919, under, which relator seeks to do business, is a part of article 10, c. 90, R. S. 1919, and expressly exempts associations organized under it from compliance with the other sections of that article. The Legislature, in its wisdom, has required that every association organized under this section shall submit to the Supervisor of Building and Loan Associations a detailed statement of its plans, etc., and procure from him a certificate authorizing it to do business, and imposes on the Supervisor the duty of examining into such association and if he finds that the business of such association is not in conflict with the laws and Constitution of this state, he shall issue his certificate authorizing it to do business. This requirement is exclusive. The relator is not required to obtain permission to do business from the State Bank Commissioner under section 11919, R. S. 1919, commonly called the "Blue Sky Law." "Expressio unius est exclusio alterius."

[9] 6. The respondent's return states that:

"The plan of said association is financially unsound and is such as will make the loan and trust fund insolvent, and it had inherent defects that will tend towards its dissolution. The surrender values at or after loan are more than the reserve requirements of the loan and trust funds."

On the other hand, in the briefs of counsel for the amicus curiae they estimate the "profits of the association for 11 years from loan and trust fund to be \$370,161.50 and compound interest, 11 years at 7.7208 per cent. on \$100,000 capital fund, \$126,615.78; total profits of association, 11 years, \$496,776.78. Per annum on \$100,000 capital fund, 45.16 per cent." They say:

"The share of the association in the earnings of loan and trust fund is very large, as above shown. Relators have not shown what they will be, nor have they shown that the agreement is fair in this respect. Such a partnership in profits between trustee and beneficiary should not be countenanced by a court of equity."

Suffice it to say that the very large and unconscionable profits estimated in the brief disprove the contention of the respondent

that the plan of doing business adopted by the relator spells financial ruin.

The opinions of the actuaries attached to the petition are fairly summarized in the statement. It is there shown that the undivided share of each certificate owner in the fund and its earnings at 7.72 per cent. interest will amount to \$1,248.37 per \$1,000, showing a profit of \$248.37 for the exclusive benefit of the holder. "But under the terms of the certificate 'all surplus earnings from interest, cash surrender, and partial paid up values' belong to the nonborrowing owners of trust certificates to the extent of, but not to exceed \$308 per \$1,000 face value."

These considerations are matters of contract. Courts, as it has been seen, have no power to pass on the reasonableness of the terms adopted by the contracting parties.

[10] 7. It is claimed in the return that the name of the association "Great American Home Savings Institution" is an imitation of the American Home Building & Loan Association, a corporation domiciled in the city of St. Louis, or is so near thereto as to be likely to mislead the public. It is admitted by the pleadings that prior to the time relators applied for a certificate to do business relators were advised by the then Secretary of State that the name adopted "was available for their use, and that same did not conflict with any corporate name then in use in this state."

[11] The name of a corporation or of an unincorporated association is a necessary element of its existence, and the right to its exclusive use will be protected upon the same principle that persons are protected in the use of trade-marks. *State ex rel. v. McGrath*, 92 Mo. 355, loc. cit. 357, 5 S. W. 29; 5 C. J. 1343 (31). In *Supreme Lodge, Knights of Pythias, v. Improved Order Knights of Pythias*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658, it was held that the latter name was not an infringement on the former. The court said:

"To me it is self-evident that no careful person could think that these two orders were identical, and, as has been said, in cases of this class the question is whether the similarity is calculated to mislead the ordinary run of mankind. There certainly is just as much distinction between these two names as there is between that of the Episcopal Church and the Reformed Episcopal Church, or that of the Presbyterian Church and the United Presbyterian Church."

We think there is little, if any, resemblance between the name of the relator association and that of the American Home Building & Loan Association, at least none that is calculated to mislead the ordinary run of mankind.

[12] 8. Respondent contends that section 10263, R. S., denies the equal protection of the law, in violation of section 1, art. 14 of the Amendments to the Constitution of the

United States, in that it allows the association referred to to be licensed, supervised, and examined without cost to such association, and throws the burden of the expense thereof upon the building and loan associations. Section 10230, R. S. 1919, provides that every incorporated building and loan association shall make semiannual reports to the supervisor, and that with such report each association shall pay 25 cents for each \$1,000 of assets shown by such report, which payments go into the state treasury to make up a fund known as the "building and loan supervision fund." The salaries of the supervisor and of his examiners and employees and the cost of maintaining the department are paid out of this fund. Section 10263 makes no requirement of incorporated building and loan associations.

[13] Can the Missouri State League of Building and Loan Associations raise this question? It is not a party to this case, and cannot be heard to call in question the constitutionality of this act in an action between other parties.

"Laws enacted by the Legislature are presumed to be valid, and, even if defective because violative of some provision of the state Constitution, are not void, although they may in a proper case be voidable; that is, upon complaint by a party whose rights are impaired by such statute. Upon this point Cooley says: 'The statute is assumed to be valid, until some one complains whose rights it invades. "Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect of the Legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers."'" *State ex rel. v. Blake*, 241 Mo. 100, loc. cit. 107, 144 S. W. 1096, Ann. Cas. 1913C, 1283.

See, also, *Ex parte Tartar*, 278 Mo. 356, 213 S. W. 94-96; *State v. Bockstruck*, 136 Mo. 335 (3), 38 S. W. 317; *State v. Bixman*, 162 Mo. 1 (3), 62 S. W. 828.

We think it a misconception that the statute grants to relator a special privilege or immunity.

Section 10263 requires the supervision of the Supervisor of Building and Loan Associations, and provides that—

"Such association shall from time to time furnish such surety bonds to secure the faithful performance of their trust as such Supervisor of building and loan association shall reasonably require, and be subject to his supervision and examination, similar in so far as



applicable to his supervision and examination of building and loan associations."

It cannot be reasonably inferred from this that this section grants or contemplates free inspection or free service in any respect. When the statute requires supervision and examination similar in so far as applicable to the supervision of building and loan associations, it adopts and incorporates the statute referred to, so far as applicable, and by necessary implication entitles the Supervisor to the fees appertaining to such service. The laborer is worthy of his hire. 36 Cyc. 1152; *Crohn v. K. C. Home Tel. Co.*, 181 Mo. App. 313 (2), 109 S. W. 1068.

[14] 9. It is said that section 10263, R. S., violates section 5 of article 12 of the Constitution of Missouri, in that it permits corporations to conduct their business in such a manner as to infringe the general well-being of the state. Section 10263 has no reference to corporations. It deals solely with unincorporated associations. But, aside from this, section 10263 subjects this class of societies to the wholesome supervision and examination of the Supervisor of Building and Loan Associations. It is not seen that it permits them to conduct their business in a manner to infringe on the general well-being of the state.

[15] 10. Finally, it is said that section 10263, R. S., permits lotteries in violation of section 10 of article 14 of the Constitution. It authorizes the accumulation of a fund or funds for the purpose of enabling the contributors to such funds or their assigns to secure loans. A simple reading of the statute excludes every conception of a lottery. It forbids the issue of a certificate authorizing an association to do business if the business is in conflict with the laws and Constitution of the state. Section 10 of article 14 of the Constitution outlaws lotteries.

[16] Criticism is made of the plan for making loans; that they must be made in the order of their application. Any other plan would savor of favoritism. Counsel cites *Silver v. Investment Co.*, 183 Mo. 41, 81 S. W. 1098. The facts in that case show that the scheme was an unmitigated gamble, if a scheme in which the contributor will always fail and the investment company can never lose may be so characterized. The difference between that case and the case at bar is the distance between the poles.

[17-19] There are other suggestions made in the return; e. g., that the act of 1919 (section 10263) is void because the title is defective and because it is special and class legislation and violative of public policy. Although they are not mentioned in the brief, we have considered these suggestions and find no merit in them. Courts cannot declare statutes void on the ground that they are against sound public policy and morals and

liable to lead to corruption and oppression. 8 Cyc. 778.

Finding, as we do, that the relators are clearly entitled to a certificate authorizing them to do business as an unincorporated association under section 10263, R. S. 1919, it is ordered that a peremptory writ be issued as prayed.

All concur, except ELDER and WOODSON, JJ., not sitting.

#### PEUGH v. PEUGH et al. (No. 20643.)

(Supreme Court of Missouri. Division No. 2.  
June 23, 1921. Motion for Rehearing  
Denied July 19, 1921.)

##### 1. Deeds ⇨190—Evidence of forgery admissible without plea of non est factum.

In a suit by a widow claiming under a deed from her husband not recorded until after his death, defendant, his son, was properly permitted to introduce evidence that the deed was not genuine, under the general denial, without pleading non est factum.

##### 2. Deeds ⇨199—Evidence of husband's control and payment of taxes held admissible on question of his ownership.

Under the Married Women's Act of 1889, giving a wife exclusive control of her real estate with no right in the husband to collect rents, control or possess it unless as her agent, in ejectment suit by a widow against her husband's son by a former marriage, in which she claimed by a deed from her husband, executed a long time before his death but not recorded until afterwards, which defendant claimed was a forgery, it was permissible for defendant to show such acts of authority on the husband's part as tended to prove his continued ownership.

##### 3. Deeds ⇨199—A will was not evidence that deed was not genuine, where the will did not attempt to dispose of the property conveyed.

In a suit by a widow claiming under a deed from her husband, executed a long time before his death but not recorded until after, against his son, who claimed that the deed was not genuine, the will of the deceased was improperly admitted, where it merely bequeathed to her a certain amount of cash, household and kitchen furniture, the use of the mansion house, and contained no specific devise of the land described in the deed; being no evidence that the deed was not genuine.

##### 4. Ejectment ⇨110—Instruction as to necessity of possession under alleged forged deed held erroneous.

In an ejectment suit by a widow claiming under her husband's deed, which defendant, his son, alleged was forged, an instruction as to the execution and delivery of the deed requiring the jury to find that plaintiff took possession thereunder, and so held possession to the date of his death, was erroneous, in that possession was not necessary.

5. Appeal and error  $\Leftrightarrow$  499(3)—Error in admission of evidence not reviewed, where the record does not show specific objections.

The court on appeal cannot review assignments of error to admission of alleged incompetent evidence, where it cannot find that the appellant properly preserved specific objections to the introduction of the evidence.

Appeal from Circuit Court, Livingston County; Nat M. Shelton, Special Judge.

Action by Eliza A. S. Peugh against Edwin De W. Peugh and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

See, also, 211 S. W. 83.

W. W. Davis, Thos. H. Hicklin, and Scott J. Miller, all of Chillicothe, for appellant.

J. H. McKinney, of Billings, Mont., and Frank Sheets, of Chillicothe, for respondents.

WHITE, C. The suit is ejectment to recover a tract of land in Livingston county. The plaintiff is the widow, and defendant Edwin De W. Peugh is the son by a former marriage of Peter P. Peugh, deceased. The defendant Thomas was made party defendant as the tenant of Edwin De W. Peugh in possession of the premises sued for.

Peter P. Peugh died in February, 1908. This suit was filed March 31, 1909. The plaintiff claims title under a deed purporting to have been executed by Peter P. Peugh in September, 1893, and filed for record in the office of the recorder of deeds for Livingston county, April 4, 1908, after the death of Peter P. Peugh.

The petition in the usual form states a cause of action in ejectment; the answer is a general denial. The plaintiff offered in evidence the deed mentioned and evidence as to the rents and profits of the land, and rested.

The defendants offered evidence for the purpose of showing that the deed under which the plaintiff claimed was a forgery. On that issue, as to whether the deed was genuine or a forgery, a large volume of evidence was offered on each side. A number of witnesses who were familiar with the signature of Peter P. Peugh and a number of experts testified. The evidence for the defendants tended to show that the signature was not genuine, and that for the plaintiff tended to show it was the genuine signature of Peter P. Peugh. The notary who took the acknowledgment, Fred J. Gould, was sworn and placed upon the stand by the defendant. He testified that the impression of the notary's seal on the certificate of acknowledgment was not his seal, and that the writing of the word "seal" in the middle of the impression was not in his writing. He stated, however, that the deed and certificate of acknowledgment were in his (Gould's) handwriting, includ-

ing the signature to the acknowledgment; that he was acquainted with the handwriting of Peter P. Peugh, and in his judgment the signature to the deed was the genuine signature of Peugh. He had no recollection of the transaction, which occurred 16 years before, because he took so many acknowledgments, but he was sure he would not have certified to the acknowledgment without the genuine signature.

The original instrument, together with a number of other instruments containing the genuine signature of Peter P. Peugh, have been filed here with the record for the court's inspection. Other facts pertinent to the questions raised will be considered later in the opinion. The jury returned a verdict in favor of the defendants, and the plaintiff appealed.

[1] I. The plaintiff assigns as error the admission by the court of testimony tending to show the signature of Peter P. Peugh was not genuine because there was no plea of non est factum. The defendants, under the general denial, could show any fact which would tend to impair the evidence offered by plaintiff in support of her case; they could show any fact which would destroy the validity of the deed as an effective instrument of conveyance, including proof that it was a forgery. *Patton v. Fox*, 169 Mo. 106, 69 S. W. 287; *Carter v. Mut. Life Ins. Co.*, 275 Mo. 84, 204 S. W. loc. cit. 402, L. R. A. 1918F, 325.

[2] II. The defendants offered evidence to show that Peter P. Peugh, after the date of the deed under which the plaintiff claims, was in possession of the land, collected the rents, and paid taxes on it. This, it is claimed, was error. In recent cases, this court has held that the Married Women's Act of 1889 gives a wife exclusive control of her real estate, and the husband has no right to collect rents, control or possess it, unless he does it under her authority as her agent. *Riggs v. Price*, 277 Mo. loc. cit. 354, 210 S. W. 420; *Teckenbrock v. McLaughlin*, 246 Mo. loc. cit. 718, 719, 152 S. W. 38; *Powell v. Powell*, 267 Mo. loc. cit. 128, 129, 183 S. W. 625, 188 S. W. 796; *Cross v. Huffman*, 280 Mo. 640, 217 S. W. loc. cit. 523; *Brooks v. Barker* (No. 21532) 228 S. W. 805, not yet [officially] reported.

Under these authorities the possession of the husband and his payment of the taxes on the premises might be said to indicate that the land was his and not the land of his wife, and thereby throw some light upon the question at issue, that is, whether the deed under which plaintiff claims was genuine. His possession and control of the land, unexplained, therefore would be competent for what it was worth. It would be then open for explanation, either that he claimed it as his own or that he was acting for her.

There was no error in the admission of that evidence.

[3] III. The defendants offered in evidence the will of Peter P. Peugh, executed in 1908, just before his death. It was admitted over objection of the plaintiff. The will gave the widow \$3,600, the household and kitchen furniture, and permitted her to remain in the mansion house for a period of six months, and made E. De W. Peugh residuary legatee.

There is nothing in the evidence to show the value of the estate left by Peter P. Peugh; there was no specific devise of the land described in the deed under which the plaintiff claims, and nothing in the circumstances which would show that the bequest in the will affected the issue. Peugh might well have given his wife the land in question, and likewise have made the provision in the will. The evidence was erroneously admitted.

[4] IV. In the first instruction given on behalf of the defendants the court directs the jury's attention to the issue as to whether the paper writing purporting to be the deed of Peter P. Peugh was signed by him, and proceeds:

"The court further instructs you that in making up your verdict in this case you may take into consideration all the facts and circumstances detailed in evidence, and unless you believe and find from the evidence that said Peter P. Peugh signed and delivered to plaintiff, in his lifetime, the instrument of writing marked Exhibit A, of date September 23, 1898, and filed for record April 4, 1908, and that plaintiff took possession of said premises under said instrument of writing in person or by her deceased husband, claiming to own the same, and so held the possession thereof to the date of the death of said Peter P. Peugh, then your verdict must be for the defendants."

This instruction is clearly erroneous. The jury might have found that the deed was genuine, and they necessarily would have had to find for the defendants if the plaintiff had not been in possession all the time from the execution of the instrument until the death of Peter P. Peugh. Under the evidence in the case as the record shows it, possession was wholly immaterial. The widow did not have to take possession if she showed title to the premises. There was no evidence that she was ever in possession, so that the instruction was equivalent to a peremptory direction to the jury to find for the defendants.

It is suggested that perhaps the statute of limitations might come into the case. It is unnecessary to determine or discuss whether, or under what circumstances, a husband may hold his wife's land in adverse possession so as to ripen title in himself. Under the facts presented in the record, there is

nothing to show that his possession and control of the land was adverse to his wife.

[5] V. The appellant assigns as error that much incompetent evidence was introduced on behalf of the defendants over her objection. We are unable to review the assignment any further than has been done, because we cannot find that the plaintiff properly preserved specific objections to the introduction of any evidence.

For the errors pointed out, the judgment is reversed and the cause remanded.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur.

# MEFFERT v. LAWSON. (No. 22135.)

(Supreme Court of Missouri, Division No. 2.  
June 23, 1921. Motion for Rehearing  
Denied July 19, 1921.)

1. Evidence  $\S$  588, 590—Intelligence, experience, interest, etc., considered in determining probative force of testimony.

In weighing and measuring the testimony of witnesses to satisfactorily determine its probative force, their intelligence, experience, familiarity with the matter in controversy, and interest or lack of interest in the result may be fairly taken into consideration.

2. Limitation of actions  $\S$  195(2), 197(4) — No presumption that indorsement of part payment was made at time it bears date; proof aside from indorsement necessary to show part payment.

There is no presumption that an indorsement of a payment on a promissory note was made at the time it bears date, and, to remove the bar of limitations, it is necessary to adduce other evidence than the mere production of the note with a credit thereon bearing a date which would have that effect.

3. Limitation of actions  $\S$  197(4)—Making of credit on note before bar or actual payment must be shown.

To remove the bar of limitations by reason of a part payment credited on a note, it is necessary to show that the credit was actually made by the owner of the note or by his direction at a time when the note was not barred, or by more direct evidence that the payment was actually made by the maker at such time.

4. Limitation of actions  $\S$  197(4)—Proof that holder indorsed credit on note before bar prima facie proof of payment.

If it be shown that a credit was indorsed on a note by the holder at a time when the note was not barred, and when the credit was con-

sequently against his interest, this will furnish prima facie proof that payment was made at that time preventing the bar of the statute in the absence of a showing to the contrary.

**5. Limitation of actions**  $\Leftrightarrow$  197(4)—Evidence insufficient to show part payments indorsed on notes.

In an action on notes of a decedent bearing indorsements of payments claimed to have been made by him and to remove the bar of limitations, evidence held insufficient to show that the payments were made when dated, or at any other time.

**6. Alteration of instruments**  $\Leftrightarrow$  27(1), 30 — Presumed made before execution unless suspicious, when it becomes a jury question.

Alterations and erasures on written instruments are presumed to have been made at or prior to the time of their execution unless the alteration or erasure appears suspicious on its face, in which case there is no presumption and the time when, the person by whom, or the interest for which the alteration was made are matters of fact to be found by the jury upon proof adduced by the party offering the instrument in evidence.

**7. Alteration of instruments**  $\Leftrightarrow$  2—Alteration of date or amount of note is material, and must be explained.

Under Rev. St. 1919, § 911, alterations in the date or sum payable in a note were material alterations, which should have been explained.

**8. Appeal and error**  $\Leftrightarrow$  1050(1)—Evidence  $\Leftrightarrow$  275½, New, vol. 18 Key-No. Series—Statement of decedent held inadmissible and prejudicial when not shown to have referred to matter in controversy.

In an action on notes of a decedent claimed to have been taken out of the statute of limitations by the indorsement of part payments thereon by the decedent, testimony that when the decedent was in extremis he told a witness that he had "fixed his notes, and he will get his money" was inadmissible, and its admission prejudicial, in the absence of evidence connecting the statement with the notes or identifying in some manner the person referred to.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Proceeding instituted in the probate court by Charles Meffert against M. E. Lawson, executrix, etc., of Joseph F. Meffert. Judgment for plaintiff was affirmed in the circuit court, and defendant appeals. Reversed and remanded.

Lathrop, Morrow, Fox & Moore and George W. Day, all of Kansas City, for appellant.

Kelly, Buchholz, Kimbrell & O'Donnell, of Kansas City, for respondent.

**WALKER, J.** The plaintiff filed a petition in the probate court of Jackson county for the allowance of a claim against the estate of Joseph F. Meffert, based on three promissory notes alleged to have been made by the latter to the plaintiff. A verdict was rendered by a

jury in favor of the plaintiff, from which an appeal was perfected to the circuit court. Upon a trial in that court a judgment was rendered May 2, 1919, in favor of plaintiff, from which the defendant appeals.

The petition on which this action is based is in three counts: The first is on a note made to plaintiff by Joseph F. Meffert, on November 14, 1901, for \$2,950, with the following indorsement on the back of same: "By cash, October 24, 1911, on within note \$50.00." The second is on a note made to plaintiff by Joseph F. Meffert, November 14, 1902, for \$500, with the following indorsement on the back of same: "By cash, October 21, 1912, on within note \$10.00." The third is on a note made to plaintiff by Joseph F. Meffert, June 8, 1913, for \$200. The last-mentioned note is conceded to be valid, and is not contested.

Thos. A. Hardwicke, a barber, testified for the plaintiff as to his familiarity with the handwriting of the deceased; that he had known the latter for about 20 years, and had frequently seen him write; that he was careless in his writing; that he had none of his writing at the time, but had formerly had one or two prescriptions given him by the deceased, who was a doctor, and that he got one of these from a drug store where he had left it "and it was exhibited to the jury;" that this prescription was in the handwriting of the deceased; witness then identified the indorsements on the back of the notes as being in the same handwriting.

William Meffert, a brother of the plaintiff and of the deceased testified to his familiarity with the handwriting of the latter; that the notes sued on and the indorsements thereon were, in his opinion, in the handwriting of the deceased. In response to an inquiry as to whether he had had a discussion with the deceased a few hours before his death, concerning amounts owing on notes signed by the deceased, he replied that the deceased said: "I have fixed his notes and he will get his money." That this was practically all he said in connection with that matter. Further, that the "hundred and twenty-nine" on one of the notes was in Dr. Joseph Meffert's handwriting.

On cross-examination this witness stated that except casually on two or three occasions he had not seen the deceased for about 25 years; that when the daughter of the deceased sent the witness word that her father was dying, a day or two before his death, he at first refused to go to see him, but finally went; that the deceased was not conscious when the witness first saw him, but that he brought him to consciousness. Continuing, the witness said:

"I say he was conscious and I brought him there purposely. He was unconscious, he was under the influence of hyocene, catoine, and mor-

phine, and they had been doping him with one shot right after another until I arrived, when I changed that formula. I never saw him for probably two hours after I got there, until he became conscious, and then they asked for me to be admitted. I treated him after I arrived, to restore consciousness. He was really muddled from hyocine, what we call a mild delirium, due to the action of the drug; he was not normal when I got there. In two hours after, he knew people. He was still partially conscious, practically, you might say, in a subconscious state, under the influence of a drug. I simply withdrew that; that was early in the evening, after my arrival about 10 o'clock, as I remember. I saw him about midnight, or possibly earlier. I cannot say the exact hour. I stopped the administration of the drug, he talked to me in the morning about 8 o'clock, and died about 5 that evening. I was with him that morning about three-quarters of an hour; I seen him again; I was right with him when he died. He was not conscious all the time. He became conscious in the afternoon, about 2 or 3 o'clock, maybe 4. The coma deepened until he became absolutely unconscious. There is no scratching or erasure on the \$500 note that I can see. The handwriting on the back is Dr. Meffert's handwriting—the indorsement. So far as my judgment is concerned, I would say absolutely so. My reason is familiarity with his handwriting; that I haven't seen it would make no difference. You get an impression of this case, don't you? You know that as well as I do, and to show you a similarity in that letter, this front part of the letter is one of the letters I refer to. This is one of the letters I found at home among other letters, and I picked that up to compare this with your notes at the other trial; that is the reason I had this letter in my possession."

There were two letters. Another letter was exhibited in regard to which the witness says:

"That is also my brother's handwriting; that was written long years ago; probably 20 or 25 years ago."

Then follows a long statement by the witness wholly irrelevant as to the nature of his personal relations with the deceased. On redirect examination the witness said:

"That note handed to me appears to have scratches on it; also this one is certainly with those that are scratched. The word 'May' is written under the word 'June' in pencil on the \$200 note. I cannot make that out; there is some writing there under '2'; the word June has been written over that. It appears there under the words 'Chs. Meffert.' There has been some writing there that has been scratched out, and in the \$200 note. I did not visit with my brother, the doctor, Joseph Meffert, in my mother's home when I went to Emporia; we never met there."

On further cross-examination, the witness said:

"I asked him [deceased] in regard to Charley's note; he remarked 'These notes were all right, and would be paid.'"

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That was the substance of what I testified to in the other trial. Thos. A. Hardwicke, recalled for further cross-examination said:

"I never looked for any more prescriptions or receipts; my business is that of a barber; I have nothing to do with handwriting, only just our laundry and writing laundry names, different names. I am no expert; I saw the doctor's handwriting on these prescriptions, which I turned in to the druggist, and I had two receipts, and that is all the familiarity I had with his handwriting."

The wife of the witness Hardwicke, testifying for plaintiff, said:

"I knew Dr. Joseph F. Meffert in his lifetime, 12 or 14 years; I knew his brother Charley (the plaintiff) and Charley's wife; I heard some talk of a trade between Dr. Joseph Meffert and his brother Charley, for real estate in Kansas City. I took two or three trips with my sister-in-law to look at places. After we had looked at two or three places, the doctor said, 'Well, if you want the property I will see that you get it. I owe Charley between \$3,600 and \$3,700 on these notes, and the trade will more than pay for the property.' I know the handwriting of Dr. Joseph Meffert, the \$3,674 note dated July 23, 1915, payable to Mary Meffert, is in Dr. Meffert's handwriting, and so is the note of September 6, 1915, \$2,000, payable to Mary Meffert, and the \$2,950 note of November 14, 1901, payable to Chas. Meffert. In my judgment the words 'twenty-nine hundred' are in Dr. Meffert's handwriting, and so is the indorsement on the \$500 note, 1902, the words 'by cash, October 21, 1912, on within note \$10.00.' In my opinion, Dr. Meffert wrote those words. In my opinion Dr. Meffert wrote the figures '2-15,' and signed his name on the receipt for \$10, December 4, 1915, reading: 'Received from Pippa Taylor, rent 3602 East 15th, till December 1, 1915, Joseph F. Meffert.' I am the wife of Mr. Hardwicke; my husband's sister is Charley Meffert's (the plaintiff's) wife. I have talked with Dr. Meffert; he said he owed Charley some money, and would pay it; he said he owed between \$3,600 and \$3,700, with interest. If they did not get the amount I stated in my testimony at the former trial, that is not my fault. I remember it, because the doctor said it at my house."

Cross-examined as to the appearance of the faces of the notes, the witness found no evidence of any erasure or other indications of a change in the note since it was originally written. Witness has had no experience in the matter of handwriting, or the comparison of same.

A Mrs. Baker testified:

"I am the sister of Dr. Joseph, and of Charley and William Meffert; I have lived in Liberty practically all my life. I have seen my brother, Dr. Joseph Meffert, sign different papers; I think I know his handwriting. My opinion is that the \$2,000 note, payable to the order of Mary Meffert, is in his handwriting. In the last five or six years before his death, I saw him do writing very little. He did not do any writing at our home at all. Only if he

wanted a little change from Ma, he would make a little note and sign it to her. That is all the writing he ever done—he never gave me a line; I never had any business transactions with him; the only ones I ever saw were some he gave my mother."

Disclaiming any knowledge of the handwriting of the deceased, other than as indicated, the witness said:

"As far as his name to the notes is concerned, I think he wrote his name. That looks, to my opinion, like his writing in the body of the note, the words 'twenty-nine hundred,' and the figure '2.' Of course, that may be his writing or may not; of course, I can't tell. I didn't see him do it. I don't know whether it is or not. I signed the paper at Mr. Lawson's office, saying I knew nothing about this case. He did not show me the notes. I told him I didn't know anything about the notes. I told him I had not seen the notes. I have not seen enough of the doctor's handwriting to be able to tell about his signature."

She could not remember to have heard the doctor say anything about any indebtedness to his brother Charley.

"I never spoke to him about his business at all. Of course, I know that you know that he owed Charley some money. I can't just remember; it was probably 18 or 19 years ago; it was a long time ago since I heard from any source he owed Charley."

This was all the evidence for the plaintiff.

The testimony for the defendant, was as follows:

John S. Major, president of the First National Bank of Liberty, testified as follows:

"I am in the banking business; I have been for 22 years. I was acquainted with Dr. Joseph Meffert in his lifetime. He was a customer of our bank when I came there in 1897; he had been before, but I don't know how long. He carried an account there up until the time of his death, and I had his checks often. I became familiar with his handwriting. It is a part of my business to familiarize myself with handwriting, as an active official of the bank. The indorsements on the back of the two notes, the one for \$500, and the other for \$2,950, are, in my opinion, not in the handwriting of Dr. Meffert. Looking at the word 'hundred,' on the note for \$2,950, it appears that there has been a line drawn thereon and extended out to the word 'dollars,' and the line erased and the word 'hundred,' written over it. There is a character joining the top of the two strokes, forming the letter 'H,' in the word 'hundred,' that is the same character as the '&' out at the end of it. Also at the end the 'hundred' under the line is printed, and the '50' is written over, as '50/100'. If the line was drawn from the 'twenty-nine' it would read 'twenty-nine fifty.'

"In the \$500 note, the '2' figure in 1902 shows to have been written over an erasure. You cannot make out distinctly what is under there; it looks like it might be a '1,' but I am not sure about that, but the '2' has evidently been written over the other, with a different colored ink. One has turned brown, and the other, the '2,' in

black ink, has not turned brown. The date seems to me to originally have been 1901. There is a payment 'by cash, October 21, 1912, on the note for \$10.00.' I am familiar with Dr. Joseph's signature. That is his signature on this note. Dr. Meffert was a careless man in his way of writing."

Having read the face of the \$200 note, conceded to be genuine, the witness stated:

"This reads 'two hundred' with dollars and then interest; very carelessly and loosely drawn. It is plain that the word 'May' was erased and June written over it on this note, and that the handwriting is that of Dr. Meffert, and the 'two hundred' is written over the erased word 'received'; at least, that is what the face of the note indicates. There seems to have been an erasure where the name of 'Charles Meffert' now appears in the note."

The witness is here examined at length about the distinguishing differences between the similarity and dissimilarity in the figures appearing on the different notes, as indicative of the amounts of same.

John L. Dougherty, cashier of the Commercial Bank, at Liberty, who has occupied that position for 15 years, testified as follows:

"In connection with my business, I have had occasion to give attention to the matter of handwriting and the signatures of people and the identification of their writing. We have to know our customers' signatures; naturally we pick up information about handwriting. My position has required me to do that kind of work. I knew Dr. Joseph Meffert all my life, nearly; he did most of his banking business, while I was with the Commercial Bank, at the First National, but he did some business with us. I had occasion to see his checks, and also to pass on them. At times he had an account in our bank. I am familiar with his handwriting."

Shown the two notes, one for \$2,950 and the other for \$500, the witness stated:

"That the indorsements on the back of same were not in the handwriting of Dr. Meffert; the signatures seem to be in his writing. On the note for \$2,950, it looks like the 'hundred' had been scratched out between 'twenty-nine and 50/100 dollars,' and the space written over. The top stems of the 'H' seem to have been changed. The 'hundred' and 'twenty-nine' is heavier, as would be natural when written over an erasure. It looks very much as though there had been a line drawn there, running from the 'twenty-nine' to the cents, '50/100,' and the 'H' looks like it had been made with two strokes, and then afterwards another added. At first glance, if it was by itself, you would not know whether it was intended for an 'H' or not. On the \$500 note, it looks to me like the '2' had been erased and written over with a different colored ink."

On cross-examination, witness stated:

"That if he was called on to pay a check for 'two thousand, nine hundred fifty' he would not pay it, because there is nothing there to indi-

cate that it is dollars. There is nothing to indicate that there is dollars, except the dollar mark in front of it and that is imperfect. It is not '\$29.50' in figures, and it ain't '\$2,950.' There is no symbol or anything to indicate to me what it was. It looks to me like the figures '\$2,950' are Joseph Meffert's, but I couldn't tell without a good many more of them to compare with it than I have. I would not say that those figures following the dollar mark, '\$2,950,' were written by Joseph Meffert for \$2,950. This note which you show me as having been made to his mother looks like the doctor's handwriting. I would swear to it as well as I can swear to anything. The word 'hundred' in the \$200 note is written over an erasure. The signature to that note is in his writing. It looks as though the \$200 note had been written on some kind of a blank receipt. The doctor was a slovenly man in making his checks and notes, at times. I knew Dr. Joseph Meffert all my life, and I don't know whether he ever drank or not. I think the doctor wrote the note which you have shown me, to his mother, and also the \$200 note. I think he wrote the word 'hundred' in the \$500 note. I don't recall that he ever borrowed money from our bank."

James H. Southwell, director of a Microscopical Pharmacy, in Kansas City, testified:

"That he had about 30 years' experience in this line of work."

Shown the \$500 note, he stated:

"That this note is written in the common ink used, called fluid, or, as chemists call it, iron nutgall ink, except the figure '2' which is written in common black or logwood ink. I tested this note in different places, first the figures, then the signature, and found that the '9' and '0' were written in iron nutgall ink, common writing fluid, such as Carter's, Sanford's, or Arnold's, while the '2' is written in logwood potassium ink, or common black ink. These are the two kinds most commonly used for business purposes. The body of the note and all of the date except the '2' is in one kind, and the '2' is in another kind."

This is followed by a long statement of the witness as to the constituent elements of the different kinds of ink and the tests used in determining their nature. Continuing, the witness said:

"I put the \$2,950 note through these tests. I found that it was entirely written in one kind of ink, and examined the word 'hundred' microscopically, and found a line of erasure that ran from a little this side of the '&' to nearly the end of the 'u' upon the paper. This examination disclosed that the paper fiber was disturbed, and that it ran over to the '50/100.'"

The witness demonstrated the manner in which the erasure was disclosed by illuminating the same under an electric light. Following this exhibition, the witness said:

"Well, you can see at the end of the 'd' there, that the erasure or disturbing of the paper runs up to the 'd' and beyond. The paper is scored or picked into a little bit where the erasure was made. By moving the paper along

here, you can see, it shows plainly. The erasure I find is discernible up to the first part of the 'u,' and from there on clear on before the small 'r' in the word 'hundred.' I have had a great deal of experience in the matter of examining handwriting in one way or another. I have made a study on this subject. I think these indorsements were written by the same person. It seems as though they were done by a writer, more or less expert than the person who did the writing on the face of the notes. I discover no common characteristics between the writing on the faces of the notes and the two indorsements, but the latter have the same characteristics."

Further dissimilarities between the writing on the faces of the notes and the indorsements were brought out on cross-examination, as well as points of difference not necessary to be detailed here.

Anna Meffert, a daughter of the deceased, testified as follows:

"I was present at the time of my father's death, in 1916. I was not living with him at the time, but was with him from Sunday until after he died on Wednesday. There was in his house when I went there, and until his death, the housekeeper, and Mrs. Charles Meffert was out there part of the time; a nurse was with him all the time. When I saw my father on Sunday, before his death, he was very low, and seemed to recognize me a little; he kind of smiled, but was not able to talk. I don't remember of his saying anything to me. I walked up to him and took hold of his hand, and he just pressed mine, and I could tell from the way he was acting that he knew who I was. He seemed to be in rather a dazed condition, and he was lying with his eyes closed; he was conscious on Monday, and a little conscious on Tuesday, but after Tuesday evening he did not seem to know anything. On Tuesday night I went out to Mrs. Baker's and stayed all night. Wednesday morning, as soon as I could come back, I went to his sick room, and was there until he died. I may have gone out to lunch; I don't remember; I may have gone into the dining room now and then, and came back after lunch, and came back and sat there before he died, and when the nurse came into the kitchen and told us he was dying. During the last day, Wednesday, he did not converse with any one; he was not conscious; I was present along from early in the morning until when I just stepped out. If my uncle, Dr. William Meffert, from Emporia, had any conversation with him that morning about notes, I did not see him, and did not hear him. He was there on Wednesday afternoon, and I think it was then he went in there; I was there sitting in the room and he wanted father to take some nourishment; he was lying at the time, in a semi-conscious condition—I don't know whether it was a stupor or not. He did not open his eyes or say anything. They put something into his mouth, and Dr. William Meffert took his face and patted it and said, 'swallow, swallow, swallow.' That was all; there was no response on my father's part."

Cross-examined, she said her father was about 59 years of age, and that he left her

the greater part of his property in the will. Portions of the will were then read over to the witness:

"I cannot say what the relationship was or had been between my father and his brother William, as manifested when the latter came to my father's bedside, because he was unconscious. I cannot say that it was friendly; I am sure that he was unconscious from Tuesday evening on. I was in the room off and on."

C. W. Ransom, author of a system of penmanship in different forms for 30 years, testified:

"I have written text-books on the subject and have had occasion to examine handwriting and disputed documents for the purpose of ascertaining the genuineness of the writing. I have made a study of that matter. I have examined these two notes, one for 'twenty-nine hundred dollars' in writing and '\$2,950' in figures, and one for '\$500' in figures, and I have had an opportunity to examine these writings you hand me, and which are marked as exhibits in this case. In my opinion, the indorsement on the back of the note for \$500, to wit, 'By cash, October 12, 1912, on within note \$10.00,' is not in the handwriting of the party who wrote the face of the note, excluding the date there or the '2' in said date. The indorsement on the note for \$2,950 is, in my opinion, not in the handwriting of the party who wrote the face and body of that note and the signature."

Witness then explains his reasons for that conclusion, based upon the manner in which the writing was done and the formation of the letters. Taking the \$500 note, the witness stated:

"That it was very evident that underneath the '2' in the date, 1902, there had been an erasure."

The reasons for this conclusion are also given, not necessary to be detailed. Continuing, the witness said:

"It looks very much like the 'twenty-nine' in this note for \$2,950 was written, but the '&' was made and then a straight line extended to the '50,' and then this line was erased. This erasure seems to have been made clear across and right over the top of the 'hundred,' and the loop or the top of the uprights of the 'H' are the remnants of the old '&.'"

Cross-examined, the witness said:

"I understand that all the signatures are admitted to be genuine on these different notes. I think I could pretty definitely determine whether the handwriting was that of Joseph Meffert."

The witness then proceeds to define the distinguishing characteristics between the different writings on these notes, the conclusion being that the changes made were not in the handwriting of Dr. Joseph Meffert, or, more correctly, perhaps, that the signatures and the other writings on the notes were not by

the same person who made the erasures and the changes. On redirect examination, the witness stated:

"That the \$200 note was apparently written on a piece of paper that had theretofore been used for something else, and was dated 'May 1st' with an indelible pencil."

What are called the characteristics of handwriting was explained, and, while they were stated to vary in some degree, according to the position of the writer and the conditions under which they were written, that the characteristics would be the same.

Martin E. Lawson, testifying on behalf of the defendant, said:

"I live in Liberty; I am the administrator of Dr. Meffert's will. I had known him about 25 or 26 years before his death, and had acted as his attorney for 21 or 22 years. He was in my office on an average once a month during that time. Frequently he was there twice a week; oftentimes I would have him sign deeds, contracts, or papers, and he would sit down and make some rough sketch or agreement he was about to make with some one, for me to put in legal form. I have seen him write a great many times, and have had his handwriting before me frequently. I had seen the note dated June 8, 1913, payable to Charles Meffert, for \$200, before the doctor's death. My recollection is I saw it before it was delivered to Charles Meffert. I first saw these two notes, one 'twenty-nine hundred dollars,' in writing, \$29.50, and the \$500 note, the two that are in controversy in this case, shortly before the doctor's death. Sometime after his death, Charley Meffert and his wife brought the notes to my office. I then saw the indorsements or credits on the backs. From my experience and acquaintanceship with the doctor's handwriting, and having seen him write, I am of the opinion that these indorsements were not written by him. I formed that opinion when I first saw the notes, and took them to his banker, Mr. Major, that same day. At the time this suit was instituted, and after these notes were brought to me, and my suspicions were aroused about them, I took a statement to Mrs. Baker and Mrs. Meffert, the mother and sister, and asked what they knew about it. I took their statements in writing; Mrs. Baker signed it, and Mrs. Meffert, who was blind, made her mark."

Cross-examined, the witness said:

"I do not attempt to account for the slovenly or careless way in which the \$200 note is written. The doctor had a way of picking up most any sort of paper and writing on it. I notice this note is written on a receipt blank. I don't know anything about his writing, rubbing out, and writing over it.

"He was careless in the formation of letters; he did not form his letters fully and completely at all times. I never saw him rub out and write over anything. This note looks like he started, or somebody started, to write the word 'received' here and this had been rubbed out and the note written over the top of it. It is written on a loose piece of paper."



The witness then explains the conditions under which the \$200 note, conceded to be genuine, was made by the deceased to his brother, the plaintiff. This was all of the evidence.

[1] The setting forth at length of the relevant testimony of the witnesses for the respective parties is not deemed inappropriate to assist in determining the greater credence which should be given to their testimony if, in its examination, the rule is kept in mind as to the province of the jury where there is substantial evidence to sustain any issue. In no other way than by a presentation of the testimony of witnesses in their own words can the same be weighed and measured so as to satisfactorily determine its probative force. In the application of this test, the intelligence, experience, and familiarity with the matter in controversy, and the interest or lack of interest of the witnesses in the result of the action, may be fairly taken into consideration.

The payment of the notes in controversy is contested: (1) On the ground that they have been paid; (2) that they are barred by the statute of limitations; (3) that they are void because of material alterations; and (4) that the credits on the backs of same are not in the handwriting of the alleged maker.

I. Other than by implication, there is nothing to sustain the contention that the notes have been paid. The facts, not disputed, are that Joseph F. Meffert, in addition to being actively engaged in the practice of medicine, made money in dealing in real estate, in which transactions he had continuous dealings with local banks. These facts lend persuasive coloring to the conclusion that, while thus engaged, it would be rather singular that he should not only borrow, but retain without any payments thereon, for almost 10 years, the amounts of these notes, from a brother not shown to have been possessed of any considerable means, who combined the modest vocation of a barber with that of a druggist in a small town in Kansas. In the face of these facts, the impartial mind which draws its conclusion from the known and well-recognized conduct of men under like circumstances might reasonably hesitate to give ready credence to the creation of these debts. If created, however, no substantial proof has been adduced as to their having been paid.

II. A more serious question confronts us in the contention as to the bar of the statute of limitations. On the back of the note for \$2,950, there appears a credit or the indorsement of a payment for \$50, dated October 24, 1911, which was 20 days before the note would have been barred by the statute. On the back of the note for \$500 there appears a credit or the indorsement of a payment of \$10, dated October 21, 1912, or 23 days before this note would have been barred by the statute. Waiving the rather unusual circumstances that these notes were made by a

business man, who, judging from his pecuniary successes or superior acquisitive ability, must have realized the importance, and be reasonably held to have pursued the course of promptly meeting his obligations, it is rather unusual, to say the least, that he would borrow these small amounts from a brother who is not shown to have had any money, and thereafter completely ignore the obligations thus incurred, for almost the entire legal life of the debts, and then make these nominal payments in the manner in which their entry upon the backs of the notes indicate that they were made.

However, the absence of proof as to these payments having been made other than their entry on the backs of the notes is the matter with which we are primarily concerned. Aside from the opinions of certain of the witnesses for the plaintiff, shown to have been nonexperts, that the handwriting of these entries of payments was the same as that of the signatures of the payer or the alleged maker of the notes, there was no evidence offered on this subject.

[2-5] It is the well-settled law of this state that there is no presumption that an indorsement of a payment on a promissory note was made at the time it bears date, and to remove the bar of the statute of limitations it is necessary to adduce in evidence other proof than the mere production of the note with a credit thereon, bearing a date which would have that effect. A contrary rule was announced in *Carter v. Carter*, 44 Mo. 195, and in *Smith v. Ferry*, 69 Mo. 142, to the effect that, in indorsements of payments on promissory notes, it is presumed that they were made at the time they bear date; but these rulings, as shown by later cases, do not correctly declare the law, in that it is now held to be necessary in order to remove the bar of the statute to show that the credit was actually made by the owner of the note, or by his direction, at a time when the note was not barred by the statute, or by more direct evidence that the payment was actually made by the maker at such time. If it be shown that the credit was indorsed on the note by the holder at the time when the same was not barred, and was consequently against his interests to have made it, this will furnish prima facie proof that payment was made at that time, and in the absence of a showing to the contrary the note will not be barred; but in such cases there must be proof that the credit was, in fact, made at such time. There was no such showing. Aside from mere opinion evidence as to a similarity in handwriting, which was subjected to serious question by strong counter proof, no effort was made by the plaintiff to support the claim that these payments were made when dated or at any other time. If the rule regulating this matter were otherwise, ample opportunity would be afforded for fraud, in that the holder of a note would have it in his power to toll the running of

the statute by simply dating a payment prior to the bar, especially where, as in the instant case, death had closed the mouth of the maker. The countenancing of payments so entered, without proof, would result in destroying the rule heretofore recognized that payments antedating the bar of the statute are held to be against the holder's interest, in that an antedated entry of payment would rebound to his interest. Hence the wisdom of the requirement that there must be proof aliunde of such payments.

In *Phillips v. Mahan*, 52 Mo. 197, it is held that an indorsement of partial payment made on a note by the holder without the privity of the maker is not of itself sufficient evidence of a payment to repel a defense created by the statute of limitations.

In *Goddard v. Williamson's Admr.* 72 Mo. 131, it is held that, when the statute of limitations is relied on as a defense to a note, the plaintiff should not be permitted to read in evidence credits indorsed on the note without first proving when the indorsements were made.

In *Regan v. Williams*, 185 Mo. loc. cit. 631, 84 S. W. 959, 105 Am. St. Rep. 600, it is held that it is not the indorsement of a credit, but the payment, that operates as a renewal of a promise, and removes the bar of the statute of limitations; that the party relying on a payment to stop the statute must not only establish that it was made, but that it was made by the authority of the defendant; that a part payment does not take a debt out of the statute unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt and signified his willingness to pay it.

In *Zaring v. Bauman* (App.) 223 S. W. 947, in which the facts disclosed that the holder of a note had indorsed payment thereon before the note was due, it is held that the mere indorsement of a credit on a note does not prove that such credit was entered before the note was barred, but there must be evidence aliunde of the indorsement of such payment to show that it was in fact indorsed as a credit before the note was barred.

In *Berryman v. Becker*, 173 Mo. App. 346, 158 S. W. 899, it is held that, where there is proof that a credit was indorsed on a note by a holder at a time when it was not barred, this, being against his interest, is *prima facie* evidence that payment was made at that time, and, in the absence of any showing to the contrary the note will not be barred; but where there is no evidence aliunde as to when the credit was indorsed, there must be proof that the payment was, in fact, made.

III. The testimony of chemical and handwriting experts was to the effect that erasures had been made on the faces of the notes; that same was indicated by the scratched or roughened condition of the pa-

per, and that the ink used at the points of erasure was different in composition and color from that used elsewhere on the note.

[6] The ancient rule of evidence, as stated and discussed by Mr. Greenleaf (1 Gr. Ev. § 564), was that alterations and erasures of written instruments were presumed to have been made at or prior to the time of their execution. The trend of authority is still in favor of the rule as thus declared. However, where an alteration or erasure appears suspicious on its face—for example, where a different ink has been employed at the point of erasure from that elsewhere used in the instrument—it demands explanation. In the presence of this, or equally cogent circumstances of a suspicious nature, the law presumes nothing, and the question as to the time when the person by whom, or the interest for which, the alteration was made are matters of fact to be found by the jury upon proof adduced by the party offering the instrument in evidence.

[7] Commissioner Railey, in *Collison v. Norman*, 191 S. W. 60, with commendable care, has recently discussed the question here under consideration, and has reached the conclusion above indicated, supported by a wealth of authority from our own and other courts. The erasures here testified to by experts as having been made were, in one instance, such as to change the sum payable; in the other, to change the date. Such changes are classified by our statute as material alterations. Section 911, R. S. 1919. As such, they should have been explained. *Mech. Am. Nat. Bank v. Helmbacher*, 199 Mo. App. 173, 201 S. W. 383.

We have heretofore discussed the question as to whether or not there was any evidence that the indorsement of the payments on the notes was in the handwriting of the deceased.

[8] IV. Error was committed in the admission in evidence, without more, of the testimony of a brother of the deceased as to a statement alleged to have been made by the latter when, under all the attendant facts and circumstances, he was in extremis. This statement was as follows: "I have fixed his notes, and he will get his money." In the absence of evidence connecting this statement with the notes in controversy, or an identification in some manner of the person referred to, this statement, under the most elementary rules of evidence, was inadmissible. Its admission, unexplained, was irrelevant, and could only have been prejudicial to the defendant.

For the reasons stated, this cause will have to be reversed and remanded. In the absence upon a retrial of more substantial proof than has heretofore been adduced, a judgment for plaintiff cannot be sustained.

All concur.

**HOLLINGHAUSEN v. ADE. (No. 21,764.)**

(Supreme Court of Missouri, Division No. 2.  
May 28, 1921. Rehearing Denied  
July 19, 1921.)

1. Marriage  $\Leftrightarrow$ 51 — Whether plaintiff was common-law wife held, under the evidence, for the jury.

In an action for damages for preventing a reconciliation between plaintiff and her husband, the question whether there was a common-law marriage between the alleged spouses held, under the evidence, for the jury.

2. Pleading  $\Leftrightarrow$ 433(5)—Petition held after verdict to state good cause of action for alienation of affections.

Petition, alleging that plaintiff was lawfully married to defendant's brother, and that after a separation the defendant prevented a reconciliation, etc., held, after verdict, in view of Rev. St. 1909, § 2119, sufficient to state a cause of action.

3. Marriage  $\Leftrightarrow$ 13—Common-law marriage is valid.

A valid marriage may be entered into between the parties, willing and competent to contract, in accordance with the common law.

4. Appeal and error  $\Leftrightarrow$ 1002—Verdict on conflicting evidence conclusive.

A verdict on conflicting evidence is conclusive on appeal.

5. Appeal and error  $\Leftrightarrow$ 1066—Trial  $\Leftrightarrow$ 251(1)—Instruction, tendering issue not in case, is improper and reversible error.

Where an instruction tenders to the finding of the jury the facts of an issue not in the case, it is erroneous, and, if given, will constitute reversible error.

6. Husband and wife  $\Leftrightarrow$ 335—Modification of instruction in action for preventing reconciliation not improper.

In an action for damages for preventing a reconciliation between plaintiff and her husband, the modification of an instruction, submitting to the jury the question of whether defendant was guilty of acts calculated to prevent a reconciliation, etc., by adding the requirement that the jury find that they did prevent reconciliation, was not improper.

7. Husband and wife  $\Leftrightarrow$ 326—That wife on procuring divorce made settlement with her husband will not estop her from recovering damages for alienation of affections.

That a wife who procured a divorce made a property settlement with her husband will not estop her from recovering damages from one who prevented a reconciliation between the parties, although it was desired, for mutuality is a necessary element of estoppel, and the settlement in the divorce case lacked such element.

8. Husband and wife  $\Leftrightarrow$ 334(1)—In action for preventing reconciliation, wife may recover for injuries to feelings, loss of support, and society.

In an action for damages for alienating the affections of plaintiff's husband, and preventing

a reconciliation after separation, plaintiff may recover for injury done to her feelings, and for loss of support, comfort, and society of her husband.

9. Husband and wife  $\Leftrightarrow$ 325—Where defendant wrongfully prevented reconciliation between spouses, she is liable, though not responsible for the original separation.

Where defendant, a sister of plaintiff's husband, prevented a reconciliation between the parties after separation, she is liable, although she did not cause the separation.

10. Husband and wife  $\Leftrightarrow$ 333(1)—There is no presumption of good faith in case of interference between spouses by brother or sister of one.

There is no initial presumption of good faith, as in case of parents, where a brother or sister of one of the spouses interferes in the marital relations.

11. Trial  $\Leftrightarrow$ 255(4)—Party, desiring that scope of evidence be limited by instruction, must request same.

A party, desiring that the scope of the evidence be limited by an instruction, must request the same.

12. Husband and wife  $\Leftrightarrow$ 334(3)—Award of \$10,000 actual and \$5,000 punitive damages for preventing reconciliation between spouses not excessive.

Where, after a separation between plaintiff, a common-law wife, and her husband, a man worth considerably over \$100,000 a reconciliation desired between the parties was prevented by defendant, sister of the husband, an award of \$10,000 actual and \$5,000 punitive damages to plaintiff cannot be deemed excessive, though shortly after the separation she procured a divorce and made settlement of her marital rights for \$7,500, and the husband died about six weeks after the separation.

#### On Motion for Rehearing.

13. Husband and wife  $\Leftrightarrow$ 335—Instruction on liability of defendant for alienation of affections proper.

In an action for damages for the alienation of plaintiff's husband's affections and preventing a reconciliation after separation, an instruction, directing a verdict for plaintiff if defendant was intentionally guilty of such conduct as to prejudice the husband against plaintiff, and so alienating him from her and preventing a reconciliation, was correct.

14. Appeal and error  $\Leftrightarrow$ 880(2)—Where demurrer of codefendant was sustained, but formal dismissal was not made, defendant, against whom cause was submitted, cannot complain.

Where the case was submitted against the appealing defendant alone, demurrer of the other having been sustained, the appealing defendant cannot complain that there was no formal dismissal as to her codefendant at that time, and he was granted a new trial, whereupon plaintiff entered dismissal, and judgment was rendered against the appealing defendant.

Appeal from Circuit Court, Jackson County; Thomas J. Seehorn, Judge.

Action by G. D. Hollinghausen against Carl Ade and Emma Ade, his wife. From a judgment for plaintiff against Emma Ade alone, she appeals. Affirmed.

This action was brought in the Jackson county circuit court, Mo., in Kansas City, by plaintiff, Grace D. Hollinghausen, against defendants, Carl Ade and Emma Ade, his wife, to recover actual damages in the sum of \$25,000 and punitive damages in the sum of \$25,000 for alienating the affections of her husband, Carl Hollinghausen, and thereafter preventing a reconciliation between them. The petition alleges that they were lawfully married at Salina, Kan., on the—day of February, 1910, and thereafter lived happily together until the 31st day of March, 1917; that May 11, 1917, she obtained a divorce from her said husband on account of certain grievous misdeeds of her said husband, which are fully set out in Exhibit A in appellant's abstract. It further alleges a wicked and malicious conspiracy between defendants, who well knew they were so living together as man and wife, to bring about an alienation of the affections of her said husband, and a wicked and malicious attempt (which it is alleged was successful) to prevent a reconciliation between them, and prayed damages as above stated. Defendants answered with a general denial of the averments of the petition, and pleaded as defensive matter the same divorce proceedings; that said divorce was obtained by plaintiff against defendant on account of wrongs, by default, he having been duly served with summons; that pending said divorce proceedings a written contract was entered between plaintiff and her said husband, by virtue of which her right to alimony and all rights she had in defendant's estate on account of being his wife were fully adjusted and finally settled for the sum of \$7,500; that said adjustment was made voluntarily, and with full knowledge on the part of plaintiff; and that it operated to estop her from recovering in the instant action. The reply was a general denial of the new matter. With the issues thus framed, trial was had before the court and a jury, which returned the following verdict:

"Kansas City, Missouri, Feb. 15, 1919.

"We, the jury, find for plaintiff and assess her actual damages at ten thousand dollars (\$10,000). We further allow her exemplary damages at five thousand dollars (\$5,000).

"George W. Ernst, Foreman."

Two days thereafter, to wit, February 19, 1919, the following record entries were made:

"Now the court, of its own motion, on account of errors in instructions, sets the verdict aside in this case as to Carl Ade, and grants Carl Ade a new trial of this cause."

"Now plaintiff dismisses this cause as to Carl Ade, defendant herein."

"Now the court orders judgment entered in accordance with the verdict of the jury."

—to which both defendants excepted. Said judgment was to the effect that plaintiff have and recover from defendant the amount specified in the verdict, with costs of suit, and that she have execution therefor. Then followed the usual judgment of dismissal as to Carl Ade. Defendants offered no testimony. We will further refer to the facts hereafter.

Walsh & Aylward and E. A. Setzler, all of Kansas City, for appellant.

J. M. Johnson, L. N. Dempsey, and Donald W. Johnson, all of Kansas City, for respondent.

MOZLEY, C. (after stating the facts as above). [1] 1. The first assignment will be determined by the evidence. Under this assignment it is insisted that the evidence was insufficient to establish a common-law marriage between plaintiff and Carl Hollinghausen.

Without setting the testimony on this point out in full, it is sufficient to state that it shows that these parties, at Salina, Kan., on the—day of February, 1910, entered into a present agreement to become man and wife; that in a few days they returned to the home of the mother of plaintiff, at Kansas City, Mo., and introduced themselves as man and wife and received her blessings; that he provided an elegant home, where he and plaintiff resided happily together until March 31, 1917, about nine years; that during that time they were both anxious to have a child born, but on account of some impediment standing in the way he had an operation performed on her, which cost him about \$350; that during all this time they treated each other as man and wife, were introduced as man and wife, and were so regarded among their friends and neighbors.

The deposition of Emma Ade was taken by plaintiff and introduced in evidence, which we quote from as follows:

"Q. Prior to that time where was his home?  
A. Why he lived at Twenty-Fifth and Troost.

"Q. In an apartment? A. Yes, sir.

"Q. And who lived with him or with whom did he live there at Twenty-Fifth and Troost?  
A. Grace Hildebrand.

"Q. She is the plaintiff in this action? A. Yes, sir.

"Q. Were they living there together in the apartment?

"Mr. Aylward: If you know.

"Q. Yes, if you know. You needn't testify to anything you don't know. Were they living there together? A. I suppose they were living there together.

"Q. I am asking you for your knowledge. Now, how do you know they were living there together? A. Why, because they were there together.

"Q. You saw them there? A. Yes, sir.

"Q. How long did they live there together in that apartment? A. Why, I am sure I don't know how long they lived there.

"Q. No; I don't expect you to give it accurately, Mrs. Ade, but about how long they lived in those apartments there? A. Several years.

"Q. Did any one live there with them? A. Not that I know of.

"Q. Did you visit them there in the apartments? A. Yes, sir.

"Q. About how often did you visit them there? A. Just occasionally.

"Q. Well, give us an idea about how long it was, once a week or once a month. A. Why there was for a short time once a week, and then occasionally it was longer. Sometimes a month, six weeks, eight weeks we didn't see one another.

"Q. During that two or three years that they lived there together in the apartment at Twenty-Fifth and Troost did they visit you at your house sometimes? A. Yes, sir. \* \* \*

"Q. How often did Mr. Hollinghausen and the plaintiff visit you there at your house during the time they were living at Twenty-Fifth and Troost? A. Just as I stated before, just occasionally.

"Q. Occasionally? A. Yes, sir.

"Q. Once a week or sometimes not so often? A. Yes, sir.

"Q. Yes, and they came there and would sometimes have meals? That is, they were entertained at your house? A. Yes, sir.

"Q. And sometimes they would entertain you and Mr. Ade at their house? A. Yes, sir.

"Q. And you were on good terms with them? A. Yes, sir. \* \* \*

"Q. State what your conversation with your brother was on that occasion. A. As I stated it was after she shot the negro; and it was in the newspapers that my brother was married.

"Q. Yes. A. I, the next day or two later, went to him and said: 'Brother, if you were married, why didn't you come and tell me? I am your only sister. Why didn't you tell me you were married? I never knew anything about it.' And my brother said: 'Emma, I am not married. I am simply defending Grace for fear she may have trouble about the shooting affair.'"

We think this testimony was amply sufficient for submission to the jury for their determination, and the demurrer was properly refused.

[2] And if the first part of said demurrer was intended to strike at the sufficiency of the petition as not stating facts sufficient to constitute a cause of action against defendants, without setting said petition out further, we think it stated a cause of action, and it was good after verdict anyway. Section 2119, R. S. 1909.

[3] A valid marriage may be entered into between parties willing and competent to contract at common law. *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *State v. Cooper*, 103 Mo. 266, 15 S. W. 327; *State v. Hansbrough*, 181 Mo. 348, 80 S. W. 900; *Topper v. Perry*, 197 Mo. 531, 95 S. W. 203, 114 Am. St.

Rep. 777; *Plattner v. Plattner*, 116 Mo. App. 405, 91 S. W. 457; *Butterfield v. Ennis*, 193 Mo. App. 638, 186 S. W. 1173; 18 R. C. L. 391, par. 12.

[4] The jury has determined this question in favor of plaintiff, and their verdict is binding on us.

[5] 2. Instruction G, as originally drawn, so far as is necessary to quote, reads as follows:

"If, therefore, you believe and find from the evidence that plaintiff and Carl Hollinghausen were husband and wife, and that defendant Emma Ade was intentionally guilty of such conduct as was calculated to cause their separation and to alienate the affections of the said Carl Hollinghausen, and by reason thereof the defendant did cause the affections of said Carl Hollinghausen to be alienated from plaintiff, and did cause him to separate from and abandon plaintiff," etc.

Said instruction, as modified, omitted that part of the original instruction relating to the defendant being guilty of conduct that was calculated to cause their separation. The original instruction manifestly submitted the case on a wrong theory—that of the conduct of the defendant causing the separation between these parties. The case was submitted to the jury solely on the averment in the petition that a reconciliation was wickedly and maliciously prevented between plaintiff and her husband; that he was kept separate and apart from her and communication between them prevented.

3. Where an instruction tenders to the finding of the jury the facts of an issue not in the case, it is erroneous, and would have been reversible error. *De Donato v. Morrison*, 160 Mo. 581, loc. cit. 591, 61 S. W. 641; *Glass v. Gelvin*, 80 Mo. 297; *Silverthorne v. Summit Lumber Co.*, 190 Mo. App. 716, 176 S. W. 441. We rule that said instruction was correct as modified, and overrule defendant's objection thereto.

[6] 4. Instruction B as originally presented, so far as is necessary to quote, reads as follows:

"If, therefore, you believe from the evidence that plaintiff and Carl Hollinghausen were husband and wife, and that on or about March 31, 1917, they quarreled, and the said Carl Hollinghausen separated from plaintiff, and that thereupon defendant Emma Ade was intentionally guilty of such conduct as was calculated to prejudice plaintiff's husband against plaintiff and alienate him from her and to prevent a reconciliation between them, and that plaintiff was thereby deprived of the society, companionship, comfort, protection, aid, and affection of her husband, your verdict will be for plaintiff."

Said paragraph of said instruction, as modified, reads as follows:

"If, therefore, you believe from the evidence that plaintiff and Carl Hollinghausen were husband and wife, and that on or about March

31, 1917, they quarreled, and the said Carl Hollinghausen separated from plaintiff, and thereafter defendant Emma Ade was intentionally guilty of such conduct as was calculated to and actually did," etc.

Then the instruction concludes as above. It will be observed that the modified instruction differs from the original in adding the words "actually did," after the words "calculated to." We think the original instruction was erroneous, in that it only required the jury to find that the alleged conduct of defendant was merely calculated to cause her husband's alienation and prevent a reconciliation between them, whereas, as modified, the jury were required to find that said conduct actually did produce such result. The modified instruction B was correct, and we overrule defendant's objection thereto.

Instructions A and E announce correct propositions of law, and we therefore overrule defendant's objections thereto.

The court did not err in refusing to give defendant's instruction No. 1, to the effect that there was no evidence of actual malice on the part of defendant toward the plaintiff, and that issue is withdrawn from your consideration. Under this record said instruction did not correctly state the law. A correct instruction on the subject of malice was given at the request of plaintiff. We overrule defendant's objection to the refusal of the court to give said instruction.

Instructions 2, 3, 4, and 6 were properly overruled. Nos. 2, 3, and 4 related to the proposition asserted by defendant that if the jury found that plaintiff had made the settlement pleaded in the answer by which she had received \$7,500 in full of alimony and all her property rights in her husband's estate that she was estopped from recovering in this action.

[7] This settlement had nothing to do with the instant case, and defendant was not a party to it; there was no mutuality respecting the matter as between plaintiff and defendant.

"Mutuality is a necessary ingredient of an estoppel. There can be no estoppel upon one party unless the other party is equally estopped." *Hempstead v. Easton*, 33 Mo. 142; *City of Unionville v. Martin*, 95 Mo. App. 28, and authorities cited at loc. cit. 39, 68 S. W. 605; *De Ford v. Johnson*, 251 Mo. 244, 158 S. W. 29, 46 L. R. A. (N. S.) 1083, Ann. Cas. 1915A, 344.

The court properly refused these instructions.

Instruction No. 5 was properly refused, because it sought to submit to the jury an issue not in the case.

[8] Instruction 6 tells the jury that plaintiff could not recover damages for injury done to her feelings or the loss of support, comfort, and society of her husband and these elements would be withdrawn from the consideration of the jury. These were elements

plaintiff could recover for, and hence the instruction was properly overruled.

[9] Instruction 7 told the jury that if plaintiff caused the separation between her and her husband, and was not wrongfully induced to do so by either of the defendants, their verdict would be for defendants. The cause of their separation, as above seen, was not an issue of the cause, and therefore the instruction was properly refused.

Instructions 8 and 11 were properly refused.

[10] Instruction 10 told the jury that the law presumes that counsel or advice given by a sister to a brother is given in good faith and from proper motives and honest impulses, the burden of proving that such was not the case was shifted to plaintiff to prove by a preponderance of the testimony that such advice was not given in good faith, and unless the jury find such facts exist to their personal satisfaction they will find for defendant, Emma Ade. We agree with plaintiff that there is no initial presumption of good faith on the part of a brother or a sister who interferes in the marital relations of a plaintiff.

This is vastly different from a case of parents interfering between husband and wife. In the case of *Barton v. Barton*, 119 Mo. App. loc. cit. 532, 94 S. W. 582, it was held:

"We are not to be understood as intimating that a parent may, without good cause, influence a child to separate from a spouse; to do so is a tort for which the parent, like any other person, is liable. We mean to say that the law recognizes a superior right of interference on the part of a parent, and will justify the interference for a cause which would be no justification in favor of another person. This rule prevails because of the law's respect for anxiety parents feel for their children, and which impels to efforts to promote a child's welfare and happiness. This natural impulse prompts advice and assistance in domestic troubles as well as in others."

We rule that the instruction was properly refused.

It is assigned as error that the court modified and gave instruction 20. Said instruction as originally requested by defendant reads as follows:

"The court instructs the jury that in the event your finding is for the plaintiff, you are only permitted to allow damages, if any, for the loss of affections, the society, companionship, and comfort of the said Carl Hollinghausen from the 25th day of April to the date of his death, on June 9, 1917."

The modified instruction changed the date from when the damages accrued to March 31, 1917, to the date of his death June 9, 1917. There was no error in modifying said instruction, and the assignment is overruled. We rule that defendant's peremptory demurrers were properly overruled. Plaintiff's instructions given to the jury presents the case suf-

ficiently clear for their ready understanding, and, when read in connection with the 13 given at defendant's request, which were quite liberal in her behalf, we think there is no doubt but that the case was properly instructed on.

[11] 5. Error is assigned in that the court failed to limit certain evidence by instruction which was received for the sole purpose of showing the state of mind or affection of the person making the statement. If defendant deplored such instruction, it was her duty to ask the court to give one. *Rattan v. C. E. Ry. Co.*, 120 Mo. App. 270, 96 S. W. 735; *Sotabier v. Transit Co.*, 203 Mo. loc. cit. 721, 102 S. W. 651; *Brown v. Globe Printing Co.*, 213 Mo. 611-613, 112 S. W. 462, 127 Am. St. Rep. 627. We overrule the assignment.

[12] 6. Lastly defendant makes the point that the verdict is grossly excessive and is the result of passion and prejudice. There is nothing in this record that shows the verdict was the result of passion and prejudice, and we cannot hold that it was. As to being grossly excessive both sides cite the case of *Fuller v. Robinson*, 230 Mo. 32, 130 S. W. 343, Ann. Cas. 1912A, 933, to show the pro et con of the contention. The citation of authorities on this point usually are only valuable in the particular case in announcing the general rule of this court on the question. But in the instant case, the case cited, *supra*, appears to have a concrete applicability. We quote from it as follows:

"A verdict for \$10,000 in a suit for alienating the affections of plaintiff's wife is not excessive. There is no scale by which damages can be graduated with certainty in such cases, and the law commits to the jury the duty of estimating the wrong done the plaintiff, and with their discretion the court will not interfere, except where they have clearly been actuated by unreasoning \* \* \* prejudice."

Defendant argues that plaintiff could recover damages only from the date of the separation to the date of the divorce, which she calculates was 43 days. This is erroneous. As shown above, defendant requested an instruction to the effect that, if she recovered at all, she could recover until June 9, 1917, the date of the husband's death, and the court modified it, making it read from March 31, 1917, the date of the separation until June 9, 1917, the date of his death. Time is not of the essence of the plaintiff's right to recover. That right rests upon the wrong done her by defendant. That defendant's wicked and malicious efforts to keep plaintiff and her husband apart is abundantly disclosed by the evidence. It shows that the husband immediately came to her home when the separation occurred, and from that day until the date of his death she persistently and successfully kept them apart so that they could not see each other, although she knew that they were anxious to become reconciled. We overrule the point.

From what has been said above it follows that defendant's assignments that the court erred in overruling her motion for new trial and to arrest the judgment were properly overruled.

This disposes of all of defendant's assignments adversely to her contentions.

This record presents an almost unparalleled instance of wicked, malicious, and unlawful interference by defendant in successfully preventing plaintiff and her husband from effecting a reconciliation, and we affirm the judgment. It is so ordered.

RAILEY and WHITE, CO., concur.

PER CURIAM. The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court.

All concur.

#### On Motion for Rehearing.

PER CURIAM. [13] The appellant complains of error in the giving of instruction G, which is substantially, if not literally, a copy of instruction B before it was modified by the court. The portion complained of by appellant is as follows:

"And that thereupon defendant Emma F. Ade was intentionally guilty of such conduct as was calculated to prejudice plaintiff's husband against plaintiff, and to alienate him from her, and to prevent a reconciliation between them, and that plaintiff was thereby deprived of the society, companionship, comfort, etc., \* \* \* your verdict will be for the plaintiff."

1. On a reconsideration of the case, we see no error in this instruction, nor was there any need for the modification of instruction B. If the jury found that by the intentional interference of Emma Ade complained of the plaintiff was deprived of the companionship of her husband, then plaintiff was entitled to a verdict. The appellant's criticism of the instruction is without merit.

[14] 2. Appellant complains of the setting aside of the verdict against both of the defendants, the granting of a new trial as to the defendant Carl Ade, the dismissal of the case as to him, and the rendition of judgment against the defendant Emma Ade.

When the evidence for the plaintiff was closed, the court sustained a demurrer as to the defendant Carl Ade, and gave an instruction, directing the jury to find a verdict in his behalf. As will be seen by instructions B and G, given for the plaintiff, the court submitted the case solely on the issue between the plaintiff and the defendant Emma Ade; that is, if the jury found Emma Ade guilty of the conduct charged, and plaintiff was thereby deprived of the companionship, etc., of her husband, the verdict should be for the plaintiff. It authorized a verdict solely against Emma Ade. Carl Ade was out

of the case, and no verdict could be or was in fact rendered against him. All that was necessary was a formal dismissal as to him. So it is apparent that the verdict and judgment disposed of all the parties and issues in the case.

Appellant relies on *Hughey v. Eysell*, 167 Mo. App. 564, loc. cit. 565, 152 S. W. 434. As said in *State ex rel. Dunklin County v. Blake-more*, 275 Mo. 695, loc. cit. 703, 205 S. W. 626, it is unnecessary to discuss the soundness of the rule as applied in that case. The trial court, by its instruction, withdrew the case from the jury as to Carl Ade, and submitted the issues solely between the plaintiff and the appellant. We must assume the jury had sufficient intelligence to understand the instructions of the court, and that they were not authorized to return a verdict against Carl Ade. There was no occasion for the court to set aside the verdict as against Carl Ade and grant him a new trial, for the simple reason that no verdict was returned against him. The motion for rehearing is overruled.

All concur.

#### ALEXANDER v. ST. LOUIS-SAN FRANCISCO RY. CO. (No. 22155.)

(Supreme Court of Missouri, Division No. 1. July 11, 1921. Motion for Rehearing Overruled July 23, 1921.)

##### 1. Railroads ⇨328(4) — Automobile driver, crossing without looking, held negligent.

An automobile driver, who, after passing all obstructions to his view except telegraph poles 175 feet apart, could have seen the approaching train for a half mile had he looked when he was 50 feet from a familiar crossing, but never looked in the direction of the train, after he passed the first obstruction, until he reached a point some 12 or 15 feet from the crossing, when it was too late to stop his car, held guilty of contributory negligence as a matter of law.

##### 2. Railroads ⇨330(4) — Automobile driver aware of unlawful speed of train not entitled to rely on observance of ordinance.

Where an automobile driver, injured at a crossing by train, admitted he noticed the speed of the train as being 30 miles per hour, he could not rely on the presumption that it would be restricted to the speed limit of 12 miles per hour as it approached the crossing.

##### 3. Railroads ⇨330(4) — Contributory negligence not excused by speed ordinance.

It is not the law that contributory negligence of an automobile driver crossing the track in the city is excused by the existence of an ordinance limiting the speed at which a train may run in the city, where the train has violated the ordinance, and that, therefore, the driver was relieved of all duty to look and listen.

##### 4. Railroads ⇨348(6) — Evidence held not to support recovery under last clear chance doctrine.

In action by automobile driver for injuries from being struck at crossing, evidence held not to show liability under the doctrine of last clear chance.

##### 5. Evidence ⇨588 — Evidence as to impeded view held contrary to physical facts.

As respects the claim of impeded view of the track by an automobile driver struck at a crossing, his testimony that a man in an automobile could not, when near the crossing, see an approaching train within a distance of half a mile on account of telegraph poles, which were 175 feet apart, held unworthy of belief and without probative force, being unreasonable and contrary to common observation and experience.

Appeal from Circuit Court, Jasper County; Grant Emerson, Judge,

Action by R. N. Alexander against the St. Louis-San Francisco Railway Company. From judgment of nonsuit, plaintiff appeals. Affirmed.

This suit was instituted in the circuit court of Jasper county by the plaintiff against the defendant to recover the sum of \$25,000 for personal injuries sustained by him through the alleged negligence of the defendant in running one of its trains of cars against him in the city of Carthage, Mo. The trial resulted in the plaintiff taking an involuntary nonsuit, with leave to move to set same aside, which motion was overruled, and he duly appealed the cause to this court.

Counsel for the respective parties have made rather an exhaustive statement of the facts of the case, but we substantially adopt that of the respondent, for the reason that it presents a clearer and stronger view of plaintiff's case than his own statement does; also presents in a fuller and clearer manner the defendant's case than does that of the plaintiff.

As no question is presented involving the sufficiency of the pleadings, they will be put aside, and we shall deal only with the facts as shown by the record, and the law as declared by the court. The facts are:

Central avenue runs east and west, and appellant was going east. The railroad runs from the southeast to the northwest, but more nearly north and south. The train with passenger equipment of seven coaches and the engine, with an average length of something like 75 feet, was approaching the crossing from the south or southeast and running to the north, or northwest. The accident occurred on the 26th day of October, 1917, at 7 o'clock a. m. The train was one hour late.

The appellant testified in his own behalf that the crossing in question was a much-traveled one; that he had lived in Carthage 28 years, during all of which time he had been familiar with the crossing and the sur-



roundings; that he had served two terms as a member of the city council, and that at the time of the accident he was, and for 18 months prior thereto had been, street commissioner of the city of Carthage. In other words, the testimony admits his entire familiarity and intimate knowledge of the situation at the crossing as far as the obstruction either to his right or left was concerned, as he approached the place of the accident.

The ordinance limiting the speed to 12 miles an hour was introduced, and appellant testified to his knowledge of its existence. He did not testify, however, that he relied upon the presumption that the train would be restricted in its operation to the ordinance speed as it approached the crossing. On the contrary, he says he saw the train, and when he saw it it was running not less than 30 miles an hour, according to his best judgment at the time. He testified that as he approached the crossing the speed of his automobile, of which he was the driver, and which contained on the seat with him one passenger, Mr. Hull, was not less than 10 and not over 12 miles an hour, slightly down hill to the track; that his automobile and the brakes thereon were in good condition; that going at that speed he could stop his automobile in 15 or 20 feet; that he does not think he was ever able to stop it in less than a rod going 10 or 12 miles an hour; that if he had been going 4 or 5 miles an hour he could have stopped his car at 10 or 12 feet; that as he approached the crossing there was quite a tier of billboards that set just off of the street just outside of the sidewalk, some 8 feet high and perhaps 40 feet long, and that west of that, before you came to the billboards, were houses and buildings and so on; that after you got to the billboards there was considerable brush, limbs of trees, that obstructed the view until you got more than halfway from the billboards to the railroad; that the thorn tree which he spoke of was about 30 feet from the south line of the street, and about something like 30 feet east of the billboards; that the body of the tree was right in line with the right of way of the railroad; right in the fence there was a black thorn tree about 4 or 5 inches in thickness, 20 or 25 feet high with considerable top to it, besides a good deal of other brush that was along the fence; and the hang-over limbs from trees outside of the railway fence obstructed the view almost entirely until you got from behind the tree; that the tree was not close enough to the billboard to obstruct the view, but the trees along the fence hung down to such an extent you could not see up the railroad to any extent until you got past the black thorn tree; that from the thorn tree to the track would not be over 25 feet; that as he approached the track the view to the north was practically unobstructed; that he was at the wheel of his car on the north side thereof;

that he was watching for the train; that he was always careful about that as he approached railroad crossings; that as he got some past the billboards referred to, while the trees mentioned were in the way to the south, Mr. Hull, who sat beside him, asked, "Is that fellow hollooming at us?" and that he (appellant) looked immediately to the north, the direction in which Hull was looking, and there were a number of railroad men there, not less than 100 feet from the street; that he did not have time to find out whom they were calling; that he saw no motion by the men; that he had hardly time to look, running 30 or 40 feet, until Hull said, "Look out!"; that he turned his head the other way, and there was a train just off the street, not more than 50 or 100 feet away, coming down the track toward him; that the front wheel of his car had just crossed the side track, and he was so close to the main track that there was no chance for him to stop without stopping on the track, and no chance to turn either way; that he saw instantly what his only chance was, and the only safety he had was to try to get across the track, and that was the last he knew.

The testimony by the witnesses show that he was struck, on the crossing, by the train, inflicting the injuries for which he sues. He testified that he heard no signal, by either the bell or whistle. Other witnesses corroborate him in this respect, but the engineer, whom appellant put on the stand, testified that the fireman was sitting on the seat, ringing the bell, at the time of the accident, and had been since the time it arrived in the corporate limits; in addition, that it had whistled for the crossing signal.

He testified on direct examination also: That the railroad track running southeast is almost entirely straight for a full half mile, and is considerably downgrade, and a train coming down it generally coasts. That there is no grinding of the wheels and no noise made by the train to amount to anything; that at the time he discovered the train the front wheels of his automobile were about 12 feet from the crossing. After testifying to the extent of his injuries, he was cross-examined. That he was entirely familiar with the situation of Central Avenue crossing. That he had hauled gravel from the pit over it ever since he had been commissioner, off and on, and had been familiar with the crossing and surroundings, for 28 years. That on October 26th the leaves had fallen a little. That there was nothing to the north to obstruct his view of a train approaching from that direction. That there were two tracks to the railroad where it crossed Central avenue. That the first track which he approached was the switch track, and that he knew that that morning. That he had given his deposition in May, 1918, after the accident on the 26th of October, 1917. (The trial was on the 20th day of November,

1919.) That when he had given his deposition he had testified in answer to questions by Judge Gray:

"Q. Do you know how far west of the main track of the Frisco an automobile would be when you could see up the track a quarter of a mile? A. No, I don't know, but it would be guesswork with me. I should think about 80 or 90 feet.

"Q. 80 or 90 feet west of the main track, you had a view of the main track, of a train coming from the south, about a quarter of a mile? A. Yes, sir.

"Q. When you get to the west line of the right of way, what would obstruct it? A. There wouldn't be anything.

"Q. When you were about 80 feet from the crossing Mr. Hull said, 'Do you think those men are hollooming to us?' A. Yes, that was his remark.

"Q. Then from that time on until you got over the switch track or about over the switch track, Mr. Hull said nothing to you about the approaching train? A. Not until just as we were running on the switch.

"Q. Then, Mr. Alexander, had Mr. Hull looked to the south any time, he not being concerned with the operation of the machine, from the time those men holloomed until you ran onto that switch, this train coming would have been in plain view? A. Yes."

As to this last question and answer, the witness on the stand said he did not think he answered it as transcribed, but he could not say as to how he answered it. He was then asked regarding his deposition; if the following question and answer given by him at the time were not correct:

"Q. Tell me, how you could have looked between the time you got within 80 feet of that track and the time you got over the switch, without seeing the train. A. I had been looking and listening for a train, and my attention was turned the other way on account of his remark and their hollooming, and I was approaching the track; it takes very little bit, running 12 miles an hour, to run 80 feet. I had run perhaps 65 or 70 feet during the time."

He said he thought he had answered that way. He was asked if the following question was not propounded to him in the deposition:

"Q. Now, Mr. Alexander, you said you were looking and listening—when did you look to the south after you got within 80 feet of the track, and when you could have seen the train coming? Had you looked before the time you looked and it was too late? A. I hadn't looked at all."

And he replied that this was correct. Then he stated again on the stand at the trial that as a matter of fact he had not looked to the south, after he got to the end of the billboard 80 feet from the track until his front wheels were across the switch, which he thinks was about 12 feet from the main track, though he had never measured it, and does not know whether it was 16 feet or not; that he had stepped the distance from

the main line track to the corner of the billboard, and that it was 80 feet; that he had done this after his deposition was taken. He admitted that at the taking of his deposition he was asked:

"Q. When was it you were looking to the south and listening for a train, and where were you with respect to the billboard on the west side of the track and on the south side of Central avenue?"

And that he had answered:

"A. I was mighty near the point where I should have seen the train; my attention was attracted the other way."

He testified that, if there were no other obstruction when you passed the billboard and got in 80 feet of the track, as far as the billboard was concerned when you get past it you could see up the railroad to the Harrington quarry, which the testimony shows was several blocks away. He reiterated he was 80 feet from the main line when Hull spoke to him. He again reiterated that he never looked south after he passed the billboard until he was within 12 feet of the crossing, and that after he had crossed past the billboard, if he had looked down the track south he could have seen a train 150 feet, and every foot nearer the track it traveled would enable him to see farther up the track if he had been looking that way, and then when he was 27 feet from the west rail of the main track that he could have seen a train south for half a mile, except in so far as the telegraph poles would obstruct his view; that the telegraph poles to a man in an automobile would obstruct a train containing six coaches half a mile away.

After other witnesses had testified the plaintiff was recalled to the stand by his counsel for a further examination, and he testified on direct examination that when he was going down Central avenue he was looking and watching for trains more from the south than the north, because he had a better view to the north than to the south; that he saw no signal, heard no whistle, heard no noise or any train whatever; that he had been looking and listening more to the south than to the north, although he always watched both ways, and he was asked this question by his counsel:

"Q. How long a time elapsed when your attention was called by Hull of that fellow calling to you, how long an interval of time elapsed when you turned your head in that direction to look, and when you turned it back again on the second statement of Hull's? A. I couldn't say; I shouldn't think more than two or three seconds."

Then on cross-examination he was asked:

"If he had looked up the track south when 50 feet from the main track, if he could not have seen down past the light plant? A. Well, there would have been some obstruction in the way;

that it is hard to see a train, or anything of that kind, in an automobile when it is moving; that if he had been stopped that his view would have been practically unobstructed, except by the poles; that after he passed the billboard everything else was off the right of way except the poles."

After he had complained about his view being obstructed by the poles he was asked:

"Q. You think the seven car train would be cut off from your view by telephone poles 173 feet apart?"

His answer was:

"To a great extent, in an automobile."

Dr. Webster testified to the extent of plaintiff's injuries, whose testimony is immaterial here.

P. S. Vance testified that he, driving a wagon, had crossed this crossing just ahead of the appellant, and after passing over the crossing noticed the approaching train coming toward him at a rate of speed, in his judgment, of 30 or 35 miles an hour. His cross-examination shows that he had reached a certain point after observing the train when he heard the collision, which was almost one-third of the distance that the train was from the crossing when he saw it approaching (his team going about 4 miles an hour). He also testified that the obstruction of the thicket up there on that knoll prevented you seeing the train coming down the track until you would be almost on the track. On cross-examination he testified that the knoll in question was away up at Third street, two blocks away. Other witnesses testified as to the extent of plaintiff's injury, and that the speed of the train was 25 or 30 miles an hour.

J. W. Meredith was the only other witness who testified, except the engineer, as to the view of the appellant as he approached the track. He said that according to his remembrance there was quite a broad fence that ran pretty close, he could not say how close, and some brush and things along down there next to the road and some trees that had grown up there.

"Q. State whether or not this obstructed the view there at that time. A. Well, yes, to some extent, of course."

On cross-examination he said that on account thereof the view was not exactly plain for a person going down; that the trees were in the right of way fence.

There were no photographs introduced in evidence, but they were used in the examination of the witnesses, and the testimony of the witnesses shows that they admit that they showed an unobstructed view after the billboard was passed.

Appellant introduced Price Parmlee, in charge of the locomotive that struck his car, as a witness. He testified that the train consisted of engine, tender, and six or seven

passenger coaches; that they were an hour behind time, and running 25 miles an hour; that the whistle was blown for the crossing signal at the Missouri Pacific crossing, and that the bell was rung the entire time after entering the corporate limits until the collision; that the automobile came onto the crossing from the fireman's side; that he, the engineer, did not see or know anything of it until his attention was called to the fact by the fireman, which was just before the crossing was reached, right against it, and that he immediately commenced setting the brakes; that there was a heavy train of seven cars; it had already whistled for the station; and that the application of his brakes as they approached the Missouri Pacific crossing had more or less exhausted his air.

Plaintiff's attorney on redirect examination drew from this witness the statement that if he had been running 12 miles an hour he could not have stopped sooner than half the train length, the length of three cars at the least calculation; that 12 miles an hour would take less space with which to stop than 25; that his fireman was sitting on the seat box, ringing the bell and looking ahead, and that, watching, he could see the automobile as soon as it came out from behind the billboard; and that if he had been notified of the approach of the automobile as soon as that occurred, and he was within 100 feet of the crossing, he could have applied the brakes and slacked the train some by the time he got to the crossing, a little bit, if he had seen it, but not down to 5 or 6 miles an hour; perhaps he could have slowed down to 6 miles an hour; that you cannot apply the brakes in a second; that it takes a little space to get into communication with the fireman after he discovers it. He testified that if the fireman had known when the man was 80 feet away that he was not looking, was not going to take care of himself, that he (the engineer) could not have received notice and applied the air and stopped the train before reaching the crossing.

After the engineer's testimony, appellant called O. C. Donehay as an expert witness. He testified that the average length of a passenger coach was 75 or 80 feet, some of them longer. This expert testified that the engineer, after the fireman told him of the approach of the automobile, could, in his judgment, have stopped the train in two train lengths, which would have been a pretty good stop at 25 miles an hour; and that, if he had been going at 12 miles an hour under the same conditions, could have stopped the train within 500 or 600 feet.

J. D. Harris, of Carthage, for appellant.

W. F. Evans, of St. Louis, Howard Gray and Allen McReynolds, both of Carthage, and Mann & Mann, of Springfield, for respondent.

WOODSON, P. J. (after stating the facts as above). [1] I. The first contention of counsel for appellant is that the trial court erred in declaring as a matter of law that he was guilty of such contributory negligence as to prevent his recovery in this case. In support of this contention we are cited to the following cases: *Monroe v. Chicago & A. R. Co.*, 280 Mo. 483, 219 S. W. 68; *Maginnis v. Railroad*, 268 Mo. 667, 187 S. W. 1165; *Lagarce v. Railroad*, 183 Mo. App. 70, loc. cit. 85, 166 S. W. 1063; *Jackson v. S. W. Mo. Ry. Co.*, 189 S. W. 381; *Stotter v. Railroad*, 200 Mo. 107, 98 S. W. 509; *Weigman v. Railroad*, 223 Mo. 699, 123 S. W. 38; *Underwood v. St. L. I. M. & S. R. R. Co.*, 190 Mo. App. 407, loc. cit. 417, 177 S. W. 724; *Donohue v. St. L. I. M. & S. R. R. Co.*, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848.

The appellant testified that there were no signals given of the approach of the train that struck him, and he was corroborated in that statement by other witnesses; he also stated that he was perfectly familiar with the crossing where he was injured, and the conditions and surroundings there, and had been for many years. He also described a certain billboard and a locust tree and some brush which obstructed his view of the train until after he passed the east end of the billboard, which was 80 feet from the main track, and that after reaching that end the tree and the brush mentioned still partially obstructed his view of the train until he reached a point about 50 feet from the track, and from there on there was nothing to obstruct his view except the telegraph poles, which were something like 170 feet apart; that after passing the east end of the billboard he did not look south again until he ran his automobile some 65 or 70 feet, which brought him within 10 or 15 feet of the main line track. When he was 27 feet west of the rail of the main track he could have seen the train coming from the south for a distance of half a mile, except in so far as the telegraph poles would obstruct his view; that the telegraph poles to a man in an automobile would obstruct a train containing six coaches for a distance of half a mile. He was driving his automobile at 12 miles an hour and could stop it in 12 or 15 feet. He never saw nor heard the train until he was within 10 or 12 feet of the main track, which was too close to stop his car before the train would have reached the crossing, so he then tried to cross the track in front of the approaching train, and was struck by it and injured. The reason why he did not look south for the train after passing the end of the billboard was that Mr. Hull, the gentleman riding with him, called his attention to some one calling to him, who was north of the track, which attracted his attention in that direction, and before he got through looking in that direction his automo-

bile had run some 65 or 70 feet, which brought him within 12 or 15 feet of the crossing.

Under the authorities cited counsel for appellant contend that the evidence mentioned made a case for the jury, and that the court erred in declaring as a matter of law that he was guilty of contributory negligence, and was not entitled to a recovery. We shall briefly consider those cases:

In the *Monroe v. Chicago & Alton Ry. Co.* Case, *supra*, the plaintiff, as he approached the crossing in his automobile, actually looked towards the approaching train at a time when he could see, and did see, enough of the track in the direction of its approach, and saw that there was no train on it, and that it was impossible for a train to come within his view, running at the ordinary speed limit, and to strike him before he could have cleared the track; from that point to the crossing his view was completely obstructed.

The court in that case properly held that the plaintiff made a case, but no such facts appear in this case, the appellant never looked, and had he at any time after he reached a point within 50 feet of the crossing he could have seen the approaching train.

*Maginnis v. Mo. Pac. Ry. Co.*, *supra*, was decided upon the humanitarian doctrine. In that case the evidence shows that the engineer was looking directly at the deceased when he was 60 feet from the crossing, and could see that he was oblivious to his danger, but gave him no warning whatever. It was true *Maginnis* was guilty of contributory negligence which barred his right to a recovery, but for the fact that the engineer had the last clear chance to save his life after observing his negligence and peril, but negligently failed to avail himself of that chance. This record presents no such case as that.

The same facts, were involved in the case of *Lagarce v. Mo. Pac. Ry. Co.*, *supra*, as were those in the *Monroe Ry. Case*, *supra*. In that case plaintiff had the last clear view of the track when he was 40 feet away. He saw enough of the track to show that a train, approaching at a lawful rate of speed, could not reach the crossing until he had ample time to get over it. That is not true in this case. Nor is the case of *Jackson v. S. W. Mo. Ry. Co.*, 189 S. W. 381, in point. In that case *Jackson* was approaching the crossing at right angles, and when in about 50 feet of it he got his first possible view of the approaching car, which was some 150 feet away, which was the limit of his vision. *Jackson* and the motorman exerted themselves to the utmost to stop and avoid the collision, but neither was able to do so. No signal of the approaching car was given. It was held that *Jackson* could not as a matter of law be guilty of contributory negligence, because both he and the motorman

testified that after he got the first possible view of the approaching car he tried to avert the collision. In the case at bar the appellant could have seen the approaching train for a distance of half a mile or more, had he looked in that direction after he reached the end of the billboard, and especially when he was about 50 feet from the crossing. Nor is the case of *Stotler v. Railroad Co.* in point. In that case the defendant was operating its train in excess of the speed limit, which was 8 miles an hour, but in discussing that case the court, on page 148 of 200 Mo., on page 521 of 98 S. W., said:

"Now, if this case be viewed from the standpoint of plaintiff's evidence, she is presumed to have looked and listened and to have seen and heard the train. If it be viewed from the standpoint of defendants' evidence, she actually did see the train when it was 40 rods away, and she was still in a place of safety south of the track. The case, then, has progressed to the point where fault can be found with the plaintiff, if at all, not in her not looking and listening, in her not seeing and hearing the advancing train, but in the act of driving on the track immediately before that train. The act in question was not hers, but if she actually participated in that act, or is responsible therefor, she ought not recover."

The court then proceeded to show the tender age of the plaintiff, her reliance upon her mother, who was the driver, and on that theory alone held that she was not guilty of contributory negligence as a matter of law. And it may be inferred from the opinion in the *Stotler Case* that the mother, who was driving the vehicle, would have been barred as a matter of law by her contributory negligence.

In *Weigman v. St. L., Iron Mt. & Southern Ry. Co.*, the plaintiff was held not guilty of contributory negligence, as a matter of law, because there was an engine and train of cars on the side track which prevented him from seeing the approaching train until his horses' feet were on the track; the train having given no signal of its approach.

The *Underwood Case* is similar to the *Weigman Case*, and was disposed of upon the same principle. That case quotes from the *Campbell Case*, 175 Mo. 161, 75 S. W. 86, the following language:

"In this case the boy had a right to expect that there would be headlight (signals) on any car on that road, and if he looked in both directions as he approached the tracks and saw no headlight (heard no signals), and if he then concluded for that reason that there was no car coming, and drove on the track, the court had no right to say as a matter of law that he was guilty of contributory negligence."

The trouble with the case at bar is that the appellant testified that he never looked in the direction of the approaching train after the billboard was passed until he reached a point some 12 or 15 feet from the crossing.

The case of *Donohue v. St. L., Iron Mt. Ry. Co.*, 91 Mo. 357, 2 S. W. 424, 3 S. W. 843, is analogous to the last-considered case.

[2] Touching the right of the appellant to rely upon the presumption that respondent was limiting the speed of the train to that prescribed by the ordinance, *Kelny v. Mo. Pac. Ry. Co.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783, cites the *Donohue Case* and holds that:

"If *Kelny* had been in a position where by looking he could have seen the approaching train and could have seen that it was running in excess of the ordinance speed and at such a rate that if he went on the track he would be struck before he could get off, he could not recover. In the case at bar *Alexander* admits and his other witnesses testify to the rate of speed, and as we have heretofore said there is no presumption left in the case on that proposition."

[3] In the consideration of this case counsel for the appellant seems to assume contributory negligence is abrogated or excused by the existence of an ordinance limiting the rate of speed a train may run in a city, where the train has violated the ordinance, and that in consequence thereof the appellant was relieved of all duty to look and listen for its approach, and was therefore entitled to go to the jury upon the theory that he might have crossed the tracks in safety had the train been observing the ordinance. That is not the law of this state. He was still chargeable with contributory negligence, in the same degree as if no such ordinance was in existence. (Of course I do not mean to convey the idea that if such ordinance exists, and a person knows of its existence, he may not rely upon its observance, if he does not know that it is being violated.)

The following cases are authority to the legal proposition before stated: *Weller v. Railroad*, 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532; *Turner v. Railroad*, 74 Mo. 602; *Burge v. Railway*, 244 Mo. 76, 148 S. W. 925; *Stotler v. Railway*, 204 Mo. 619-639, 103 S. W. 1; *Hunt v. Railway*, 262 Mo. 271-275, 171 S. W. 64, L. R. A. 1916B, 951; *Moore v. Railway*, 176 Mo. loc. cit. 544, 75 S. W. 642; *Laun v. Railroad*, 216 Mo. 563, 578-579, 116 S. W. 553; *Green v. Railway*, 192 Mo. 131, 90 S. W. 805; *Schmidt v. Railroad*, 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196.

[4] II. It is not seriously contended by counsel for appellant that he was not guilty of contributory negligence, but seeks to escape the effects thereof by invoking the last chance doctrine. He put the engineer on the stand, who testified that he could not have stopped going at the rate of speed he was traveling in time to have averted the accident. He then proves by the engineer that if he had been going at the ordinance limit, 12 miles an hour, he could not have stopped in time to have averted the accident. He

proves by the engineer, who was on the opposite side from appellant as he approached the track, that after he became aware that he was not going to stop in the clear, as any one seeing him would have every right to presume he would do, he did all he could to stop in time, and failed to do so. There was no evidence introduced tending to contradict the testimony of the engineer, or that the train could have been stopped in time to have averted the injury after the appellant was in apparent place of danger.

[5] It is true that appellant, in a kind of offhand way, stated that a man in an automobile could not see a train of cars within a distance of half a mile approaching the crossing in question from the south at any point east of the end of the billboard mentioned, and west of the crossing on account of the telegraph poles, which were 175 feet apart, which would be about 15 poles, set in the usual and ordinary way.

This testimony is so unreasonable and against all common observation and experience, we deem it unworthy of further notice. There is no probative force in it whatever, and the trial court probably refused to submit it to the jury upon the ground that it was against the physical facts in the case.

For the reasons stated we are of the opinion that the trial court properly declared as a matter of law that the appellant was guilty of contributory negligence, and that he could not recover.

Finding no error in the record, the judgment is affirmed.

All concur.

#### DENNIS et al. v. GORMAN. (No. 22139.)

(Supreme Court of Missouri, Division No. 1. June 6, 1921. Motion for Rehearing Denied July 11, 1921, and Motion to Transfer to Court in Banc Denied July 23, 1921.)

#### 1. Homestead ⚡—Special statutory estate not governed by general laws of descent and distribution.

The homestead laws create a special statutory estate unknown to the common law, and not governed by the general laws of descent and distribution.

#### 2. Homestead ⚡—Laws to be liberally construed.

Homestead legislation is to be liberally construed in favor of the owner, his wife and children, and against creditors, to promote its beneficent purpose.

#### 3. Homestead ⚡—Rights determined by law in force when husband dies.

The rights of widow and children of the owner of a homestead and of his creditors are fixed and determined by the law in force when the husband dies.

#### 4. Executors and administrators ⚡—329(2), 383—Sale of homestead for payment of decedent's debts void and open to collateral attack.

Under Rev. St. 1899, § 3620, providing that the homestead shall continue for the benefit of the widow and children without being subject to the payment of debts not legally charged thereon in the decedent's lifetime, until the youngest child attains majority, and until the death of the widow, where the probate court attempted to sell the homestead for debts not charged thereon in the decedent's lifetime it had no jurisdiction over the subject-matter, and the sale was an absolute nullity and void upon collateral attack, and the rule has not been changed by the Amendatory Act of 1907 (Laws 1907, p. 301, now Rev. St. 1909, § 6708), except in cases where the heirs of the husband are persons other than his children.

#### 5. Executors and administrators ⚡—329(2)—Sale of homestead for decedent's debts only permitted when there are no children.

Rev. St. 1909, § 6708, to provide that when the heirs of the husband are persons other than his children the homestead may be sold for the payment of debts of his estate subject to the rights of the widow, applies only when all of his heirs are persons other than his children, and not when his heirs are his children and a grandchild.

#### 6. Executors and administrators ⚡—329(2)—Homestead cannot be sold for decedent's debts because widow and heirs moved away.

Under Rev. St. 1909, § 6708, the sale of a homestead for payment of the debts of the deceased owner was not authorized because the owner's widow, daughters, and grandchild left the homestead after his death, and changed their domicile, as the rights of the children and heirs, as remaindermen in fee, became vested upon the death of the decedent, and their title was not forfeited by their failure to continue to reside on the property.

#### 7. Executors and administrators ⚡—329(2)—Interest of grandchild not subject to sale for decedent's debts.

Under Rev. St. 1909, § 6708, where the owner of a homestead left children and a grandchild as his heirs, the undivided interest of the grandchild could not be sold by the probate court for payment of the decedent's debts.

#### 8. Executors and administrators ⚡—377—Children and grandchild not estopped to attack sale of homestead for debts.

Where children and a grandchild of a deceased owner of a homestead knew nothing of the sale by the administratrix for the payment of debts and received none of the proceeds, and the administratrix refused to file the petition for such sale, which was made upon petition of creditors, the children and grandchild were not estopped to attack the sale.

#### 9. Dower ⚡—57(1/2)—Executors and administrators ⚡—189—Homestead ⚡—146—Widow's quitclaim deed held to convey all of her rights.

A quitclaim deed by the widow of the owner of a homestead conveyed all of her

rights in the property, whether of homestead, dower, or quarantine.

10. Homestead §5, 142(1)—Grandchild of decedent has no right of joint occupancy; homestead laws not construed beyond intent of Legislature.

Under Rev. St. 1909, § 6708, providing that when any owner of a homestead dies leaving a widow or minor children his homestead shall pass to the widow or children, or both, where the homestead owner left minor children and a minor grandchild as his heirs, the minor grandchild had no right of joint occupancy with the widow and children as the statute, though entitled to a most liberal construction, cannot be construed beyond the intent of the Legislature.

11. Homestead §146 — Rights of widow's grantee terminated by remarriage.

The rights of one to whom the widow of the deceased owner of a homestead quitclaimed terminated, so far as the homestead right was concerned, upon the widow's remarriage.

12. Dower §57(2)—Widow's grantee held entitled to possession until assignment of dower.

Where the widow of a deceased owner of a homestead quitclaimed all her interest in the property, her grantee, who thereby acquired her right of dower and quarantine, had a right of possession until dower was assigned, under Rev. St. 1909, §§ 6708 and 6710, expressly providing for dower and the assignment thereof.

Appeal from Circuit Court, Wright County; C. H. Skinner, Judge.

Suit by Allie Dennis and others against W. H. Gorman. From a judgment for defendant, plaintiffs appeal. Affirmed in part, and reversed and remanded in part, with directions.

George W. Goad, of Springfield, for appellants.

Lamar & Lamar, of Houston, and J. W. Jackson, of Hartville, for respondent.

SMALL, C. I. Suit to quiet title to 95 acres of land in said county. The petition is in the regular form to quiet title at law; it also contains a second count in ejectment.

The answer, besides a general denial, after admitting possession and claim of ownership, sets up that defendant purchased the property at a sale made by the administratrix of the estate of George Manear at the February term, 1913, of the probate court of said county, to pay the debts of the deceased, under due and regular orders and proceedings, after due notice to all parties interested in said estate, including plaintiffs, who were personally served with notice of such proceedings by the sheriff, as required by law; that at such sale the defendant was the highest and best bidder, and purchased the property for \$880, which he paid to the administratrix, and received a regular administratrix's deed

therefor; that said sale was duly confirmed, and is binding upon the plaintiffs as res adjudicata, and the orders and judgment of said court are pleaded in bar of all claims of the plaintiffs. It is further alleged, by way of estoppel, that the said estate received the benefit of the money paid by defendant, and defendant afterwards took possession and made valuable improvements upon said land with the knowledge and consent of plaintiffs.

The reply put the allegations of the answer in issue.

There is substantially no dispute as to the salient facts. The plaintiffs Allie Dennis and Marie Hearold are the children, and the minor plaintiff, Leon England, is the grandchild, and they constitute the only heirs of George Manear, who died October 15, 1907. At and a number of years before his death he was the owner of the land and occupied it with his family as a homestead. It did not exceed \$1,500 in value. His family, when he died, consisted of the plaintiffs and his wife, Laura Manear. The widow was appointed administratrix in 1908, but, she failing and refusing to apply for and procure an order of sale to pay debts proved up against the estate, the creditors filed such petition, and after the order of sale was made, in 1911, and renewed for several terms, the property was sold at the February term, 1913, and defendant became the purchaser. The proceedings were all regular, in the usual form for the sale of real estate of the deceased to pay his debts. The plaintiffs did not appear at any stage of the proceedings or take any notice thereof. The debts for which the land was sold were not charged against it in the lifetime of the decedent, and were not contracted before the homestead was acquired. About a year before the sale, or in 1912, the widow and two daughters and granddaughter, who up to that time continued to reside on the homestead, removed to Springfield, Mo., where they resided at the time of the sale. The children and grandchild received none of the proceeds of the sale, so far as shown by the evidence, and had no knowledge of its occurrence. But \$250 of such proceeds was paid "back on the land" by the administratrix. Just before the sale, the widow by quitclaim deed dated April 8, 1913, sold and conveyed all her interest in the property to the defendant for \$1,160. At the time of their father's death one of his daughters was 22 years of age, the other 16, and said grandchild was an infant of tender years, and was a minor when this suit was brought. The widow, in testifying, said her name was Laura Hendricks at the time she testified.

The lower court found the issues for the defendant on both counts of the petition, and, refusing a new trial, the plaintiffs brought the case here by appeal.

The principal question on this appeal submitted by counsel on both sides is whether, on the foregoing facts, the said administratrix's sale was absolutely void and subject to collateral attack. There are some minor questions also which will be noticed in the opinion.

[1, 2] **II.** Our homestead laws create an estate unknown to the common law. It is a special statutory estate, not governed by the general laws of descent and distribution. The purpose of such legislation was to afford a safe harbor and anchorage for a man and his wife and children against financial stress and storm, and is accordingly to be liberally construed in their favor and against creditors to promote its beneficent purpose. *Balance v. Gordon*, 247 Mo. loc. cit. 124, 152 S. W. 358.

The law in this state was first enacted in 1862 (Laws 1862-63, p. 22), and changed from time to time since its first enactment. The various statutes and the history of the Homestead Act have been so repeatedly set out in the decisions of this court that it is sufficient for us to refer to the statutes on the subject directly bearing upon and governing this case. Section 2 of the Homestead Act of 1895 (Acts 1895, p. 185), being afterwards incorporated in R. S. 1899 as section 3620, was as follows:

"If any such housekeeper or head of a family shall die leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow: that is to say, the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband; and the probate court having jurisdiction of the estate of the deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto." R. S. 1889, § 5439, amended Laws 1895, p. 185-c."

Said section 3620, R. S. 1899, was subsequently changed by the act of 1907 (Acts of 1907, p. 301), afterwards section 6708, R. S. 1909, by making the joint right of occupancy of the widow and children continue until all the children were 21 years of age, and expressly authorizing sale of the homestead for the general debts of the decedent in cases where his heirs "be persons other than his children," by adding to the law of 1895 the following:

"Provided, that if the heirs of the husband be persons other than his children, then such

homestead may be sold for the payment of any debt or debts legally established against his estate, subject to the rights of the widow. Such sale in either case may be made at any time during the course of administration of the husband's estate, and to be conducted in like manner and the same proceedings had as is or may be provided by law for sales of other real estate for the payment of the debts of deceased persons."

[3] It is firmly established that the rights of the widow and children and the creditors are fixed and determined by the law in force when the husband dies. *Bushnell v. Loomis*, 234 Mo. 384, 385, 137 S. W. 257, 36 L. R. A. (N. S.) 1029; *Balance v. Gordon*, 247 Mo. 131, 152 S. W. 358.

[4] So that *George Manear*, having died October 15, 1907, the act of 1907 was then in force, and the rights of the parties hereto must be determined by that act, or said section 6708, R. S. 1909. Under the said section 3620, R. S. 1899, it has been uniformly held that the probate court has no power to sell the homestead for the debts of the deceased, because the statute prohibited such sale and vested the title in the widow and children and heirs free from the claims of creditors of the deceased, and, in effect, holding that the homestead is no part of the decedent's estate, and is not subject to the jurisdiction of the probate court in administering his estate. *Broyles v. Cox*, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714; *In re Powell's Estate*, 157 Mo. 156, 57 S. W. 717; *Balance v. Gordon*, 247 Mo. 127, 152 S. W. 358; *Armor v. Lewis*, 252 Mo. 574, 161 S. W. 251; *Ehlers v. Potter*, 219 S. W. 916; *In re Boward's Estate*, Div. No. 2, 231 S. W. 600, decided April term, 1921, not yet [officially] reported.

It is true that the question did not arise collaterally in all the above cases, but it did arise collaterally in *Balance v. Gordon*, 247 Mo. 119, 152 S. W. 358, and *Armor v. Lewis*, 252 Mo. 568, 161 S. W. 251, and the point was urged by counsel, as shown by their briefs in the *Armor Case*, that, if the probate court had jurisdiction over the subject-matter and the parties its judgment ordering the sale could not be absolutely void and subject to collateral attack. But the court necessarily ruled that the said court had no such jurisdiction to sell the homestead, which was the subject-matter of its action.

In the *Armor Case*, supra, 252 Mo. loc. cit. 582, 161 S. W. 254, the court, per *Lamm, C. J.*, said:

"It must be taken as assumed that it could not be contended for a moment that the probate court had any jurisdiction to order the sale of the homestead in contravention of the homestead statute."

And on page 576 of 252 Mo., on page 252 of 161 S. W., the learned Judge observed:



"We shall not overrule the Broyles-Cox, the Powell, and the Balance-Gordon Cases. *Stare decisis.*"

All of which cases held the probate court had no power to sell the homestead for debts of decedent.

This court very recently had occasion to review its prior decisions, and especially the *Armor Case*, *supra*, and the cases therein relied upon, and has construed them as holding that a sale of the homestead by the probate court under the act of 1895 was without jurisdiction, and subject to collateral attack as absolutely null and void. In *re Ehlers v. Potter*, 219 S. W. 916 (Div. No. 1); In *re Boward's Estate* (Div. No. 2), decided this term of court, not yet [officially] published, in which it is said such sale is "*coram non iudice.*"

So, under the law as it stood in Wag. Stat. § 5, c. 58, when the homestead was vested in fee in the widow with a joint right of occupancy in the children until majority, this court held the orders and judgment of the probate court authorizing the administrator to sell and confirming the sale of the homestead for debts of the husband absolutely void in collateral proceedings. *Lewis v. Barnes*, 272 Mo. 377, 199 S. W. 212; *Rogers v. Marsh*, 73 Mo. 64; *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423. In the case last cited the widow appeared and contested in the probate court the application of the administrator for such order of sale, but took no appeal from the adverse judgment of the probate court, notwithstanding which this court held the proceedings void for want of jurisdiction in the probate court. The *Rogers Case* and the *Anthony Case* are also referred to with approval in *Balance v. Gordon*, 247 Mo. *supra*, at page 127, 152 S. W. 358.

So that, without reference to the authorities cited by learned counsel for respondent from other jurisdictions, we hold that it is the settled law in this state, that under the said act of 1895, and afterwards up to the taking effect of the act of 1907, the probate court had no jurisdiction over the subject-matter when it attempted to sell the homestead of the decedent for his debts, and any such sale was an absolute nullity and void upon collateral attack.

[5] III. Did the act of 1907 (section 6708, R. S. 1909), in case the decedent left children him surviving, give the probate court any more or other jurisdiction than the act of 1895? Obviously not. It is only in case the heirs of the husband "be persons other than his children" that the probate court has power or jurisdiction to make such sale under the act of 1907. In this case the husband's heirs were his children and his grandchild. So that it cannot be said that his heirs were "persons other than his children." The statute of 1907 means that only in case all the husband's heirs are "persons other than his

children" can the homestead be sold for his debts not expressly charged thereon in his lifetime, which is not claimed was the case here. If he left *any* children as his heirs, it cannot be said that his heirs were "persons other than his children." Any other construction would be a "sour" construction of the statute, which this court, per Lamm, C. J., said, in the *Armor Case*, *supra*, was not admissible.

We rule, therefore, that the administratrix's sale in question here was an absolute nullity for want of jurisdiction in the probate court over the subject-matter of such sale, and as such is subject to collateral attack.

[6] IV. Nor is it material that the widow and two daughters and grandchild of George Manear left the homestead after his death, and changed their domicile to Springfield, Mo., where they resided when such sale was made. The rights of his children and heirs as remaindermen in fee became vested in them upon the death of the householder, and there is nothing in the statute requiring them to continue to reside on the property or forfeit their title. The case of *Wilson v. Wilson*, 255 Mo. 523, 164 S. W. 561, is beside the point, because, under the statute passed on in that case, a statute prior to the act of 1895, the heirs had no fee in remainder.

[7] V. Under the statute of 1895, as amended in 1907, the remainder in fee passed to the heirs, all the heirs of the deceased husband. This would vest an undivided one-third in the grandchild in this case. Said one-third was not subject to the sale made by the administratrix, although said minor was not the child of the decedent, because, as we have just ruled, the homestead could not be sold by the probate court for the decedent's debts unless all his heirs were "persons other than his children," which was not the case here.

[8] VI. The estoppel pleaded in the answer is not urged in this court by learned counsel for respondent, no doubt, because the facts in the record show the children knew nothing of the administratrix's sale and received none of the proceeds, and the widow refused, as administratrix, to file petition for the making of such sale, which was made upon petition filed by the creditors because she did so refuse. Obviously, there was no estoppel against the plaintiffs in this case.

[9] VII. We rule, therefore, that the plaintiffs, as heirs of said George Manear, deceased, owned the fee in the land in dispute, subject to the rights that were conveyed to the defendant by the quitclaim deed of the widow. This deed conveyed all her rights, whether of homestead, dower, or quarantine, in the property to the defendant. *Phillips v. Presson*, 172 Mo. 24, 72 S. W. 501.

[10] VIII. Did the minor child, Leon England, have right of joint occupancy with the

widow and daughters of the deceased until she was 21 years? We think not. While the statute is entitled to a most liberal construction, it cannot be construed beyond the intent of the Legislature. *Regan v. Ensley*, 222 S. W. 774 (Div. No. 2). We do not think grandchildren come within the intent of the Legislature as the children who would have a joint right of occupancy of the homestead with the widow until they are 21 years of age, even although they had been residing with the decedent as members of his family, their parents being dead, as in this case. It was only the *minor* children of the householder who were to have any such right of occupancy, and this was to cease when they reached the age of 21 years. This shows that even all of the householder's own children were not to be beneficiaries in such joint tenancy, and it was to be limited to his "minor children," and that such words were used in their ordinary and primary meaning. The words "minor children" have been construed in the following cases in other jurisdictions, and we concur in the construction not to include "minor grandchildren" in similar provisions in homestead acts, although they were dependent members of the householder's family at the time of his death. *Peeler v. Peeler*, 68 Miss. 141, 8 South. 392; *Wilkins v. Briggs*, 48 Tex. Civ. App. 598, 107 S. W. 185; *Clements v. Maury*, 50 Tex. Civ. App. 158, 110 S. W. 185; *Brown v. Brown*, 104 Ark. 313, 149 S. W. 330. Consequently the minor plaintiff, Leon England, had and has no joint right of occupancy as a minor child of the decedent until she is 21 years of age, but her right is limited to her remainder in fee as an heir of the decedent.

IX. It appears that both of the plaintiffs, Allie Dennis and Marie Hearold, were more than 21 years of age when the administratrix's deed was made, which was the 5th day of May, 1913. Their right of joint occupancy, therefore, as minor children of the deceased, had expired long before this suit was brought, which was July 5, 1919.

[11] X. The widow having remarried since her husband's death, as we assume from her testimony that her name was Laura Hendricks at the time of the trial, the defendant has no right to possession of said property as the grantee of the widow's homestead right, because that expired with her remarriage, under the statute.

[12] But defendant also acquired the widow's right of dower and quarantine by his deed from her, which gave him a right of possession to said property until said dower is assigned. *Phillips v. Presson*, 172 Mo. 24, 72 S. W. 501, *supra*. Such dower and the assignment thereof are expressly provided for by the Homestead Act in force on October 15, 1907, when George Manear died. Sections 6708 and 6710, R. S. 1909.

The result is the judgment of the circuit court on the second count of the petition is affirmed, but is reversed as to the first count, the count to quiet title, and remanded, with directions to the circuit court to enter judgment on said first count declaring that plaintiffs are the owners in fee simple of the property described in the petition, subject to the dower and quarantine rights of said former widow of George Manear, deceased, which are owned by the defendant, all in accordance with the views expressed in this opinion.

BROWN, C., not sitting.

RAGLAND, C., concurs.

PER CURIAM. The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All the Judges concur.

STATE ex rel. McCLUNG v. BECKER, Secretary of State. (No. 22938.)

(Supreme Court of Missouri, in Banc. July 8, 1921.)

1. Licenses ⇐—Law providing for automobile registration fee is revenue measure.

The law providing for the registration of automobiles (Rev. St. 1919, § 7553), and for the payment of registration fees according to a schedule of horse power ratings (section 7558), is a revenue measure, in view of sections 7604 and 10902, providing that the registration fees must be paid into the state treasury for the benefit of the state road fund, less the cost of administering the law.

2. Licenses ⇐—Automobile registration fee not tax on property but on privilege of operating on highways.

As the owner of a motor vehicle may operate it on his own premises without being subject to the payment of the automobile registration fee imposed by Rev. St. 1919, § 7558, the fee is not a tax on the vehicle but on the privilege of operating it on the highways of the state.

3. Licenses ⇐7(2)—Automobile registration fee graded according to horse power not unconstitutional.

Rev. St. 1919, § 7558, requiring the payment of automobile registration fees according to a schedule of horse power ratings, does not violate Const. art. 10, § 3, providing that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, since this applies only to taxes on property, especially in view of section 44a, as added to article 4 (see Laws 1921, p. 707), requiring motor vehicle registration fees, license fees, and taxes, except the property tax, to be appropriated to the payment of certain bonds, thus recognizing the validity of registration fees.

Original application by the State, on the relation of D. C. McClung, for a writ of mandamus directed to Charles U. Becker, Secretary of State of the state of Missouri. Writ denied.

Irwin & Haley, of Jefferson City, for relator.

Jesse W. Barrett, Atty. Gen., and Merrill E. Otis, Asst. Atty. Gen., for respondent.

**HIGBEE, J.** This is an application for a writ of mandamus directed to respondent, commanding him to register in his office relator's automobile truck, authorizing him to operate said car upon the public highways of the state of Missouri, upon the payment of a fee of \$1. The petition, in substance, avers that relator is a resident of Jefferson City, Cole county, Mo.; that he is the owner of a Kelly-Springfield motortruck, which he operates and drives upon the public highways of this state; that said motortruck is propelled by a gas engine, has four cylinders,  $4\frac{1}{2}$ " bore, and that the horse power of said motortruck is 30 h. p.; that on May 27, 1921, he presented to the respondent, Secretary of State, an application in due form for the registration of said motortruck, on a blank furnished by the Secretary of State for that purpose, which it is admitted was in accordance with section 7553, R. S. 1919, and tendered to the said respondent a fee of \$1 for the registration of said truck, but that said respondent refused to register said truck unless the said relator paid to the said respondent, for the use and benefit of the state of Missouri, a registration fee of \$10 in accordance with the schedule provided in section 7558, relating to motor vehicles; that the action of the respondent in refusing to register said automobile truck and in demanding a greater sum than \$1 as a license fee for the registration of said motor vehicle is unwarranted, unlawful, and unjust in the following particulars, to wit:

(1) Because said sum of \$1 tendered by the relator to the respondent is in excess of and amply sufficient to pay all costs incident to the issuance of the certificate of registration, two duplicate number plates, the printing of the application blanks, the cost of clerical help, together with all other costs incident to the registration of said automobile.

(2) Because the sum demanded of relator by respondent is \$9 in excess of all costs and expenses incident to the registration of said automobile, and that said excess is a tax upon this relator in the sum of \$9.

(3) Because section 7558 is violative of section 3 of article 10 of the Constitution, in that the tax levied under the provisions of said section is not uniform upon the same class of subjects within the territorial limits of the state.

(4) Because said section 7558 is violative

of section 4 of article 10 of the Constitution, in that all property of the state subject to the tax imposed by said section is not taxed in proportion to the value of said property.

(5) Because section 7558 is unconstitutional, for the reason that it places a special tax in the sum of \$9 upon relator's property, which is already assessed and taxed as personal property. Wherefore, relator prays, etc.

The issuance of the alternative writ was waived. The respondent's return admits all the facts alleged, but denies that his action in refusing to register relator's automobile truck and in demanding a greater sum than \$1 as a license fee for the registration thereof was unwarranted, unlawful, and unjust. On the contrary, respondent states that it was his duty to refuse to register said truck except upon the payment of a registration fee of \$10, as required by section 7558, R. S. 1919.

Respondent denies that section 7558 is violative of either of the sections of the Constitution specified in the petition. Respondent says that the motor vehicle license fee provided for by section 7558 is not a tax upon property but a license fee exacted for the privilege of operating motor vehicles on the public highways of the state, and that section 3 of article 10 of the Constitution only requires uniformity as to taxes on property in this state.

[1, 2] 1. Section 7553, R. S. 1919, requires the annual registration by the Secretary of State of every motor vehicle operated upon the public highways (except as otherwise provided), and section 7558 requires the payment of registration fees thereon according to a schedule of horse power ratings. The fee for those rating 24 and less than 36 horse power is \$10. By section 7604 (also 10902), the registration fees provided by the act must be paid by the Secretary of State into the state treasury for the benefit of the state road fund, less the cost of administering the provision of the chapter relative to motor vehicles. It is therefore avowedly a revenue measure. The owner of such vehicle may operate it on his own premises without being subject to the payment of the registration fee imposed by the statute. In such case he will pay the general property tax. The state maintains roads and bridges at great expense and exacts a license fee for the privilege of driving or operating these high-powered vehicles thereon. It is clear, therefore, that the registration fee is not a tax on the vehicle but upon the privilege of operating it on the highways of the state.

[3] 2. The constitutional questions raised by the relator were thoroughly considered in *St. Louis v. Green*, 7 Mo. App. 468. An ordinance of the city of St. Louis imposed an annual license tax on vehicles, from \$2 upon a hand cart, \$3 on a buggy, up to \$30 for a

six-horse omnibus. It was contended that the ordinance was violative of the identical provisions of the Constitution now urged by the relator. The court said that—

"Every burden imposed for revenue purposes is levied under the taxing power, by whatever name the tax is called. License fees, when for revenue, tolls, polls, taxation of money, and of corporations in proportion to their capital stock, are instances of special cases of taxes which are regarded as exempted by implication from the constitutional rules as to ad valorem assessments. \* \* \* It is therefore a mistake to suppose that the constitutional provisions in question include every species of taxation. These provisions as to equality and uniformity of taxation apply to property alone, not to taxes on privileges or occupations, or on the exercise of a civil right."

The court held that the tax, being general and uniform as to each class of vehicles named in the ordinance, not according to value but graduated so that the kind of carriage which is the most destructive to the street shall pay the most, and those that are the least destructive to the pavement shall pay less according to their kind, does not appear to be unconstitutional on any ground of inequality.

"The tax, then, is not a tax upon the carriage as property, but upon the right to use the carriage on the streets of the municipality imposing it. And though imposed for revenue, and not for police purposes at all, it is a tax of the nature of a license, because it is a permission to do that which, after the passage of the ordinance, it becomes unlawful to do without having obtained the permission." 7 Mo. App. 477.

On appeal this ruling was affirmed; all the judges concurring. 70 Mo. 562.

3. In *St. Louis v. United Railways*, 210 U. S. 266, 272, 28 Sup. Ct. 630, 52 L. Ed. 1054, the constitutionality of an ordinance of the city of St. Louis, imposing a tax on street cars equal to one mill for each passenger carried by any street car, was upheld as a revenue measure. At the time the ordinances granting rights to the street railways were passed, there were sections of the Municipal Code in force requiring them to pay to the city collector an annual license fee of \$25 for each car used by them in carrying passengers for hire in the city. The ordinance in question imposed the mill tax for each passenger so carried, and was an amendment of the sections of the Municipal Code fixing the license tax at \$25 per car. In *St. Louis v. United Railways*, 263 Mo. 387, loc. cit. 449, 174 S. W. 78, the city sued to recover this mill tax. It was contended by the defendant that this was not a license tax but a tax on property and double taxation, violative of section 3, article 10, of the Constitution. This court, however, held that it was a license tax for a privilege bestowed,

citing with approval *St. Louis v. Green*, supra, and other cases.

4. The advent of motor vehicles made necessary the continued expenditure of large sums of money in the construction and maintenance of better roads and bridges, including the cost for the protection and identification of such vehicles, for police protection, and for control and direction of the heavy and dangerous traffic which came with that class of high-powered vehicles. It is therefore not only a police regulation but a revenue measure as well. *Berry, Automobiles*, § 110, p. 119.

"Its purpose is manifestly the production of revenue to be used for the purpose specifically set forth. If the law raised sufficient to pay only the expense of administering it, it would not be a tax at all. It would be in the nature of a license. Being a tax laid on the privilege for a specific purpose to be used for the maintenance and repair of the thing concerning which the privilege is granted, it is a valid tax unless unreasonable. The use of the entire proceeds in aid of the specific privilege enjoyed by those who pay the tax is an essential feature in determining its reasonableness. \* \* \* The authorities agree that a statute is general and uniform if it operates equally upon every person and locality within the circumstances covered by the act, and when a classification has a reasonable basis it is not invalid merely because not made with exactness, or because in practice it may result in some inequality." *Saviers v. Smith (Ohio)* 128 N. E. 269, citing many cases.

"The charging of an annual sum for the use of its highways by automobiles instead of a mileage fee is clearly a matter within the discretion of the state. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. *Home Ins. Co. v. New York*, 134 U. S. 504, 10 Sup. Ct. 593, 33 L. Ed. 1025. \* \* \* The imposition is a license or privilege tax charged in the nature of compensation for the damage done to the roads of the state by the driving of these machines over them and is properly based, not upon the value of the machine, but upon the amount of destruction caused by it. \* \* \* The fact that an ad valorem tax is levied by local authorities upon all automobiles as property does not make this double taxation, which occurs when the same property is taxed twice by the same government during the same period." *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685, 689, Ann. Cas. 1915C, 706.

See, also, *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. Ed. 385; *In re Kessler*, 28 Idaho, 764, 146 Pac. 113, L. R. A. 1915D, 322, Ann. Cas. 1917A, 228; *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421; *Ard v. People*, 66 Colo. 480, 182 Pac. 892; *Pine Bluff Transfer Co. v. Nichol*, 140 Ark. 320, 215 S. W. 579; *Atkins v. State Highway Dept.* (Tex. Civ. App.) 201 S. W. 226; *Smith v. Com.*, 175 Ky. 286, 194 S. W. 367; *Ex parte*

Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L. R. A. (N. S.) 949; State v. Lawrence, 108 Miss. 291, 66 South. 745, Ann. Cas. 1917E, 322; Kane v. State, 81 N. J. Law, 594, 80 Atl. 453, L. R. A. 1917B, 553, Ann. Cas. 1912D, 237; State v. Ingalls, 18 N. M. 211, 135 Pac. 1177.

"In the absence of any inhibition, express or implied, in the state Constitution, the Legislature may, either in the exercise of the police power or for the purpose of revenue, levy license taxes on occupations or privileges within the limits of the state." 25 Cyc. 599.

The Constitution does not prescribe uniformity of taxation as to any subject-matter of taxation except property, in the constitutional sense. Ludlow-Saylor Co. v. Wollbrinck, 275 Mo. 389 (1), 205 S. W. 196.

5. The amendment by section 44a to article 4 of our Constitution reads, in part:

"Any motor vehicle registration fees or license fees or taxes, authorized by law, except the property tax thereon, less the cost and expense of collection and the cost of maintaining any state highway department or commission, authorized by law, shall, after the issuance of such bonds, and so long as any bonds herein authorized are unpaid, be and stand appropriated without legislative action for and to the payment of the principal of the said bonds, and shall be credited to a sinking fund to be provided for by law." See Laws 1921, p. 707.

This is a solemn recognition of the validity of the registration fees imposed by section 7558, R. S. 1919, for the privilege of operating motor vehicles on the public highways of the state, as distinct from the ad valorem tax to which they are also subject. Is the Constitution constitutional? It is said that doubt is the beginning and end of our efforts to know. There are, it seems, some who still doubt the constitutionality of Amendment 18 to the federal compact, but it has been surmised that thirst is father to the doubt.

6. The relator's learned counsel cited *Venor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128, which, they claim, supports their contention. The opinion states:

"But we are dealing with a case where the enactment, impliedly at least, recognizes the fact that the sums imposed are for taxation, and all other taxation is prohibited."

It does, however, hold that the license tax, if a revenue measure, is double taxation and unconstitutional. The opinion cites *Janes v. Graves*, 58 Ohio Law Bul. p. 55, decided by an Ohio court of common pleas, also *State v. Lawrence*, 105 Miss. 58, 61 South. 975. The latest decisions in those states are in harmony with *St. Louis v. Green*, and with the trend of authority as shown by the citations, supra. *Kansas City v. Grush*, 151 Mo. 128, 52 S. W. 286, does not support it. That case holds that an ordinance which assesses an occupation tax against a produce dealer who

is clearly a merchant is unconstitutional. A city cannot tax some merchants and exempt others.

The writ is denied.

All concur; GRAVES, J., in separate opinion.

GRAVES, J. I concur in all of the opinion of my learned Brother, except what is said of *St. Louis v. United Railways*, 263 Mo. 387, 174 S. W. 78. That case is a misconception of the law in the instant case. There is no question that there may be a property tax, ad valorem, on a given article of property, and in addition the use of the same property may be subjected to a license or privilege tax. In other words, an automobile may be taxed as property, and in addition its use upon the streets and public roads be subject to a license or privilege tax, and such would not be double taxation. The object of both taxes may be to produce revenue. What is known as the *St. Louis Mill Tax Case* was double taxation from any angle you view it. By statute its franchise rights were made property. Everything the railroad company had, except the mere right of corporate existence, was made property, and the right to run its cars upon the street was property, under that statute, and was valued, assessed, and taxed as property and as the cars were taxed. The right to operate on the streets being made property by the statute, and subject to taxation under the statute, any further tax upon the privilege or right would be double taxation, because a tax upon property. This, because the statute made the privilege property.

Another idea of the *Mill Tax Case* is found in the fact that when the city granted the railway company the right to run its cars upon the streets it exacted of the railway an annual tax for that privilege, which was being paid at the time of the levy of the so-called mill tax. This tax provided for in the ordinance granting the privilege was a license or privilege tax, and the mill tax was a license or privilege tax for the exercise of the same privilege, i. e., the operation of cars upon the streets. There was a double taxation of the same privilege. *St. Louis v. United Railways*, 263 Mo. loc. cit. 466 et seq., 174 S. W. 78.

But this *Mill Tax Case*, in facts, is not this case. Here we have the automobile taxed as property, and then we have a privilege tax upon its use upon the public highways. These are two different classes of taxes, and not double taxation. To have double taxation the two taxes must be of the same general class. Two property taxes upon the same property is double taxation. So also, two license or privilege taxes on the same privilege is double taxation. But that is not this case.

With the exception herein noted, I concur.

**HEDGEWOOD v. SHIEK. (No. 2853.)**(Springfield Court of Appeals. Missouri.  
June 18, 1921.)

1. Evidence  $\S$ 386(3) — Judgment regularly entered on docket cannot be contradicted by parol.

The statute requires a justice of the peace to keep a docket and to enter therein all judgments rendered by him, and, when a judgment is regularly entered therein, it speaks for itself, and imports verity, being the best and only competent evidence as to what judgment the justice in fact rendered, and is not to be contradicted by parol evidence of his having announced at the close of the trial that his judgment would be in favor of the other party.

2. Justices of the peace  $\S$ 135(4) — Circuit court powerless to change judgment of justice as shown on docket.

In the absence of fraud, accident, or mistake, the circuit court was powerless to change the judgment of a justice of the peace as shown on his docket, or to prevent its enforcement by execution.

3. Justices of the peace  $\S$ 126 — Announcement of finding after trial did not deprive justice of right to change mind before entry on docket.

Where trial was before a justice of the peace without a jury, since the statute gave him three days in which to reach a conclusion and render a judgment and enter it in his docket, his announcement at the close of trial that he would find for defendant did not deprive him of the right to change his mind on the same day and to enter on his docket judgment for plaintiff.

Appeal from Circuit Court, Wayne County; F. H. Dearing, Judge.

Action by C. W. Hedgewood against John Shiek. From judgment for plaintiff, defendant appeals. Judgment reversed.

O. L. Munger, of Piedmont, and Geo. Munger, of Bloomfield, for appellant.

A. O. Daniel and G. C. Stephens, both of Piedmont, for respondent.

COX, P. J. Action to enjoin defendant, who is a justice of the peace, from issuing execution on judgment entered by him in his docket in favor of A. H. Breitenbach against the plaintiff, C. W. Hedgewood. A temporary writ of injunction was issued, which on the trial was made perpetual, and defendant appealed.

The case was tried upon an agreed statement of facts which shows the following: That A. H. Breitenbach brought suit against Hedgewood, plaintiff herein, before defendant, John Shiek, a justice of the peace. The case was tried before the justice without a jury. At the close of the trial at about 11 a. m., the justice announced that his judgment would be in favor of defendant, Hedgewood. Defendant and his counsel then left the

office of the justice where the case was tried and did not return. At about 5 p. m. on the same day the justice met the attorney for defendant on the street and informed the attorney that he had changed his mind about the case and the judgment would be for the plaintiff. The judgment for plaintiff, Breitenbach, against Hedgewood was written up in the justice docket about 5 p. m. on the same day, but whether before or after the notice to defendant's attorney does not appear. The defendant took no steps to appeal, but immediately brought this suit to enjoin the justice from issuing execution on the judgment as written in the docket and contends that the judgment in fact rendered by the justice was what he announced at the close of the trial, which was in his favor, and that the judgment shown in the docket is a nullity.

[1] We know of no theory of law upon which the judgment of the trial court restraining the justice from issuing execution on the judgment as shown in his docket can be upheld. The statute requires the justice to keep a docket and to enter therein all judgments rendered by him, and, when a judgment is regularly entered therein, it speaks for itself and imports verity. *State ex rel. v. Wurdeman*, 192 Mo. App. 657, 664, 179 S. W. 964.

The docket entry being clear and unambiguous, and no fraud, accident, or mistake being charged, the docket is the best and only competent evidence as to what judgment the justice in fact rendered, and it cannot be contradicted by parol. *Garnett v. Stacy*, 17 Mo. 601; *Sutton v. Cole*, 155 Mo. 206, 55 S. W. 1052; *Development Co. v. Norman*, 184 Mo. App. 146, 168 S. W. 643.

[2] In the *Garnett* Case the court, in discussing the question of contradicting proper entries in the justice's docket by parol said:

"But, to permit a party, at any length of time after a trial, and when no appeal had been taken, to contradict the entries on the justice's docket, would be a very dangerous practice, and would destroy all confidence in the trials before those officers."

We hold that in this case the docket of the justice showing a judgment for the plaintiff could not be contradicted by parol testimony and the agreed statement of facts, and the further fact that no objection seems to have been made as to the competency of the evidence to contradict it does not change the rule. In the absence of fraud, accident, or mistake, the circuit court was powerless to change the judgment of the justice as shown on his docket or to prevent its enforcement by execution.

[3] From another view of this case, we hold that the judgment actually rendered was the one entered in the docket. The trial was before the justice without a jury, and

the statute gave him three days in which to reach a conclusion and render a judgment and enter it in his docket. While he may have announced at the close of the trial that he would find for the defendant, we do not think that announcement took away from him the right to change his mind before he entered the judgment on his docket. A judgment of a court of record is in the breast of the court until the end of the term, and he may change his finding even after the record has been written, if done at the same term. Justice courts have no terms of court fixed by statute, but a justice does have three days in which to enter judgment, and we think he should have the right, within that time at least, to change his mind at any time before the judgment is entered in the docket even after he had announced his decision, if he can do so without resultant injury to either of the parties. In this case the defendant was informed on the same day of the trial and at or about the time of the docket entry was made that judgment would be entered for plaintiff, and his right of appeal was as secure to him as it would have been had the first announcement been that judgment would go for plaintiff. Had defendant not learned of the change of the mind of the justice until his time for appeal had expired, a very different situation might be presented, for that would bring into the case the element of fraud, but, on the facts as they stand here, he has not been injured by the justice changing his mind, and no ground for injunctive relief is shown.

We have been cited to cases holding that, where some mistake is made in writing the judgment on the record after its rendition or something is omitted that should have been included, then in a proper proceeding the mistake or omission may be shown by parol without charging or showing fraud. That is true when proof of the error can be made without contradicting the record, but those cases do not militate against the position that the record cannot be contradicted by parol in the absence of fraud, and are not in conflict with our holding here.

Judgment reversed.

FARRINGTON and BRADLEY, JJ., concur.

# SWINEHART v. KANSAS CITY RYS. CO. (No. 14036.)

(Kansas City Court of Appeals. Missouri.  
June 13, 1921. Rehearing Denied  
July 7, 1921.)

## 1. Damages §158(1)—Evidence of injury to kidneys admissible under allegation of injuries to internal organs.

Where plaintiff in a personal injury suit against a street railway company alleged that

"his internal organs were deranged, displaced, and injured and will no longer perform their usual and natural functions," evidence of an injury to the kidneys was within the pleadings.

## 2. Witnesses §383—Evidence impeaching motorman's credibility held material.

In an action for injuries to a fireman in a collision with a street car negligently driven in front of a truck responding to an alarm, where the motorman of the car on cross-examination denied that he had said that he was not in the collision, evidence on rebuttal that he did say so was material as tending to show either that he was not the motorman concerned or that he was conscious of being in the wrong, thus tending to contradict his testimony that he was not to blame and did not see or hear the truck until it was too late; the evidence not being immaterial.

## 3. Appeal and error §1056(2)—Exclusion of question to witness held so irrelevant as not to be prejudicial error.

In an action against a street railway company for injuries, the exclusion of testimony sought from a witness that at the trial of her husband's damage suit against an electric light company, she had led him about as if he were blind was not reversible error; such testimony being so irrelevant as not to be prejudicial error.

## 4. Trial §47(1)—On exclusion of question offer must show what answer would have been.

Where a question to a witness is excluded as irrelevant, party asking question must then offer to show what the answer or proof would have been.

## 5. Street railroads §118(15)—Instruction on humanitarian rule held justified by petition for injuries to fire truck driver.

In an action against a street railway company for injuries to a fireman in a collision with a street car negligently driven across the street in front of a truck responding to an alarm, an instruction to find for plaintiff if the motorman of the car knew, or in the exercise of ordinary care could have known, of plaintiff's danger before starting the car across the street and in time to have caused it to remain stationary, was justified, though the petition setting up the right of way ordinance did not allege a violation of the humanitarian rule in the usual form nor that plaintiff was oblivious to his peril; the allegations being that plaintiff was in the truck approaching the crossing in a position of peril if the car were started, and that the motorman knew, or in the exercise of ordinary care could have known, thereof before the car was started and could have kept it at a standstill.

## 6. Street railroads §118(15)—Evidence held to support instruction on humanitarian rule.

In an action for injuries to a fireman in a collision with a street car negligently started across the street in front of a truck responding to an alarm, evidence held to support an instruction on the humanitarian rule.

**7. Appeal and error ⇨1033(5) — Instruction requiring plaintiff to carry greater burden not prejudicial to defendant.**

In an action for injuries to a fireman on a truck which collided with a street car negligently driven in front of it, defendant cannot complain of plaintiff's instruction to find for him if, in getting into peril, he was relying on the right of way ordinance; it requiring the jury to find such fact in addition to other necessary facts conjunctively joined therewith requiring findings of actual negligence of the motorman.

**8. Street railroads ⇨114(5)—Evidence held to support recovery by fire truck driver.**

In an action for injuries to a fireman on a truck which collided with a street car driven across the street after having stopped, evidence held to support a recovery irrespective of a violation of the right of way ordinance.

**9. Street railroads ⇨118(15)—Instruction allowing recovery under humanitarian rule, though plaintiff negligent, not erroneous.**

In an action for injuries to a fireman on a truck which struck a street car, an instruction that plaintiff could recover if the motorman knew, or in the exercise of ordinary care could have known, of plaintiff's peril before starting the car across the street and in time to have kept it at a standstill, notwithstanding plaintiff was negligent in getting into peril, was not erroneous; there being no inconsistency between such violation of the humanitarian rule and plaintiff's want of negligence.

**10. Action ⇨48(2)—Common-law negligence and violations of ordinance and humanitarian rule may be charged in same petition.**

It is not improper to unite in the same petition charges of common-law negligence, negligence in the violation of an ordinance, and negligence in the violation of the humanitarian rule.

**11. Trial ⇨253(4)—Striking words from instruction which, with them, ignored humanitarian rule not error.**

In an action for injuries to a city fireman on a truck which, while responding to an alarm, collided with a street car negligently driven across the street in front of it, it was not error to strike from an instruction requested by defendant the words "cannot recover in this action, and your verdict must be for defendant," when the instruction, without such words, was good and applicable, but, with them, completely ignored the humanitarian rule.

**12. Damages ⇨132(3)—\$5,500 not excessive for loss of strength of hand and arm, serious injuries to kidneys, severe and permanent injuries to bones of spine, etc.**

A verdict for \$5,500 is not excessive for injuries to the muscles and ligaments of the arm, resulting in inability to raise it above the head, badly injured kidneys, the functions of which were seriously impaired, a sore spine, severe and permanent injuries to the bones at the end thereof, an opening through the flesh to the bone through which corruption leaked, the bone being necrosed and the back swelling when the opening closed, and inability to stoop

or work without pain, in which condition plaintiff was 2½ years after the accident, whereas before he was a strong, healthy man, weighing 245 pounds.

Appeal from Circuit Court, Jackson County; Wm. O. Thomas, Judge.

"Not to be officially published."

Action by John Swinehart against the Kansas City Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. J. Higgins, of Kansas City, Kan., and Chas. N. Sadler, Louis R. Weiss, and E. E. Ball, all of Kansas City, Mo., for appellant.

J. Francis O'Sullivan and Atwood, Wickersham, Hill & Popham, all of Kansas City, Mo., for respondent.

TRIMBLE, P. J. On the morning of December 16, 1917, about 8:30 o'clock, a fire truck of the Kansas City fire department was proceeding east on Linwood boulevard in response to a fire call. As it approached Prospect street, which ran north and south, traveling at from 23 to 25 miles per hour, and was yet over 200 feet west of Prospect, a north-bound street car on the latter street pulled up to the "safety stop" on the south side of Linwood. As it did so the driver of the fire truck reduced his speed, not being certain whether the street car was going to stop or not. The street car came to a standstill at the safety stop, with the front end of the car close to the south edge of the sidewalk on the south side of Linwood and about 45 feet south of the center thereof, from whence the motorman could have seen, had he looked, for several blocks west along Linwood, and consequently could have seen the fire truck which was then about 200 feet away. When the driver of the fire truck saw the car stop, he immediately resumed his former speed, but, when the truck was about 75 feet from the crossing, the motorman suddenly started his car north across Linwood, thereby blocking the crossing and placing his car right in front of the oncoming truck. It was cold and the street was icy and slippery, and, although the truck driver endeavored to stop the truck, he could not do so, and the result was it crashed into the street car, severely and permanently injuring the plaintiff. He was a powerful, vigorous, healthy man weighing 245 pounds, and the force of the impact was so terrific that it threw him from his post of duty on the truck high in the air over the vestibule of the street car and down upon the street car tracks, he striking on his shoulders, lower part of his spine, and back of his head. He was rendered unconscious, and was taken to a hospital in that condition. He regained consciousness in about an hour after he



reached the hospital, but had vomiting spells, bled at the nose, and fainted again in the afternoon. After eight days at the hospital he was taken to his home, where he again had fainting spells. The muscles and ligaments of his right forearm are injured so that the hand and arm have lost their strength. He cannot raise his arm above his head unless he pushes it up with other force. His kidneys were badly injured and their function so impaired that he has much trouble with them, passing blood in his urine, and is compelled to frequently urinate, especially in the night. His spine is sore and hurts between the shoulder blades, and at the lower end of the spine there is a severe and permanent injury to the bones thereof and an opening through the flesh to the bone through which there is a leakage of corruption, the bone being necrosed at that point; and whenever this opening closes up the back swells until the pus bursts out again. He cannot stoop over or work without pain. He was in this condition at the time of the trial, 2½ years after the accident. He brought this action for damages and recovered judgment for \$5,500, and the defendant appealed.

[1] The petition alleged that the plaintiff's body and the trunk thereof was injured; that his back, spine, and spinal column were wrenched, sprained, displaced, dislocated, and injured; that "all of his internal organs were deranged, displaced, and injured and will no longer perform their usual and natural functions," etc. So that we are unable to say that the evidence showing an injury to the kidneys was not within the pleadings. The kidneys are manifestly internal organs. No motion or request was ever made to make the petition more definite and certain as to the injuries sustained. There was no error in admitting the evidence. *Houston Electric Co. v. McDade*, 84 Tex. Civ. App. 497, 79 S. W. 100, 101; *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578; *Fink v. United Rys. Co.*, 219 S. W. 679. The evidence did not relate to some condition or disease which was not the natural and necessary result of an injury to the kidneys, but was admissible as evidencing that the kidneys were in fact injured by the collision. However, long after the court had ruled on the objection that an injury to the kidneys was not alleged in the petition, a question was asked a medical expert as to an examination of plaintiff's urine and what it showed, and the expert said the examination revealed only urine of a low specific gravity, thin light urine, which would be "in accord with the history of frequent urination." The objection here made was only that it was "immaterial to any issue in the case." This was no objection that the evidence was not within the pleadings. Furthermore, the evidence here objected to did not show something unusual and not naturally and necessarily resulting from the in-

jury, but in fact did no more than tend to corroborate plaintiff in his testimony that he was compelled to urinate frequently from and after his injury.

[2] It is urged that the court erred in the admission of evidence, the only purpose of which was to impeach defendant's witness, the motorman of the street car, upon an immaterial matter. We do not think so. The evidence is to the effect that the truck was painted a bright red, that the siren thereon was blowing, and the truck made all the noise that such an apparatus usually makes going down the street, and even one of the defendant's witnesses says there was a "commotion" among the passengers on the street car when the front end of the car was at the sidewalk on the south side of Linwood and at that time he could see the fire truck coming. Defendant introduced Pepper, an elderly man who wore glasses, who said he was the motorman on that occasion and who testified that he brought his car to a stop at the south edge of the sidewalk on the south side of Linwood; that he looked both ways on this street and saw nothing and heard nothing, and did not look west again till he was in the center of Linwood, and then saw the truck 80 to 100 feet away, and it "wasn't more than a second" until the collision occurred; that up until he was in the center of the boulevard and saw the truck he heard no siren or noise of any kind; that he moved his car from a standing position at the point above indicated at the safety stop to the center of the boulevard, a distance of 45 feet, without ever looking to the west. As to what occurred after the collision he testified to little else except that he got off his car, then got back on again, and took the names of his passengers as witnesses. He could tell little about what was the situation of the men that were hurt or what was done in regard to them. No one save this witness testified that he was the motorman or identified him as being the one that was there. In this situation he was asked on cross-examination if he did not, after the collision, deny that he was in the collision, and he answered "No." He was then asked if, after the collision and on the return trip of the car, he was not asked by certain specified persons at a specified place if it was his car that was in the collision and if he did not say that it was not. The witness denied having so stated. Afterward on rebuttal plaintiff introduced evidence to the effect that at the time and place and to the persons specified in the questions to Pepper the latter did say he was not in the accident. The ground of defendant's complaint is that Pepper was thus impeached upon an immaterial matter, and that such was reversible error. It was not, however, an immaterial matter if it tended in any way to show that the witness Pepper was not in fact the motorman who was in charge of the car

at the time of the collision. Nor would it be wholly immaterial to show that, if he was really the motorman who was at the collision, he was conscious of being in the wrong when it occurred. *Rice v. Jefferson City, etc., Transit Co., 186 S. W. 568, 573.* This would tend to contradict his testimony at the trial tending to show that he was not to blame and that he did not see nor hear the truck. In other words, the evidence bore on the credibility of the witness, and when it does that, it is not immaterial. The evidence adduced was not as to the witnesses' admission of some negligent act, offered for the purpose of thereby holding defendant liable. Consequently cases holding the admission of such evidence reversible error are not applicable; neither are cases which hold that the refusal of the court to permit impeaching evidence on what appeared to be immaterial matter is not ground for reversal authority for the reversal of the judgment, under the circumstances of this case.

[3, 4] The testimony sought to be elicited by defendant from one of plaintiff's witnesses on cross-examination that witness, at the trial of her husband's damage suit against an electric light company, had led him about as if he were blind when in fact he was not, was so clearly irrelevant and without any possible bearing on this case that the court's action in excluding it can in no view be considered reversible error. Besides, the question was excluded, and no offer was ever made to show what the answer or proof would have been. *Emerson, etc., Co. v. Simpson, 217 S. W. 559, 562; McCormick v. City of St. Louis, 166 Mo. 315, 338, 65 S. W. 1038.*

[5] The petition set up an ordinance of the city which provided for fire department wagons having the right of way in any street and that the "driver of a street car shall immediately stop his car and keep it stationary upon the approach of any fire apparatus"; that while plaintiff was on the truck responding to a fire alarm, and approaching the crossing, and the car was at the safety stop, it was negligently allowed and permitted by those in charge of it to start across said Linwood boulevard; that the operatives in charge of said car knew, or by the use of ordinary and reasonable care could have known, of the approach of said motor fire truck "and of plaintiff's position of imminent peril if said car was started, before said car was started from its usual and customary stopping place at the southeast corner of said street intersections, which stopping place is and was at all times herein mentioned a 'safety stop' on said line; and that the defendants, its agents, servants and employés in charge of said car, could have kept said street car at a standstill at said point until said fire truck could have passed said intersection, and hence have avoided the collision with said fire truck or have avoided causing said

fire truck from having collided with said street car," etc.

Under such allegation the plaintiff obtained his instruction No. 2, reading as follows:

"The court instructs the jury that, if the jury find and believe from the evidence that on or about December 16, 1917, plaintiff was riding on the fire truck mentioned in evidence eastwardly along Linwood boulevard as a city fireman, and in response to a fire alarm, and that as said fire truck was nearing and approaching Prospect and was so close to Prospect that said fire truck could not pass thereover if the street car was started, and moved across Linwood (if so), the north-bound car mentioned in evidence was standing on the south side of Linwood boulevard, and that plaintiff was then in a position of imminent danger and peril from the starting and moving forward of said car and was unable to cause said fire truck to stop before reaching the point of collision, if you so find, and that plaintiff in approaching Prospect and in getting into such peril, if any, was relying upon the right of way ordinance referred to in evidence (if so), and that the motorman of said car knew, or by the exercise of ordinary care could have known, of all the above facts, if any, in time thereafter and before the car started, by the exercise of ordinary care to have caused and allowed said car to stand and remain stationary and have thus prevented it from moving across Linwood, and could thereby have prevented the collision, if you so find, and that such motorman failed to so keep said car stationary, but caused and permitted same to start and to move over Linwood, and was thereby negligent, if you so find, and that as a direct result of such negligence, if any, the fire truck collided with the street car, and plaintiff was thereby injured, if you so find, then your verdict must be for plaintiff, and this is so under this instruction irrespective of all other instructions herein, even though you should further find and believe from the evidence that plaintiff was negligent in getting into such situation of peril, if any, in the first instance.

"Ordinary care," as used in these instructions, means such care as would usually be exercised by ordinarily careful and prudent persons under circumstances the same or similar to those shown in evidence.

"Negligence," "negligent," and "negligently" as used in these instructions mean failure to exercise ordinary care."

Numerous objections are made to this instruction, the first of which is that it submits the case on a violation of the humanitarian rule when such is not pleaded in the petition. While the petition does not allege a violation of the humanitarian rule in the usual and stereotyped form, yet we think the elements thereof are included, and that a violation of the humanitarian rule is set forth in the petition. From the allegations it appears that plaintiff was on the truck approaching the crossing in a position of peril if the car was started across the street, and that the motorman knew this, or in the exercise of ordinary care could have known it,

before the car was started, and could have kept the car at a standstill and avoided the collision, but did not do so. The violation of the humanitarian rule can arise out of an affirmative act as well as a failure to act. Here there was both a moving of the car into the street and a failure to keep it standing still. And this is alleged to have arisen after the peril of plaintiff, if said car was moved, was known or could have been known to the motorman; for, if the motorman knew of the plaintiff's peril before he started his car, then certainly he had time in which to allow his car to remain at a standstill and thus avoid a collision. It is true the petition says nothing about the plaintiff being oblivious to his peril. But under the circumstances of this case obliviousness on his part is not a necessary ingredient. The function obliviousness plays in cases in the humanitarian rule is to show that the injured person did not purposely or wantonly expose himself to danger, and to inform the operator of the car that the other person is not going to avoid or escape the danger, and therefore he, the operator, must endeavor to avoid it. *Newton v. Harvey*, 202 S. W. 249, 251; *Dunn v. Kansas City Rys. Co.*, 204 S. W. 592, 593. The danger to plaintiff on the truck and approaching the crossing would be manifest to the motorman, whether plaintiff was oblivious or alive thereto, so that obliviousness could have no effect on the motorman. Hence it was not an essential element under the circumstances of this case. *Newton v. Harvey*, supra; *Dunn v. Kansas City Rys. Co.*, supra; *Aqua Contracting Co. v. United Rys. Co.*, 203 S. W. 483; *Bybee v. Dunham*, 198 S. W. 190, 193; *Heryford v. Spitaufsky*, 200 S. W. 123, 125; *King v. Kansas City Rys. Co.*, 204 S. W. 1129, 1130; *Wittenberg v. Hyatt's Supply Co.*, 219 S. W. 686.

[6] The contention that the instruction has no evidence to support it is clearly without merit, as the evidence amply shows there was nothing to prevent the motorman, while his car was standing still, from seeing and hearing the fire truck; that the driver of the truck, seeing the street car come up to the safety stop and not being sure it would stop, slowed his truck down, but when the car stopped he resumed his speed again, and thereafter, when it was impossible to stop the truck, the street car went on into the street. Defendant's own evidence shows that after the car started from the safety stop it could have been stopped within four or five feet, so that not only was there time and opportunity for the motorman, after the situation was revealed, to refrain from starting the car, but, after starting it, he could have stopped and avoided the collision. Clearly any one on the truck was in a position of imminent peril if the car was started up, and the evidence is ample that the motorman could have seen this and should have seen

it, and that thereafter he had time to avoid the collision and negligently failed to do so.

[7] It is not discernible in what way the instruction's reference to the ordinance giving firemen the right of way was misleading or confusing to the jury, nor how such reference rendered the instruction erroneous. The jury were required to find all the facts submitted (conjunctively joined as they were) before they could find a verdict; and hence the jury were required to find this fact in addition to all the other necessary facts. But defendant ought not to complain because plaintiff chose to carry this additional and perhaps unnecessary burden. *Raber v. Kansas City Rys. Co.*, 204 S. W. 739, 740; *Rigg v. Chicago, etc., R. Co.* (Sup.) 212 S. W. 878; *Burkett v. Missouri Pac. R. Co.*, 208 S. W. 104, 106; *Holt v. Hamilton-Brown Shoe Co.*, 186 Mo. App. 83, 94, 171 S. W. 673.

[8] The claim that except for the right of way ordinance there could be no ground of recovery in the starting of the stationary car cannot be upheld in view of the evidence in the case which we have heretofore discussed.

[9, 10] There being a case made under the humanitarian rule, both in the pleadings and in the evidence, the instruction was not erroneous because it allowed a recovery notwithstanding plaintiff may have been negligent in the first instance (though in what way he was negligent is not easy to see). The humanitarian doctrine does not necessarily and in every case concede that the plaintiff is negligent, and there is no inconsistency, under the circumstances of this case, between the claimed violation of that rule and the insistence that plaintiff was not negligent. *Wittenberg v. Hyatt's Supply Co.*, 219 S. W. 686; *Clark v. St. Joseph, etc., R. Co.*, 242 Mo. 570, 595, 148 S. W. 472. Nor is it improper to unite in the same petition charges of common-law negligence, negligence in the violation of an ordinance, and negligence in the violation of the humanitarian rule. *Hanson v. Springfield Traction Co.*, (Sup.) 226 S. W. 1.

[11] There was no error in modifying defendant's instructions 2 and 3, since the only modification was to strike out the words "cannot recover in this action, and your verdict must be for defendant." With these words eliminated, the instructions were good and applicable to the case, but, with these words left in, they would have completely ignored the humanitarian rule.

[12] We will not enter into a discussion of the merits of the contention that the verdict is excessive, further than to refer to the injuries as hereinabove set out, of which there was ample evidence in the record, from which it will appear that we are in no position to hold that \$5,500 is excessive.

The judgment is affirmed.

The other Judges concur.

**McMAHON v. KANSAS CITY RYS. CO.**  
(No. 14028.)

(Kansas City Court of Appeals. Missouri.  
June 27, 1921. Rehearing Denied  
July 7, 1921.)

1. Carriers  $\S$ 321(15)—Conductor is required to know whether passenger is attempting to alight at regular stopping place.

Where a street car passenger had given notice of her intention to alight, and the car had stopped at a regular stopping place to permit her to do so, the conductor was bound to ascertain whether she had alighted before giving the signal for the car to start, so that an instruction which did not require a finding that the conductor knew she was attempting to alight as a prerequisite to recovery, was not erroneous, though such a finding would be necessary to sustain recovery if the passenger were attempting to alight at a place other than a regular stopping place.

2. Damages  $\S$ 5, 142—"Special damages" distinguished from "general damages"; special damages must be specially pleaded.

There is a distinction between "general damages," which are such as the law implies or presumes to have occurred from a wrong complained of, and "special damages," which are such as actually result from the commission of the wrong, but are not such a necessary result that they will be implied by law, and special damages must be specially pleaded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Damages; Special Damages.]

3. Damages  $\S$ 208(6) — Recovery for mental anguish held for jury without direct evidence thereof.

In an action for personal injuries, where the plaintiff had pleaded mental anguish and the injuries proved by her were such as to permit the jury reasonably to include mental anguish as one of the natural results thereof, it was not error to submit the question of mental anguish to the jury, though there was no direct evidence in the record specifically tending to prove it.

4. Carriers  $\S$ 321(2) — Instruction need not define passenger.

The objection that an instruction in an action for injuries to a street car passenger, who was injured while alighting from the car, was erroneous for failure to define the word "passenger," is untenable.

5. Evidence  $\S$ 588—Evidence held not to show plaintiff's story was contrary to physical facts.

In an action for injuries to a street car passenger when the car suddenly started forward while she was attempting to alight, thereby throwing her against the car railing and injuring her, evidence held not to show that the plaintiff's story of the accident was so contrary to the physical facts that it should be disregarded.

6. Appeal and error  $\S$ 932(1)—In determining whether amount is excessive, testimony is considered most favorably to plaintiff.

In ruling on the objection that the award of damages to plaintiff was excessive, the court

must take into consideration the testimony most favorable to plaintiff, and disregard the testimony contra.

7. Damages  $\S$ 132(4) — Award of \$2,000 for permanent displacement of ribs held not excessive.

In an action for personal injuries, where there was evidence that plaintiff had been able to do her housework after an operation before her injury, but that as a result of the injury her ribs were displaced from the normal position, as a consequence of which there was pain in her back and side, and that the condition was permanent, a verdict awarding \$2,000 as damages will not be set aside as excessive.

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially reported."

Action by Elizabeth McMahon against the Kansas City Railways Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

R. J. Higgins, of Kansas City, Kan., and Chas. N. Sadler and Mont T. Prewitt, both of Kansas City, Mo., for appellant.

C. R. Leslie and Atwood, Wickersham, Hill & Popham, all of Kansas City, Mo., for respondent.

ARNOLD, J. This is a suit in damages for injuries sustained by plaintiff through alleged negligence of defendant, based upon the following circumstances. On the afternoon of April 27, 1918, plaintiff, a woman 45 years of age, while a passenger on an east-bound street car of defendant, attempted to alight therefrom at the regular stopping place at the intersection of Ninth street and Indiana avenue in Kansas City. While leaving said car at the rear steps thereof, plaintiff took hold of the center rod of the vestibule, having one foot on the step and the other in the act of stepping down, when the car started forward with a jerk, throwing plaintiff around with a violent twist, causing her to lose her equilibrium, and to be thrown against portions of the car, greatly to her injury.

At the time of the injury plaintiff was accompanied by two children, one five and the other seven years of age. When she started to leave the car plaintiff first assisted the smaller child off, using her right hand for this purpose; she then took hold of the center rod with the same hand and started to step down, when the accident occurred as stated. The larger child remained in the vestibule until the car was again brought to a stop. Plaintiff walked about two blocks to her home, and then was compelled to lie down, suffering from pain in her back, right shoulder, right arm, and the side of her neck. The day following, or the second day, a doctor was called to attend her.

The petition alleges the facts practically as above set out and charges that—

"Defendant negligently and carelessly caused and permitted said car to start forward and to move, whereby plaintiff was thrown around and caused to lose her position on the step of said car, and caused to hang onto the same, for a distance of several feet, and was thrown and caused to fall against portions of said car and other hard surfaces, and by said negligent acts and omissions on the part of the defendant she was injured," etc.

Then follow allegations of specific injuries, including, among others, injury to abdomen, internal regions, affecting kidneys and other organs, injury to back and spine, spinal cord, side, and ribs, head and neck jerked and injured, injury to arms, shoulders and lower limbs—

"from all of which she has suffered and will suffer great nervousness, sleeplessness, headaches, dizziness, physical pain, and mental anguish, and her power to work and earn a livelihood has been permanently lessened and impaired."

The petition alleges also expenses for medicines in the sum of \$50, and prays damages in the sum of \$10,000. The answer was, first, a general denial, and second, a plea of contributory negligence. Plaintiff's reply was in the nature of a general denial. The cause was tried to a jury, and verdict was returned for plaintiff in the sum of \$2,000. Motions for new trial and in arrest were filed and overruled, and thereafter an appeal was taken to this court.

Defendant's assignments of error charge, first, that the court erred in giving instruction No. 1 for plaintiff, for the following reasons: (a) The instruction fails to require the jury to find that the motorman or conductor knew that plaintiff was in the act of alighting; (b) that the instruction must be predicated upon the evidence and the pleadings, and not upon the pleadings alone; (c) the instruction fails to define the word "passenger."

[1] It is charged in the petition and the instruction required the jury to find—

"that those in charge of the car stopped same at Indiana avenue for the purpose of permitting plaintiff and other passengers to disembark therefrom; that while said car was at rest, she attempted to leave the same, and while she was in the act of so doing, and before defendant had given plaintiff a reasonable opportunity so to do, defendant negligently caused and permitted said car to start forward."

The testimony of plaintiff shows that she pushed the button on the side of the car as a signal that she desired to alight therefrom at Indiana avenue; that the car did stop there; that she and the two children walked to the rear platform, where she proceeded to alight; that one of the children, with plaintiff's assistance, actually had alighted; and

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that when plaintiff was in the act of stepping down from the car the injury occurred.

We are not impressed with defendant's subdivision "a" as above stated. The cases cited by counsel are not in point on this objection. They are cases where the crew were not advised of intention to disembark at a particular point not a regular stopping place. In one case a father, without the knowledge of the crew, was assisting his daughter to alight, and in another a passenger was attempting to leave the train after it had started. None of the cases cited by appellant apply to the point raised herein. In cases involving the elements of those cited, an instruction covering the entire case and directing a verdict should include and require knowledge on the part of the train crew of the intention of the plaintiff to leave the car. But the difference between those cases and the one at bar lies in this, that this was a regular stop, and the testimony shows that the car actually had stopped for the discharge of passengers, and plaintiff had proceeded to the rear door for the purpose of alighting.

This court has repeatedly held that it is the duty of the conductor, before giving a signal to start, in such a situation as the one presented in this case, to know whether or not a passenger was alighting. In *Alten v. Railway*, 133 Mo. App. loc. cit. 430, 118 S. W. 691, loc. cit. 698, it is said:

"The witnesses for both parties agree that the car had stopped at the regular stopping place and passengers were getting on and off. In such situation, it was the duty of the conductor, before giving the signal to start, to know whether or not a passenger was alighting. If plaintiff was in the act of stepping from the platform, it would be no excuse for the conductor to say that he did not know that fact. In the exercise of reasonable care, he was bound to know it. *Green v. Railway*, 122 Mo. App. 647, 99 S. W. 28; *Nelson v. Railway*, 113 Mo. App. 702, 88 S. W. 1119; *Hurley v. Railway*, 120 Mo. App. 262, 96 S. W. 714."

We hold that the giving of the instruction was not error in failing to direct a finding as to knowledge of the conductor as to whether plaintiff was in the act of alighting.

By way of further objecting to instruction No. 1, defendant argues there was error in submitting to the jury the question of mental anguish, basing the contention on its own interpretation that there is no evidence in the record showing mental suffering as charged in the petition, and that the instruction is erroneous unless predicated upon both the pleadings and the evidence. And further, counsel expresses serious doubts as to whether or not the petition is broad enough to permit the introduction of evidence as to mental anguish.

[2, 3] It is well-established doctrine that:

an instruction which purports to cover the entire case and direct a verdict is good if it include all of the elements of the plaintiff's case and there is any testimony that tends to support the same. Defendant's contention that there is no direct evidence of record that tends to prove specifically "mental anguish" is well taken, and would be decisive of this appeal were it not for the fact that there is a clear distinction between general and special damages. General damages are such as the law implies or presumes to have occurred from a wrong complained of, while special damages are such as actually result from the commission of the wrong, but are not such a necessary result that they will be implied by law. Special damages must be specially pleaded. The injuries proved by plaintiff in this case are such as to permit the jury reasonably to include "mental anguish" as one of the natural results thereof, and, as mental anguish was pleaded, it was not error to submit the question to the jury.

The third objection to instruction No. 1 goes to the measure of damages. Defendant argues that it is conceded that plaintiff previously had been operated upon and for 20 years had suffered from so many sicknesses that the jury needed to be guided by the instructions exactly as to what elements should be considered by them. We think the language of the instruction sufficiently restricted the jury to the scope of the pleadings, and that it was properly given.

[4] The suggestion that the instruction is erroneous for failure to define the word "passenger" we deem unnecessary to discuss.

The objections urged against the giving of instruction No. 2 have been sufficiently answered in what we have said above.

[5] Defendant's third assignment of error charges that the court erred in refusing to give its instruction in the nature of a demurrer to plaintiff's evidence. In support of this contention counsel declares the physical facts testified to by plaintiff and other witnesses all show that plaintiff could not have been injured as claimed. Counsel does not point out with certainty wherein the "physical facts" would change the deductions made by plaintiff's counsel upon the allegations and proof.

There are so many elements entering into questions of this nature that it is not possible to lay down hard and fast rules that would govern in all cases. For instance, the velocity of the forward movement of the car,

the avoiddupols of the person injured, the angle at which the body was inclining, and the direction of the incline, the amount of resistance offered, etc. We cannot say, as a matter of law, that plaintiff's version of the incident is not the true one, and, in the light of the evidence, the question was for the jury to determine.

In *Benjamin v. Railroad*, 245 Mo. loc. cit. 609, 151 S. W. loc. cit. 94, where a similar law of physics was invoked, the court held that—

"To draw the conclusion that the learned counsel draw from that law of physics, they do not take into account the natural or involuntary resistance the person whose equilibrium is disturbed offers to the motion, especially if it is a sudden movement."

This ruling is followed in *Hoffman v. Dunham*, 202 S. W. 429; *Middleton v. Light Co.*, 196 Mo. App. 258, 195 S. W. 527. In *Holland v. Railway*, 157 Mo. App. loc. cit. 481, 137 S. W. 997, it is said:

"Strange things sometimes happen, and apparently inconsistent with natural laws, but we should be slow to conclude that because of the apparent impossibility they did not occur."

The conclusion is warranted that the court committed no error in overruling the demurrer to the evidence.

[6, 7] Defendant's last assignment of error upon which it bases its claim for reversal is that the amount of the verdict is excessive. In determining this question it is necessary to take into consideration the testimony most favorable to plaintiff, and to disregard testimony contra. In this connection it is proper to notice that plaintiff previously had been operated upon, but had recovered so far as to be able to do her housework. Plaintiff states that she has pain in her back and side where her ribs were displaced and separated, that there is soreness and tenderness in her back where the injury was received, and that she continues to suffer pain. Doctor McKenzie testified that it is impossible to get plaintiff's ribs to stay in, or grow back to, their normal position, and that this condition is permanent. Other doctors testified to the same state of facts. The award of \$2,000 seems to us to be a modest sum under the proof, and it will not be disturbed.

We find no reversible error. The judgment is affirmed.

All concur.

**RIGGINS et al. v. MISSOURI PAC. R. CO.**  
(No. 2874.)(Springfield Court of Appeals. Missouri.  
June 18, 1921.)**1. Trial** ¶156(3)—Plaintiff's evidence considered as true on demurrer to evidence.

On demurrer to the evidence, the court must consider as true every material fact which plaintiff's evidence tends to establish, and every reasonable inference deducible therefrom.

**2. Railroads** ¶484(3) — Circumstantial evidence of cause of fire necessary for submission of case to jury.

The plaintiff, in order to have the case submitted to the jury, is not required to establish by direct evidence that the fire complained of was set by sparks from a locomotive, but is required to establish facts from which a reasonable inference is deducible that the fire so originated, the mere fact that it might have so originated being insufficient.

**3. Railroads** ¶484(3)—Evidence of cause of fire held insufficient for submission to jury.

In action for destruction of plaintiff's house by fire claimed to have been set by a spark from defendant's locomotive, evidence held insufficient for submission of case to jury, in that there was no evidence from which it could be reasonably inferred that the fire so originated, the mere fact that it might have so originated being insufficient.

**4. Railroads** ¶482(2) — Circumstantial evidence of origin of fire must admit of no other reasonable conclusion.

Where the evidence in an action for destruction of a house by fire set by sparks from a locomotive is wholly circumstantial, the plaintiff must show that there is no other reasonable conclusion as to the cause of the fire than that it was so caused.

Appeal from Circuit Court, Ripley County;  
Almon Ing, Judge.

Action by El. W. Riggins and others against the Missouri Pacific Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Jas. F. Green, of St. Louis, and J. C. Shepard, of Poplar Bluff, for appellant.

Chas. B. Butler, of Doniphan, for respondents.

**BRADLEY, J.** Plaintiffs, husband and wife, sued to recover for the loss of their house and contents, alleged to have been set on fire by sparks from a locomotive engine of defendant. The cause was tried to a jury, and plaintiffs recovered. Unsuccessful in motion for new trial, defendant appealed.

The evidence is wholly circumstantial. Plaintiff's house, a four-room frame, stood on the east side and about 260 feet from defendant's track. There was a low or valley-like place between the track and the house. The

house stood on a hillside, but the railroad track was somewhat higher than the foundation of the house. The smokestack of defendant's locomotive on the track directly opposite the house would, according to plaintiff's evidence, be a few feet higher than the top of the house. The house on the side next to the track was covered with shingles, and these were somewhat old and dry. The other side of the roof was rubberoid. There were two flues to the house, one the kitchen stove flue which was on the east side of the house, another flue was on the west side next to the track. The house burned between 5 and 6 o'clock in the afternoon of April 21, 1920. There had been no fire that day in the stove in the room next to the track. A fire had been in the cookstove at the noon hour—a big fire, Mrs. Riggins testified—but had gone out. The wind was blowing rather hard from the west to the east, or from the track towards the house. No one was in or about the house at the time the fire started, except two small children, who were in bed. Mrs. Riggins was in a meadow north of the house, some 400 yards away when the train passed. Immediately after the train passed she noticed that the house was on fire at the end toward the railroad track, and opposite from the kitchen flue. She ran to the house and got out the children. She stated the outside of the house, presumably, roof is meant, burned first.

Defendant's evidence shows that on the day plaintiff's house was burned that its train passed over the track west of plaintiff's house just prior to the fire on the way from Neelyville to Doniphan; that for some mile or more before reaching plaintiff's house and on beyond the house toward Doniphan its track is down grade, and that when its train passed down this grade it was coasting, that the steam was not working, and that no sparks were escaping. That the engine was equipped with a spark arrester in good condition, and that, with the engine so equipped, and on the down grade, and not working the steam, no sparks could have been emitted or escaped. Defendant's evidence tended to show also that the wind was from the south or southwest. The trees and vegetation to the north of the house were scorched and burned more than anywhere else about the burned house. A small wooden smokehouse with shingle roof stood about 40 feet east of the house and was not burned. Defendant's brakeman was in the baggage car, and as the train passed plaintiffs' place he stepped to the door, and says that he saw smoke coming out from the house as the train passed. He saw Mrs. Riggins in the meadow, waved at her, and threw out a paper for her. The fireman testified that as they passed he saw smoke coming from the house. All the train crew testified that the train was coasting as

it passed the house, and was not working the steam. Plaintiffs, over defendant's objection and exception, showed that the next morning as the train went out from Doniphan that it set fire to some grass on plaintiffs' premises, north of the burned house, but about the same distance from the track. Defendant meets this evidence by saying that this was on the up grade, and when the engine was working the steam.

The defendant assigns as error the refusal of the court to direct a verdict in its favor, and in admitting certain evidence over its objection.

[1] In considering the demurrer we consider as true every material fact which plaintiffs' evidence tends to establish and every reasonable inference deducible therefrom. Plaintiffs established, therefore, that their house was burned; that defendant's train passed just before the house was discovered to be on fire by Mrs. Riggins; that the fire was first discovered "at the corner of the front part of the house," next to the railroad, and away from the flue; that the wind was strong and was blowing from the railroad track toward the house. It was not shown that the train was emitting any sparks as it passed the house, or near the house, or that any engine at any time had emitted sparks passing down this grade in the neighborhood of this house, or anywhere else on this grade, when the train was coasting, and not working the steam. It was shown that sometimes the fire box was shaken down when coasting down this grade, and that when this was done live coals and cinders fell a distance of a few inches to the space between the ties. But there is no showing that such occurred on the occasion when plaintiffs' house was burned, or that if it had occurred that it was within the realm of reasonable probability or possibility that one of the cinders so dropped from the fire box could have been picked up and carried by the wind to plaintiffs' house.

[2] Plaintiffs were not required to establish by direct evidence that their house was set on fire from sparks or cinders from defendant's locomotive engine, but they were required to establish facts from which a reasonable inference is deducible that the house was so set on fire. Unless such facts were established the demurrer should have been sustained. *Gibbs v. Railroad*, 104 Mo. App. 276, 78 S. W. 835. The probative force of the evidence must be strong enough to induce in the minds of reasonable men, the jury, that the fire in fact originated from one of defendant's locomotive engines. It is not sufficient that it might have so originated. *Big River Lead Co. v. Railroad*, 123 Mo. App. 394, 101 S. W. 636; *Taylor v. Lusk*, 194 Mo. App. 133, loc. cit. 139, 187 S. W. 87; *Railroad v. Richardson*, 91 U. S. 470, 23 L. Ed. 356.

In *Gibbs v. Railroad*, supra, the destroyed house, a hotel, was in the town of Leasburg,

and stood about 50 feet from the railroad. The house faced the track, and was a story and a half high with a porch in front, which porch extended around the corner a short distance. A signboard was fastened to the roof of the porch, but there was evidence that this sign had blown over, and was lying on the porch roof. It was claimed that the fire started from a cinder from a locomotive engine catching against the sign. The fire was discovered about 1 o'clock a. m. and at that time was burning on the northeast corner of the porch roof in a patch about one and one-half feet wide, and from two to three feet long close to, if not in contact with, the roof. There were fires in the house early in the evening in three stoves. One of these was a King heater, which was filled with wood when the family retired. Other facts appear in the opinion which brought forth from the court the remark that such facts argued that the house was on fire in the inside when the fire was discovered on the roof. The train had passed three or four minutes before the fire was discovered. Discussing this case and the facts the court said:

"Equally important is the lack of evidence to make the proof of defendant's responsibility at all satisfactory. There was no testimony that the train which passed immediately before the discovery of the fire threw out sparks, and no evidence tending to prove it did, except the statement of Mary Gibbs that it seemed to be a heavily loaded train, and the fact that the track runs through Leasburg on a rising grade. No witness saw the train. Neither was there testimony adduced to show that defendant's engines frequently, or ever, threw out sparks while on that grade, nor to what extent, if at all, they threw them, how large they were, or how far they flew. No testimony of a positive sort was adduced on that subject, nor opinions of experts as to whether locomotives emit sparks large enough to fly 50 feet and fall still burning. As the want of such testimony is the point on which the decision must turn, it is unnecessary to give a fuller digest of the evidence; for respondent counsel does not contend there was any proof, either expert or direct, as to the emission of fire by locomotives."

The court held in the *Gibbs* Case that the evidence was not sufficient.

In *Manning v. Railroad*, 137 Mo. App. 631, 119 S. W. 464, the facts appear about as follows: Plaintiff's cottage was about 50 feet from the track, part of it on the right of way. It was a one-story building, of shingle roof, a porch in front covered with tin or sheet iron. The roof of the porch was against the eaves of the house. The fire occurred late in the afternoon. A woman a quarter of a mile away, immediately after the train passed, saw a bright spot on the porch roof, which she at first thought was the sunlight on the tin, until she noticed the sun was not shining; then she thought it was fire. The house was on the south side of the railroad,



and the wind was blowing from the track towards the house. Another witness a quarter of a mile away saw the fire about half an hour after the train passed. It was then a small fire on the roof of the main building above the porch, and there was no fire around the flue. This witness saw no sparks. Another witness saw the fire half an hour after the train passed when the fire was not very large. She said it was burning down from the edge of the tin roof. This witness said sparks were being emitted as the train passed. She saw it throw sparks when climbing the grade before it reached the house, and after it left the depot, but did not notice sparks as it passed the house where the track was level.

Another witness who lived within 100 yards first saw the fire when it was about half way down the front side of the roof, and did not notice any sparks as the train passed. The tenant was at the depot a quarter of a mile away when the train came in, and as soon as it left started for the house. He walked to the house, found a good fire in the stove, did a few chores, and discovered the fire, which appeared to be between the ceiling and the roof. Other witnesses gave evidence tending to show that the fire originated near the flue, and not at the edge of the porch near the roof. It was held that this evidence was not sufficient, because there was no evidence that any sparks were emitted as the train passed the house, and because there was no evidence tending to show—"the possibility of the fire being ignited by sparks or coals thrown off by defendant's engine at the distance, whatever that may have been, it was seen to throw them; and some proof of the kind was required"—citing *Campbell v. Railroad*, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530.

In *Bates County Bank v. Railroad*, 98 Mo. App. 330, 73 S. W. 286, the facts appear substantially as follows: The railroad ran east and west through a station named Nyhart on to the town of Butler, and passed within 150 feet of some hayricks on the south side. Between the right of way and the hay was a green hedge fence about 15 feet high. About 25 or 30 yards east of where the hay was stacked was a private roadway, passing north and south over the railroad. This roadway was used by the farmers to haul hay from the bottom lands. A short time previous to the fire some hay had been scattered along this roadway to the railroad track. On the day of the fire a train passed east through Nyhart to Butler about 11 o'clock a. m. The track from Nyhart to Butler was on a slight grade, and at the time of the fire there was but a light wind. When the smoke was first seen it was south of the hedge, and extended upward for some distance, and then gradually moved towards the south, and the hay between the ricks and where the roadway

crossed the track and extended along the roadway a strip had been burned. The fire was discovered about an hour after the train had passed. There was evidence from persons who passed over the private roadway after the train passed and before the fire was discovered, and they testified they noticed no fire. It was held that this evidence was not sufficient. Discussing this case the court said:

"There were other facts and circumstances that must be taken in connection with that which we have noted as constituting the total of plaintiff's testimony upon which it claimed a verdict, viz.: The slight upward grade of defendant's track approaching the place in question; the entire absence of evidence that the train in question was a heavy one, necessitating the exertion of more than ordinary power by the engine, usually resulting in sparks from the smokestack, or that it did emit such sparks; and further, the undisputed testimony of witnesses Chipp and Scoles, who passed along the private roadway over the scattered hay 10 minutes or more after the passage of defendant's train, and stopping in the meantime to talk with Hensley in the proximity of the hayricks, without seeing any smoke or fire, seems to rebut any inference, if any existed, that the engine set out the fire that destroyed plaintiff's hay."

[3, 4] Other cases of like or somewhat similar import to those we have mentioned are *Peffer v. Railroad*, 98 Mo. App. 291, 71 S. W. 1073; *Fritz v. Railroad*, 243 Mo. 62, 148 S. W. 74; and *Peck v. Railroad*, 31 Mo. App. 123. Plaintiffs cite *Hudspeth v. Railroad*, 172 Mo. App. 579, 155 S. W. 868; *Campbell v. Railroad*, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; *Matthews v. Railroad*, 142 Mo. 645, 44 S. W. 802, but we find no case upholding a verdict where there was no evidence that any sparks were emitted or nothing to show the probability that such was the case, such as an up grade, heavy load, working steam, etc. It may be that plaintiffs' house and contents were destroyed by a fire caused by a spark or cinder from defendant's locomotive, but that such might have been the case is not sufficient. We are not overlooking the fact that plaintiffs' offered evidence tended to show that next morning defendant's locomotive set out a fire near plaintiffs' house, and about the same distance from the track; but the conditions were not similar. The next morning the train was going up the grade, and was working steam when cinders will most likely escape. Merely because there may be no satisfactory evidence as to the cause of the fire is no reason why it should be assumed that it was caused by sparks or cinders from defendant's locomotive. It must be shown, the evidence being wholly circumstantial, that there is no other reasonable conclusion to draw as to the cause of the fire that destroyed plaintiffs' house

other than it was caused by sparks or cinders from defendant's locomotive. The evidence adduced does not support that conclusion. The judgment below should be reversed, and it is so ordered.

COX, P. J., and FARRINGTON, J., concur.

**LASS v. KANSAS CITY RYS. CO.**  
(No. 14026.)

(Kansas City Court of Appeals. Missouri.  
June 13, 1921. Rehearing Denied  
July 7, 1921.)

1. Carriers  $\S$ 321(23)—Instruction basing liability of carrier on fact that car "suddenly started forward" as plaintiff was alighting not error, though action was for "sudden jerk."

In an action for injuries, wherein the petition alleged a street car started with a "sudden jerk" as plaintiff was alighting therefrom, an instruction in favor of plaintiff if the car was "suddenly started forward" with such force as to throw her to the street was not reversible error, though it did not use the word "jerk," the words used conveying practically the same idea, and the gist of the negligence averred being the premature starting of the car.

2. Trial  $\S$ 244(5), 252(21)—Instruction on effect of willful false testimony erroneous if no evidence justifying same and if it singles out witnesses.

The giving of an instruction that, if the jury believed any witness had willfully sworn falsely to any material fact, it might disregard such fact or the whole of such witness' testimony, is error, if there is no evidence justifying it, nor can the evidence of any particular witness be singled out by such an instruction.

3. Appeal and error  $\S$ 1170(7)—Trial  $\S$ 210(2)—Instruction as to effect of willful false testimony held justified by evidence, and not reversible error.

In an action for injuries from being thrown to the pavement by the sudden starting of a street car as plaintiff was alighting, where the evidence was conflicting as to whether plaintiff attempted to get off before or after the car stopped and as to whether the car stopped a second time, thus indicating that plaintiff attempted to get off while it was motionless, an instruction that, if the jury believed any witness had willfully sworn falsely to any material fact, it might disregard such fact or the whole of such witness' testimony, was not reversible error on the theory that it permitted the jury to go on a roving expedition as to what was a material fact, there being evidence to justify the instruction, and the court, under Rev. St. 1919,  $\S$  1513, being forbidden to reverse except for error materially affecting the merits.

4. Carriers  $\S$ 321(23)—Instruction that conductor need not anticipate passenger's attempt to alight from moving car properly refused where only issue was whether car was still and started while she was attempting to get off.

In an action for injuries from being thrown to the platform by the sudden starting up of a car from which plaintiff was alighting, an instruction that the conductor was not bound to anticipate that she would attempt to alight while the car was in motion, and that if, when such intention became manifest, it was too late to prevent her, plaintiff could not recover, was properly refused, being outside the issues, the only question being whether the car was still when plaintiff attempted to get off and started up while she was doing so, and its only effect being to divert and confuse the minds of the jury.

5. Damages  $\S$ 132(8)—\$1,000 not excessive for broken arm and bruised head, face, and hip.

A verdict of \$1,000 is not excessive for a broken arm and bruised head, face, and hip.

Appeal from Circuit Court, Jackson County; Thomas B. Buckner, Judge.

"Not to be officially published."

Action by Cora M. Lass against the Kansas City Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. E. Ball and Gabriel & Conkling, all of Kansas City, for appellant.

Swearingen & Finnell, of Kansas City, for respondent.

TRIMBLE, P. J. Plaintiff's action is to recover damages sustained on account of personal injuries received in being thrown to the pavement while in the act of alighting from defendant's street car. She suffered a broken arm; her head and face were bruised and wounded so that the latter was bloody when she was picked up; her hip was bruised; and when she breathed it hurt her to inhale. She recovered judgment for \$1,000, and the defendant has appealed.

The testimony of plaintiff and her witnesses tended to prove that she was a passenger on defendant's south-bound Marlborough car, and as it was approaching Fiftieth street she rang the bell to notify the operatives of the car that she desired to alight there. She was seated about three seats from the rear end, and she arose and went to the rear vestibule. The car stopped at the usual stopping place, and when it did so a man by the name of Steward (one of plaintiff's witnesses) got off the car ahead of plaintiff. Plaintiff then attempted to step off, and as she was doing so the car started up, went a short distance, and stopped again. The starting of the car while plaintiff was in the act of alighting threw her to the pavement and injured her as hereinabove stated. Steward

said the car was at the usual stopping place and was standing still when he got off; that he made three steps on the ground toward the front end of the car, heard a scream, looked around, and saw the car in motion and plaintiff "piled upon the street." According to another of plaintiff's witnesses who was on the car, but who did not see plaintiff fall, the car stopped before she got off, then started up, and ran about a car length, when the conductor gave the motor-man the stop signal and it stopped again. Other witnesses, who did not see the fall, testified to the car thus stopping twice and then seeing or learning that some one was hurt. The car was crowded.

The defendant's testimony tended to prove that just before the car reached its usual stopping place at Fiftieth street, the plaintiff stepped off the car while it was yet moving, and received her injury in that manner, and that the car did not stop but once.

The petition alleged that as the car approached Fiftieth street plaintiff gave the signal, and the car came to a stop at the usual stopping place, whereupon plaintiff attempted to alight, "but before she had time to leave the same, and while she was in the act of stepping from the lower step on said car to the pavement, and before she had reached a place of safety, the defendant, by its agents, servants, and employees in charge of said car, negligently and carelessly and without warning to plaintiff started said car with a sudden jerk, whereby plaintiff, without fault or negligence on her part, was thrown violently to the street," etc.

[1] Plaintiff's instruction, after submitting the usual and necessary issues as to plaintiff's being a passenger, her signaling to stop and the stopping of the car at the usual place, continued:

"And if you further find from the evidence that while plaintiff was alighting from said car, or in the act of stepping from the lower step of said car to the street pavement, and that she was exercising ordinary care for her own safety, and if you further find that before she had reasonable time to alight from said car, it was *suddenly* and negligently, and without warning to plaintiff, *started forward with such force* as to throw plaintiff to the street and injure her," then the verdict should be for plaintiff, if the jury found she was damaged as a result of such negligence, if any.

We have italicized the portions which bear on the point made by defendant that the instruction does not follow the petition in that the petition says the car started with a sudden jerk, but the instruction does not submit the issue of a jerk.

The gist of the negligence averred is in the premature starting of the car while plaintiff was in the act of alighting and before she had reasonable time to do so. It is true the petition characterizes the premature start as being with a sudden jerk; but, while

the instruction does not use the word "jerk," it does use words which convey practically the same idea—i. e., that the car "suddenly \* \* \* started forward with such force as to throw plaintiff to the street." And plaintiff's evidence is in keeping with the petition and the instruction. We are unable to uphold defendant's contention that reversible error was committed in this regard. *Nelson v. Metropolitan St. Ry. Co.*, 113 Mo. App. 702, 88 S. W. 1119; *Baldwin v. Kansas City Rys. Co.*, 214 S. W. 274. The case at bar is wholly unlike that of *Simms v. Dunham*, 203 S. W. 652, for there the evidence of the plaintiff was that he had a secure handhold and foothold on the car, and would not have been thrown off but for the violent jerk, which evidence, of course, made the case depend upon whether there was a violent jerk or not, and not merely on the premature start of the car.

[2] Plaintiff's instruction 2 is complained of as being erroneous. It is as follows:

"The court instructs the jury that you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and you are further instructed that, if you believe that any witness has willfully sworn falsely to any material fact, you may disregard such fact or you may disregard the whole of such witness' testimony."

[3] Where there is nothing in the evidence to justify the giving of such an instruction, it has been held error to give it. *Keeline v. Sealy*, 257 Mo. 498, 165 S. W. 1088, 1096, 1097; *Iron Mountain Bank v. Murdock*, 62 Mo. 70, 74; *Wyatt v. Central Coal & Coke Co.*, 209 S. W. 585. Nor can the evidence of any particular witness be singled out by such an instruction; for, if that is done, it will constitute error. *State v. Finkelstein*, 269 Mo. 612, 620, 191 S. W. 1002; *Stetzler v. Metropolitan St. Ry.*, 210 Mo. 704, 713, 109 S. W. 686; *Schmidt v. St. Louis R. Co.*, 149 Mo. 269, 289, 50 S. W. 921, 73 Am. St. Rep. 380. We cannot say that there was nothing in the evidence to justify the trial court in giving the instruction. There was a very sharp and decided conflict in the evidence over whether plaintiff attempted to get off before the car reached the stopping place, and therefore while it was yet in motion, or whether she attempted to get off after it stopped. The whole case hinged on whether she did one or the other. There was also a sharp issue as to whether the car stopped twice, as plaintiff's witnesses say it did, or only once, as defendant's witnesses say. But this was a material fact, since it bore directly on the question of whether the plaintiff attempted to get off while the car was motionless at the the stopping place and fell when the car started up and was again hastily stopped by the conductor, or whether she fell before the car stopped, thereby raising no necessity or occasion for the car stopping a second time.

Under these circumstances, we cannot say that giving the instruction should call for a reversal of the case on the theory that it permitted the jury to go on a roving expedition as to what was a material fact. We are forbidden to reverse a case except for error "materially affecting the merits." Section 1513, R. S. 1919. While the propriety of giving such an instruction in ordinary instances has been questioned, yet we have not been cited to a case where the giving of it at all, regardless of the circumstances, has been held to constitute error. And until it is so held we will not, in cases wherein the circumstances are like those in the one at bar, reverse the judgment on that account.

[4] Defendant complains of the court's refusal to give its instruction No. 3, which reads as follows:

"The jury are instructed that, if you find and believe from the evidence that the plaintiff was a woman apparently in the possession of her faculties and of ordinary understanding, the conductor was not bound to anticipate that she would attempt to alight from his car while the same was in motion, but had the right to assume that she would remain upon the same until it had come to a standstill, until her intention not to do so became manifest to him, and if when such intention did become manifest it was too late for the conductor, as he was situated at the time, to prevent her from so doing, then the plaintiff is not entitled to recover."

The instruction was wholly outside the confines of the case. There was no thought or idea anywhere that the conductor was remiss in his duty of preventing plaintiff from getting off the car while it was in motion. The only question was whether the car was still when she attempted to get off and started up while she was doing so. The refused instruction submitted an issue not found anywhere in the pleadings or evidence, and told the jury that, if they found those issues in favor of the defendant, plaintiff was not entitled to recover. It had no place in the case, and its only effect would have been to divert and confuse the minds of the jury. It was misleading. *Gunn v. United Railways Co.*, 177 Mo. App. 512, 524, 160 S. W. 540.

[5] The contention that the verdict of \$1,000 is excessive for the injuries and suffering the record shows plaintiff endured as a result of her fall cannot be upheld.

The judgment is affirmed.

All concur.

**NEWELL v. DICKINSON et al.** (No. 16141.)  
(St. Louis Court of Appeals, Missouri. June 29, 1921.)

**1. Railroads §370 — Lookout required at place customarily used by public.**

At a place where tracks of a railroad company are habitually used by the public with

knowledge of the company, the engineer of a train is in duty to use ordinary care to look out for pedestrians and to use due care to prevent striking them.

**2. Railroads §398(1) — Circumstantial evidence held to show injury by train.**

In an action against a railroad company for death of plaintiff's decedent, who was found dead beside the railroad track, circumstantial evidence held sufficient to show that decedent was struck by a train of defendant's company.

**3. Railroads §390—Under humanitarian doctrine train operative must have seen peril.**

To bring a case within the humanitarian rule, it is necessary that there be evidence, either direct or inferential, that the person in charge of the train could by exercising ordinary care have seen pedestrian in a position of peril and at a distance sufficiently great to have enabled him to have stopped the train before striking him.

**4. Railroads §398(4)—Evidence held insufficient to show negligence under humanitarian doctrine.**

In an action for death of pedestrian, a licensee on the track, struck by a train on a foggy morning, in which action the humanitarian rule was urged, evidence held insufficient to show that deceased was in a position of peril sufficiently long prior to the accident for actual or constructive sight by the engineer, and when train was at a distance sufficiently great to have enabled the engineer to have stopped the train before striking deceased.

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Action by Ella Rambaud Newell against Jacob M. Dickinson, receiver of the Chicago, Rock Island & Pacific Railway Company, and others. Judgment for plaintiff, and defendants appeal. Reversed.

A. E. L. Gardner, of Clayton, for appellants.

Peyton H. Smith and Robert M. Zeppenfeld, both of St. Louis, for respondent.

**BRUERE, C.** Plaintiff brings this action to recover damages for the death of her husband, alleged to have been negligently killed by a locomotive operated by the defendant, the Chicago, Rock Island & Pacific Railway Company. Plaintiff had judgment below for \$2,000, and defendants have appealed.

The petition alleges, *inter alia*, that deceased was struck and killed by said locomotive while walking eastwardly on the railway track; that there was a habitual user for many years of the track by the public, at the place of the accident, with the forbearance and consent of said railway company; and counts for recovery upon the application of the humanitarian or last clear chance rule.

The answer is a general denial, coupled with a plea of contributory negligence and a plea that the deceased, at the time he re-

ceived the alleged injuries, was a trespasser upon the tracks of the defendant railway company, and was not seen at the time by the person or persons in charge of the said on-coming locomotive.

At the close of plaintiff's case the defendants requested the court to give to the jury a peremptory instruction to find for the defendants, which the court refused to give. The defendants offered no testimony. Appellants' assignment of error is that the lower court erred in refusing to give the peremptory instruction.

The facts brought out at the trial, necessary to an understanding of the point raised, are as follows: The accident occurred on the 2d day of September, 1916, in the morning at about 6:41 o'clock. The deceased on said day lived with his wife near Vigus, a station in St. Louis county, Mo., on the railroad line of the defendant railway company. His house was situated about 100 feet south of the main track of said railway company, and about 710 feet east of Vigus Station and 713 feet west of the point of the accident. The point where deceased is presumed to have been struck is 1423 feet east of Vigus Station, and 262 feet east of the east end of the railroad bridge or trestle across Fee Fee creek. Said point is marked "rail joint" on the plat introduced in evidence. East of said trestle the railway company maintains two tracks, the main track and the so-called north quarry track. The north quarry track is north of the main track, and runs parallel therewith up to a point about 262 feet east of the said trestle; it then leaves the main track and turns to the northwest. The north quarry track runs into the main track about 400 feet east of the trestle. The tracks run east and west. The space north of the main track and east of the trestle, between the main track and the north quarry track, is level for a distance of about 400 feet east of the trestle; said space is used for unloading and piling up railroad ties. There was no evidence that railroad ties were piled on said space at the time of the accident. South of the main track there is a slope or embankment. We would gather from the facts that the height of the slope or embankment is 3 feet; there being testimony that the right of way ditch, in which the deceased was found, was 3 feet below the level of the tracks. The track, adjacent to Vigus Station, is graded level 100 feet in width, and runs that width east to the north quarry switch east of the trestle. North of and about opposite the point where deceased is presumed to have been struck is a telegraph pole. From Vigus Station east to a point 88 feet west of the west end of the railroad bridge there are two tracks, the main track or south track and the siding track. Four hundred and sixty-five feet east of Vigus Station the south quarry switch runs into the main track. Running eastward

from Vigus Station the tracks curve to the southeast up to a point about 425 feet east of Vigus Station; from that point eastward the tracks run straight up to and beyond the point where deceased is presumed to have been struck. The railroad bridge across the Fee Fee creek is 63 feet and 9 inches in length. There is a walkway south of the south rail and a walkway north of the north rail across said trestle. A photograph discloses that a railing extends along the north and south sides of the trestle; and that the walkways are constructed of wooden planks, and are sufficiently wide to enable a person to walk on them, across the bridge, without any danger of being struck by a passing train. East of where deceased is presumed to have been struck there is a footpath which runs east and south of and along the ties of the main or south track. From a point about where the north quarry track joins the main track going west to Vigus Station there is a slope or embankment to the track on the south side, and between these points the public for many years habitually used the right of way and the railroad tracks as a footpath.

With the physical facts thus before us the testimony of the witnesses, pertaining to the accident, can be more readily understood. Said testimony is as follows: Between 6:30 and 7 o'clock on the morning of the accident the plaintiff stood in her doorway and saw the deceased leave their home going east. Plaintiff last saw her husband when he was on the trestle across Fee Fee bridge. She testified that there was a fog that morning, but she was able to see plaintiff from where she stood to the trestle, where her husband disappeared, walking east on the trestle. A train passed Vigus Station, going east, about 6 or 7 minutes thereafter. Plaintiff further testified that she did not hear the bell of the locomotive ringing when the train passed her home.

Witness Mrs. Lillie Grace, who resides 53 feet east of the Newell home, also saw deceased leave his home the morning of the accident. She observed deceased opposite his home, walking east on the railroad tracks. She saw him on the trestle, at which point he was lost to view. About 5 minutes thereafter the train in question passed Vigus Station. Witness was unable to tell whether deceased in crossing the trestle used the walkway on the trestle, or whether he used the railroad tracks. The plaintiff and Mrs. Grace are the only witnesses who testified seeing deceased on the morning of the accident before he was killed.

The on-coming train in question gave several blasts of the whistle just west of Vigus Station. It passed said station at 6:41 o'clock, a. m. There was a fog on the morning of the accident at Vigus Station. The witnesses' testimony differed as to the distance a person could be observed through the

fog; the longest distance testified to being 700 feet and the shortest 50 feet.

The plaintiff called the defendant A. B. Stanley, the engineer in charge of the train, as a witness: He testified that he kept the automatic bell of the locomotive continuously ringing from a half mile west of Vigus Station to the city of St. Louis; that he kept a sharp outlook for persons on the track, and did not see the deceased, and did not know his train struck him until he was told about it. He further testified that, owing to the density of the fog, he was unable to see a person on the track at a greater distance than 100 feet. Witness saw a hat taken off the engine when his train reached St. Louis. The train was traveling 30 miles an hour, and could be stopped in a distance from 500 to 600 feet.

About 15 minutes after the train in question passed Vigus Station the deceased was found dead in the right of way ditch, about 12 or 15 feet south of the south or main track, and three feet below the level of the track. An umbrella was sticking in the ballast on the south side of the south track 18 inches from the ties and about opposite the telegraph pole. The body of the deceased was found 40 or 50 feet east and 12 to 15 feet south of the umbrella. There were indications that the deceased had been rolled along the rails, and pieces of his clothing were found sticking on the steel splinters of the south rail just east of where the umbrella was found. The body was hatless and shoeless. One shoe was picked up, but at what point the evidence does not disclose. The face of deceased was bruised and bloody, and one of his legs was broken and his clothes were torn. The point where the umbrella was found was 262 feet east of the east end of the trestle.

[1] The evidence regarding user of the tracks by the public, at the point of the accident, was sufficient to fix the status of the deceased, while on the right of way, within the user zone, that of a licensee and not that of a trespasser. The engineer had no right to expect a clear track, but the presence of persons on the track, at said place of user, was to be anticipated by him, because of the customary user of the tracks by the public with the acquiescence of the railway company. The engineer, therefore, was charged with the duty to use ordinary care to look out for pedestrians at the place in question, and to use due care to prevent striking them. *Ahnfeld v. Railroad*, 212 Mo. 301, 111 S. W. 95; *Frye v. St. L., I. M. & S. Ry. Co.*, 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069; *Fledler v. St. Louis, I. M. & S. Ry. Co.*, 107 Mo. loc. cit. 651, 18 S. W. 847.

[2] While there is no direct evidence that the deceased was struck by the train, this fact can be legitimately inferred from the facts regarding the finding of deceased's hat on the locomotive, the condition and position

of deceased's body, which was found a few minutes after the train in question had passed, and the further evidence that parts of deceased's clothing were sticking on the rails close to where his body was found.

[3, 4] But the decisive question here is: Was there any evidence introduced, either direct or inferential, to show that the person in charge of the train in question had the opportunity to avoid striking the deceased? Recovery is sought in this case upon the humanitarian rule. In order to bring the case within said rule, it is necessary that there be evidence, either direct or inferential, that the person in charge of the train could by exercising ordinary care have seen the deceased in a position of peril and at a distance sufficiently great to have enabled him to have stopped the train before striking deceased. While there is evidence that, on the morning of the accident, the deceased could have been seen on the track at a distance of 700 feet, which distance, under the evidence, was sufficient within which to stop the train, yet there is no evidence whatever in the record, either positive or inferential, that the deceased was in the place where he was struck, or in a position of peril upon or near the track, sufficiently long prior to the accident for actual or constructive sight by the engineer, and when the train was at a distance sufficiently great to have enabled the engineer to stop the train before striking deceased.

The deceased when last seen was walking east on the trestle across Fee Fee creek. This was 5 minutes before the train in question passed. Whether or not deceased was then in a position of peril the evidence does not disclose. The distance from where deceased was last seen to the place where he is presumed to have been struck is 294 feet. Where did the deceased walk in traveling this distance? Across the trestle there were walkways. East of the trestle, to where he is presumed to have been struck, the space between the south or main track and the north quarry track was wide and level, which afforded him an opportunity to step from the main track and out of the danger zone onto this level space north of the main track. Where the deceased traveled from the point he was last seen on the trestle to the point where he is presumed to have been struck is left entirely to surmise and conjecture. Absent the necessary facts showing at what place the deceased entered the danger zone in view of the approaching engine and how long he remained in a position of peril, it is impossible to intelligently determine whether or not the engineer was guilty of negligence, and that such negligence was the proximate cause of the injury.

There is no evidence in the record, either direct or inferential, to show that the deceased was in the danger zone a sufficient

length of time, and far enough away from the on-coming train, to give the engineer an opportunity to avoid striking him.

This is not a case like the case of *Starks v. Lusk*, 194 Mo. App. 250, 187 S. W. 586, cited by respondents. In that case the deceased was killed on a trestle which was 425 feet long. The facts proven were:

"That deceased was necessarily in peril from the time the train entered on that trestle until it struck him, whether he was walking, standing, sitting or lying down, and regardless of what part of the trestle he was on. He could have come onto the trestle nowhere but at the north end, and, wherever he was between those points and whatever doing, he was in peril. He was killed about 280 feet from where he entered into the place of peril, and while the train was going that distance, at least, the deceased was seeable, and was in a position of danger whatever he was doing or wherever he was. The train could have been stopped in much less distance. The place where this deceased was killed, and for some distance on either side thereof, was not like the open road-bed in the *Hamilton* and *Whitesides* Cases, where only a step or two in space and a moment of time separated the place of safety from the place of danger."

*Whitesides v. Railroad*, 186 Mo. App. 608, 172 S. W. 467, and *Hamilton v. Railroad*, 250 Mo. 714, 157 S. W. 622, are cases decisive of the point under discussion.

In the *Whitesides* Case this court, speaking through Norton, J., says, 186 Mo. App. loc. cit. 621, 157 S. W. loc. cit. 470:

"The precise inference called for relates to the position, or rather the place, of the man that is, decedent on the track in the instant case, together with the ability of the engineer to see him there, for such is essential to the fact of negligence. The inferences that a man could have been seen on the track and the train stopped in time to have saved him arise, not from the established fact that decedent was on the track at any given place, but rather rest upon the inference that he was. The decedent was found to be upon the track through utilizing inferences from facts given in evidence, and, so being upon the track, through inference alone, another inference may not be rested thereon to the effect that he was there at some particular place, and in view of the approaching engineer for a sufficient length of time to enable him to avert the injury by the use of the appliances at hand. Touching this matter, the legitimate evidence seems to be insufficient under the recent ruling of the Supreme Court in a similar case. See *Hamilton v. Kansas City, etc., R. Co.*, 250 Mo. 714, 157 S. W. 622."

See, also, *Baecker v. Railroad*, 240 Mo. 507, 144 S. W. 803; *Justus v. St. Louis-San Francisco Ry. Co.*, 224 S. W. 79; *Joseph W. Bibb, Admr., v. Robert F. Grady*, 231 S. W. 1019, decided by this court May 3, 1921, and the cases cited therein.

The above quotation in the *Whitesides*

Case is applicable here. We feel constrained to hold that the evidence was insufficient to submit the case to the jury. The peremptory instruction should have been given.

It follows that the judgment should be reversed; the Commissioner so recommends.

PER CURIAM. The opinion of BRUEBE, C., is adopted as the opinion of the court.

The judgment of the circuit court of the county of St. Louis is accordingly reversed.

ALLEN, P. J., and BECKER, J., concur.  
DAUES, J., not sitting.

#### GENINAZZI v. LEONORI. (No. 16636.)

(St. Louis Court of Appeals. Missouri.  
July 11, 1921. Rehearing Denied  
July 20, 1921.)

1. Appeal and error  $\Leftrightarrow$  989—Trial  $\Leftrightarrow$  418—  
Demurrer to plaintiff's evidence not waived  
by defendant putting in evidence, but all evi-  
dence must be considered on review.

Although defendant did not stand on his demurrer at the close of plaintiff's evidence, but put in his own evidence, and did not ask for a peremptory instruction at the close of all the evidence, he did not waive his demurrer, and could contend on appeal that the evidence failed to make a case for the plaintiff; the only effect of defendant's failure to stand on his demurrer being that all the evidence in the case must be considered in determining whether plaintiff made a case, and not merely plaintiff's evidence.

2. Negligence  $\Leftrightarrow$  66(2)—Customer falling on  
stairway held guilty of contributory negli-  
gence.

Where plaintiff, a customer in defendant's place of business, followed a salesman and saw him descend a stairway 10 feet in front of her, but on account of lights and shadows was unable to see the exact location of the steps, and though knowing the steps were there walked ahead without either stopping or feeling her way, and fell on reaching the top step, she was guilty of contributory negligence as a matter of law.

Appeal from St. Louis Circuit Court;  
Franklin Ferriss, Judge.  
"Not to be officially published."

Action by Catherine Geninazzi against R. U. Leonori. Judgment for plaintiff, and defendant appeals. Reversed and cause certified to Supreme Court for final determination.

Cobbs & Logan and Albert E. Hausman, all of St. Louis, for appellant.

Kelley, Starke & Moser, of St. Louis, for respondent.

BIGGS, C. The petition charges that the defendant is the owner of an auction and

storage room at 3615 Laclede avenue, in the city of St. Louis, at which place he is engaged in the business of buying and selling furniture; that he invited the public, including plaintiff, to enter his place of business, and that it was his duty to exercise reasonable care to keep his premises in a reasonably safe condition for persons using the same in pursuance of said invitation; that on the 13th of February, 1917, while the plaintiff was in the defendant's place of business as an invitee, and while attempting to go from one room to another, she was caused and permitted to fall down a stairway, whereby she sustained serious and permanent injuries. The petition charges that defendant was negligent, in that he caused and permitted said stairway and the stairs thereof to be in an unsafe and dangerous condition, in that said stairway and steps were dark and insufficiently lighted, so that plaintiff was unable, in the exercise of ordinary care, to see said stairway and steps and know the location thereof.

The answer was a general denial coupled with a plea of contributory negligence. Following the verdict of a jury judgment was rendered in favor of the plaintiff in the sum of \$4,000, from which the defendant, following the usual preliminaries, has perfected an appeal to this court, contending that the evidence convicted the plaintiff of contributory negligence as a matter of law, and hence his peremptory instruction in the nature of a demurrer to the evidence should have been given.

[1] At the close of plaintiff's evidence the defendant filed a demurrer thereto, but did not renew his demurrer at the close of the whole case. Defendant did not stand on his demurrer, but put in his evidence, and did not ask for a peremptory instruction at the close of all the evidence. Plaintiff's counsel contend that by reason of this situation the defendant has waived his demurrer, and that he cannot now contend on appeal that the evidence failed to make a case for the plaintiff. To this contention we do not agree. The only effect of the failure on the part of defendant to stand on his demurrer is that he thereafter has no right to ask that the demurrer be considered in the light of plaintiff's evidence alone, but that it must thereafter be considered in the light of all the evidence in the case. Under such circumstances, even though plaintiff's evidence failed to make a case, if the defendant's evidence was such as to cure the defects in the case made by plaintiff, such evidence of the defendant must be considered in connection with plaintiff's evidence in determining the question. In other words, in considering the demurrer we must consider, not the plaintiff's evidence alone, but all the evidence in the case, in order to determine whether plaintiff made a case under the law. *Klockenbrink v. St.*

*Louis & Meramec River R. Co.*, 172 Mo. 678, 72 S. W. 900; *Graefe v. Transit Co.*, 224 Mo. 232, loc. cit. 243, 123 S. W. 835; *Weber v. Strobel*, 236 Mo. 649, 139 S. W. 188; *Battles v. United Railways Co.*, 178 Mo. App. 596, loc. cit. 613, 161 S. W. 614.

[2] Viewing the evidence in the light most favorable to plaintiff, was she, as a matter of law, guilty of contributory negligence? If so, the court should have so declared by its instruction. The evidence in the case bearing on the question is found in plaintiff's testimony, and that adduced by the defendant did not in any way bear on this issue, but pertained only to the question as to whether or not the defendant was guilty of the primary act of negligence charged.

The premises referred to consisted of a former dwelling remodeled for defendant's uses in his business. Adjoining this residence and to the north or rear thereof is constructed a large one-room building 65 feet wide by 100 feet long, in which the defendant displayed his goods for sale. The dwelling proper was also used for display rooms and as an office. The plaintiff and her friend, a Mrs. Simon, visited the defendant's place of business for the purpose of inspecting his goods with an idea of making purchases. At the time in question, about 2 o'clock in the afternoon of February 13, 1917, after inspecting some goods in the dwelling house proper, the plaintiff and Mrs. Simon followed a salesman of the defendant, Mr. Hertz, down a hallway which ran through the center of the old house through the back door and onto a platform which was in the large auction room referred to. The hallway leading to the auction room was dark, but there is no dispute in the evidence about the fact that the auction room proper in the rear of the old building was well lighted by a skylight and also by large windows on the sides. The platform referred to had a railing around it except on the west side thereof where there was a flight of five steps leading down to the floor of the auction room. The salesman, on reaching the platform referred to, proceeded westwardly over the platform until he reached the steps. He then descended the steps and was followed at a space of about 10 feet by the plaintiff, who upon reaching the top of the steps referred to fell down said steps to the floor of the room, receiving the injuries sued for.

Plaintiff testified that there was furniture piled to the north of the steps and also to the west thereof, which caused a shadow to fall on the steps, and she did not see them at the time she fell. It was also shown that there was an electric light over the steps which was not lighted at the time, but which light was subsequently turned on, and the steps were then plainly visible. According to plaintiff's evidence the fact that the steps could not be seen by her was due to the shad-



ows cast by the piles of furniture. There was no question but what there was plenty of light in the room as a whole, but plaintiff contends that the steps themselves leading from the platform were insufficiently lighted. After reaching the platform referred to, the salesman being in front, with the plaintiff following at a distance of 10 feet, the salesman turned west, walked down the platform, and then down the steps, saying to plaintiff and Mrs. Simon, "Come this way." The plaintiff followed and saw the salesman descend the stairway, and plaintiff testified that she knew the steps were there, but did not see them at the time she fell because of the shadow cast by the furniture piled to the north and west of the stairway. Plaintiff walked towards the stairway, missed the top step, and fell to the bottom.

Plaintiff testified:

"Q. Now, what did you do after you stepped down onto this platform? A. Well, I stepped onto the platform, and then I turned west. The furniture that was piled up there caused it to be dark on these stairs.

"Q. Yes. A. And how many steps I took before I got to the steps I do not know, but I took a step, walked towards them, and looked down, and as I looked, the light caught my eyes, and I raised again and I looked again and went on, never counting how many steps I took.

"Q. When your eyes got below the shadows that you talk about? A. Yes.

"Q. Was it light or dark? A. It was dark."

On cross-examination plaintiff testified:

"Q. And then you turned around and started west to follow Mr. Hertz, the salesman, going down the stairway? A. Yes, sir.

"Q. Did you see Mr. Hertz go down that stairway? A. I seen him go down; yes. \* \* \*

"Q. When you came out you say there was some light shining in your eyes? A. Yes, sir.

"Q. And you had to take your eyes off of the light? A. Yes, sir.

"Q. What light was that shining in your eyes? A. I don't know; I suppose it was the light coming through the furniture.

"Q. Where did the daylight come from? A. Well, I suppose from the windows. \* \* \*

"Q. I believe you testified you saw Mr. Hertz go down the stairway ahead of you. A. Yes.

"Q. You knew the stairway was there? A. Well, I knew there was something that he went down, but he didn't say 'Be careful,' or anything; he just said, 'Come on.'

"Q. And he went on down the stairway? A. Yes; about 10 feet away from us. \* \* \*

"The Court: Q. Did you see the steps before you fell? A. No, sir.

"The Court: Q. Did you know there were steps there? A. Well, I saw the gentleman going down; he didn't say steps, or if I thought it was a hole there I certainly would not have gone down, Judge.

"The Court: Q. Then you thought it was steps? A. Why sure."

This testimony clearly establishes an admission on the plaintiff's part that she knew

the steps were there, as she saw Mr. Hertz, the salesman, go down the steps. Knowing this fact and as she was to follow him, it was her duty to approach the stairs and proceed down them with due care for her own safety. Knowing this fact, she proceeded westwardly over the platform approaching the steps, and as she neared them, according to her statement, a stream of light coming through the west window and through the furniture struck her in the eyes, which at that moment prevented her from seeing the steps, which were in the shadows cast by the furniture. Instead of stopping or cautiously feeling her way for the top of the steps, or taking hold of the handrail by her side which ran along the north side of the platform, she walked straight ahead, and as she says "never counting how many steps I took." Not being able to then see, but knowing the steps were there, she did not stop, but went ahead, missed the step, and fell to the floor of the auction room.

While ordinarily the question of whether or not plaintiff was guilty of contributory negligence is one for the jury, we think the facts presented in the present case are such as to require a ruling to the effect that reasonable minds could not well differ as to whether plaintiff exercised proper care for her own safety. In her cross-examination she stated on several occasions that she positively knew the steps were there because she could see and did see the salesman, Mr. Hertz, descend the stairway 10 feet in front of her. If thereafter something happened to prevent her from seeing the stairway as she continued to approach it, and which she testifies on this occasion was a stream of light striking her in the face, it was plainly her duty to either stop or proceed cautiously feeling her way to the stairway. She made no attempt to do this, but walked straight ahead and fell down the steps, knowing them to be there. We think the evidence admits of no other fair inference than that she was negligent, and the court should have granted defendant's peremptory instruction.

The case falls within the general rules as established by the following authorities: *Wheat v. St. Louis*, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292; *Sindlinger v. Kansas City*, 126 Mo. 315, 28 S. W. 857, 26 L. R. A. 723; *Diamond v. Kansas City*, 120 Mo. App. loc. cit. 189, 96 S. W. 492; *Welch v. McGowan*, 262 Mo. 709, 172 S. W. 18.

Plaintiff relies upon the cases of *Oakley v. Richards*, 275 Mo. 266, 204 S. W. 505, and *Nephler v. Woodward*, 200 Mo. 179, 98 S. W. 488. These cases are distinguishable from the present case, in that in these cases the plaintiffs had no knowledge of the fact that there was a step-off from the platform into the aisle of the theater in one case, and in the other no knowledge of the fact that there was a hole in the floor of the theater. In

both of these cases the plaintiffs lacked knowledge of the conditions, while in the present case the plaintiff knew that the steps were there and that she had to descend them.

It follows that the judgment should be reversed.

**PER CURIAM.** The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly reversed.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., absent.

#### On Motion for Rehearing.

BIGGS, C. Plaintiff-respondent has filed an extended motion for rehearing, urging that our ruling on the question of plaintiff's contributory negligence contravenes numerous decisions of the Supreme Court. We do not so regard the opinion, and have been referred to no case where it has been held that the question of plaintiff's contributory negligence was for the jury, where, as here, plaintiff saw at the very time the defect or obstruction which caused her injuries and where, as here, plaintiff walked into it without observing any precautions for her own safety.

On the question of waiver of the point by reason of defendant's failure to stand on his demurrer and joining issue thereafter, we deem the opinion contrary to that of the Kansas City Court of Appeals in the case of *McLaughlin v. Marlatt*, 228 S. W. 873, loc. cit. 876, and hence it is recommended that the cause be certified to the Supreme Court for final determination.

Plaintiff's motion for rehearing should be overruled.

**PER CURIAM.** The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

Plaintiff's motion for rehearing is overruled, but, as we deem the decision herein contrary to the decision of the Kansas City Court of Appeals in *McLaughlin v. Marlatt*, supra, the cause is certified to the Supreme Court for final determination.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., absent.

#### BANKS v. CLOVER LEAF CASUALTY CO. (No. 16647.)

(St. Louis Court of Appeals. Missouri. June 21, 1921. Rehearing Denied July 11, 1921.)

1. Evidence  $\Leftrightarrow$  441(1)—Antecedent or contemporaneous oral agreements merged.

All antecedent or contemporaneous oral agreements are merged in the written contract

of accident insurance, and cannot be admitted to abrogate or vary its unambiguous terms; until corrected, it stands as the final contract between the parties.

2. Insurance  $\Leftrightarrow$  175—No liability where injury sued for occurred day before policy became effective.

Where plaintiff's injury sued for occurred one day before the accident policy issued to him by defendant was effective, there was no liability on defendant insurer's part shown.

3. Evidence  $\Leftrightarrow$  405(1) — Holder of accident policy bound by statements in application, in absence of fraud.

Plaintiff holder of an accident policy is bound by his statements contained in the application therefor; there being no evidence introduced showing that the application was procured by fraud.

4. Insurance  $\Leftrightarrow$  130(2) — Application for insurance a mere request not binding until accepted.

Application for accident insurance was a mere request on the part of the applicant, and was not binding until accepted by the insurer.

5. Insurance  $\Leftrightarrow$  131(2) — Oral contract made by agent not ratified by insurer cannot be imputed to it.

The alleged oral contract of accident insurance made by defendant insurer's soliciting agent, which defendant insurer did not authorize or ratify, cannot be imputed to it.

Appeal from St. Louis Circuit Court;  
George H. Shields, Judge.

Action by B. B. Banks against the Clover Leaf Casualty Company. From judgment for plaintiff, defendant appeals. Judgment reversed.

Thomas O. Stokes, of St. Louis, for appellant.

Hall & Dame, of St. Louis, for respondent.

BRUERE, C. This is an action on an accident policy issued by the appellant to the respondent. A trial by jury was had in the circuit court of the city of St. Louis, which resulted in a verdict in favor of the respondent. From a judgment on that verdict appellant appeals.

The petition alleged:

"That the defendant on or about the 31st day of December, 1916, in consideration of the payment of policy fee and premium of \$2, paid by said B. B. Banks to defendant, and of a premium of \$2 to be paid on or before the first day of each month thereafter by said B. B. Banks, entered into a contract of insurance with the said B. B. Banks and thereupon issued its policy of insurance No. 116072, whereby it insured said B. B. Banks as accident indemnity in the sum of \$60 per month, or at said rates for any proportionate part of a month," etc., reciting the indemnity provision of the policy.

The petition further alleged that said policy of insurance was not in plaintiff's pos-

session, but was in the possession of the defendant, and that the plaintiff was entitled to the possession of the same; that plaintiff made his application for insurance to the defendant on the 31st day of December, 1916, and that prior to January 7, 1917, the defendant accepted the said application in accordance with its terms and provisions, and issued its policy of insurance as aforesaid; that said insurance policy was delivered for plaintiff to one J. M. Well, who wrongfully failed to hand over said policy to plaintiff, but wrongfully retained said policy and returned it to the defendant.

The petition further alleged that on January 7, 1917, while said contract and policy of insurance was in force, the plaintiff met with an accident, and by reason of said accident he was wholly disabled from the performance of every kind of labor pertaining to any business or occupation until the 27th day of August, 1917. The petition asks judgment against the defendant for \$460, with interest, 10 per cent. damages for vexatious refusal to pay, and attorney fees.

The answer contained a general denial and the following affirmative defenses: (1) That the policy sued on was never delivered and never became a contract of insurance. Appellant in its brief states that this defense is not relied upon here. We will therefore treat this defense as abandoned here. The answer, as a second affirmative defense, alleged that plaintiff was not insured as to the injury sued for in his petition, because plaintiff's injury occurred on January 7, 1917, and the policy was not issued until January 8, 1917; and that the policy only insured plaintiff from 12 o'clock noon, standard time, of the 8th day of January, 1917, to 12 o'clock noon, standard time, on the 1st day of February, 1917.

The reply denied the allegation of the answer and alleged that defendant had waived the condition and provision contained in said policy requiring the policy to be delivered to the plaintiff before the contract of insurance became effective; and, further replying to the second affirmative defense set up in the answer, alleged that whatever provisions or statements were contained in said policy as to the date when the policy became effective, later than the date of plaintiff's said injuries, were waived by defendant; that the said application for insurance was accepted, and the said contract of insurance became effective, prior to the time when plaintiff received his injury; that the defendant represented to plaintiff and agreed with plaintiff that the said policy should and would take effect within 24 hours after the time of signing said application; and that said contract of insurance was actually entered into prior to the time when plaintiff received his injury.

The facts pertinent to the issues raised here, disclosed by the evidence, are: On De-

cember 31, 1916, the plaintiff signed a written application for the policy sued on. The application was made out by J. M. Well, defendant's local solicitor and agent. Said agent was employed by the defendant company to take applications for insurance and send them to the defendant for rejection or acceptance. The evidence showed that he was also authorized to collect premiums; but there was no evidence introduced showing that he had the authority to issue or countersign policies or to make contracts of insurance on behalf of the defendant company.

The said application for insurance consists of questions and answers. The questions and answers relevant to the issues here are:

"Do you apply for a policy of insurance in the Clover Leaf Casualty Company based upon the following statements and warrant them to be complete and true? And do you agree to accept the policy with all its provisions, the classifications fixed by the company, and agree that the statements made shall be a part of any policy issued herein? Answer: Yes.

"Do you understand and agree that the insurance hereby applied for will not be in force until the payment of the premium in advance and the delivery of the policy to you while in good health and free from injury? Answer: Yes."

The plaintiff, over the objection of the defendant, introduced evidence tending to show that J. M. Well, defendant's solicitor, at the time plaintiff's said application for insurance was taken, said that the policy would take effect 24 hours after the application was made. Plaintiff's testimony regarding this statement was that Mr. Well told him, contemporaneously with the taking of his application, that the policy would take effect in 24 hours from the time he paid his money to him. At the time plaintiff signed said application he paid J. M. Well \$2, being the policy fee; the premium of the policy was to be paid to defendant's collecting agent. The following is the blank form of a receipt filled out and delivered by defendant's solicitor, J. M. Well, to the plaintiff at the time the \$2 were paid him by plaintiff:

#### First Payment Receipt.

Date, .....

Received of ..... an application for a policy in the Clover Leaf Casualty Company, of Jacksonville, Illinois, and the sum of ..... dollars being payment of policy fee and initial premium on same. Should the company decline to issue a policy to the above-named applicant within thirty days of this date, I agree to refund said amount. ...., Agent.

Subsequent premiums are payable to our authorized collectors or to the home office at Jacksonville, Illinois.

The application was taken and signed in the city of St. Louis, on December 31, 1916, and was sent to the defendant at Jackson-

ville, Ill., and received by it on January 8, 1917. The defendant executed its policy No. 116,072, being the policy sued on, on January 8, 1917. The plaintiff introduced said policy in evidence. It provides that—

"In consideration of the payment of the policy fee of \$2 and the premium of \$2 in advance, and the warranties and agreements contained in the application for this policy, which by the acceptance of the same the insured warrants to be complete, true, and material, does hereby insure B. B. Banks subject to the provisions and conditions herein contained and indorsed hereon, from 12 o'clock noon, standard time, of the day this contract is dated to 12 o'clock noon, standard time, of the 1st day of February, 1917, and for such further periods as are indicated by the official receipts of the company, as a class D risk, against loss resulting," etc.

The policy further contains the following clause:

"No agent has authority to change this policy or to waive any of the provisions. No change in this policy shall be valid unless approved by an executive officer of the company and such approval be indorsed thereon."

The defendant sent the policy to defendant's agent, J. M. Weil, for delivery. The plaintiff was injured on the morning of the 7th of January, 1917. Mr. Weil, having learned that the plaintiff was injured and in the hospital, did not deliver the policy to the plaintiff, but returned it to the company and tendered back to plaintiff the \$2 received from him, but defendant refused to accept the same. The defendant in its answer also made tender of said \$2 to the plaintiff.

At the close of the entire case the defendant offered a peremptory instruction in the nature of a demurrer to the evidence, which the court refused to give. Counsel for appellant insist that the demurrer should have been given.

Viewing every fact in evidence in that light which is most favorable to the plaintiff, we are forced to the conclusion that appellant's contention is well taken. This is a suit at law declaring on the policy of insurance as issued. No reformation of the policy is prayed for. There is no allegation in the petition that, by reason of fraud or mutual mistake, the contract of insurance does not speak the agreement of the parties. The provisions of the policy are unambiguous and clear. It contains no provision as contended for, but plaintiff relies upon an alleged oral contract of insurance, which is entirely different from the contract declared on. It is elementary that one cannot declare on one contract and recover on a totally different one; he must recover, if at all, upon the cause of action stated in his petition.

[1] The policy declared on was effective from 12 o'clock noon of the 8th day of January, 1917. The contract is in writing, and is the conclusive contract of the parties thereto until impeached by fraud or mutual

mistake. No attempt was made to impeach the contract sued on by fraud or mutual mistake. Plaintiff simply seeks to abrogate the terms of the contract by proof of an oral agreement made prior to the execution of the written contract. All antecedent or contemporaneous oral agreements are merged in the written contract and cannot be admitted to abrogate or vary its unambiguous terms; until corrected, it stands as the final contract between the parties. *Insurance Co. v. Mowry*, 96 U. S. 546, 24 L. Ed. 674; *Graham v. Insurance Co.*, 110 Mo. App. 98, 84 S. W. 93; *Insurance Co. v. Owen Building Co.*, 195 Mo. App. 373, 192 S. W. 145; *Insurance Co. v. Wolfson*, 124 Mo. App. loc. cit. 291, 101 S. W. 162; *Supreme Lodge, K. P., v. Dalzell*, 223 S. W. loc. cit. 789; *Schueler v. Met. Life Insurance Co.*, 191 Mo. App. 52, 176 S. W. 274; *Gillum & Co. v. Fire Association*, 106 Mo. App. 677, 80 S. W. 283; *Riley v. Insurance Co.*, 117 Mo. App. 233, 92 S. W. 1147; *National Union Fire Ins. Co. v. Patrick* (Tex. Civ. App.) 198 S. W. 1050.

[2] Plaintiff's injury, sued for in his petition, occurred on January 7, 1917, one day before the policy sued on was effective. Therefore there was no liability shown under the cause of action stated in the petition.

[3] Plaintiff seeks to nullify the rule that, in the absence of fraud or mutual mistake, parol evidence is not admissible to contradict a written contract, by claiming that the provision in said policy, making the policy effective on the 8th day of January, 1917, was waived by the defendant. For proof of waiver, plaintiff says that defendant's solicitor told plaintiff, contemporaneously with the taking of his application for the policy in question, that the policy would take effect 24 hours after his application was made. The intention of the parties was reduced to writing, and is expressed in the written application signed by the plaintiff. Said application does not contain any such provision as is claimed, but, on the contrary, it provides that the insurance therein applied for was to be in force at a date subsequent to the date of the application. Plaintiff is bound by his statements contained in said application; there being no evidence introduced showing that the application was procured by fraud. Said written application was forwarded to the defendant, and the policy issued thereon was in strict conformity thereto. No evidence was introduced in this case showing that defendant's officers who issued said policy had any knowledge that said alleged statement was made. There is no evidence here of any fraud practiced or mistake made on the part of the defendant in procuring the application or in issuing the policy.

[4] Moreover, the application for insurance was a mere request, on the part of the applicant, for insurance, and was not binding until accepted by the defendant; no such acceptance was shown.

[8] Furthermore, the alleged oral statement of J. M. Well was not binding on the defendant, for the reason that there was no evidence introduced showing that J. M. Well was authorized to make contracts of insurance on behalf of the defendant. The evidence disclosed that the said agent's authority went no further than to take applications for insurance, collect the policy fee, forward the application to the defendant for its acceptance or rejection, and deliver the policy when issued under defendant's direction. The alleged oral contract of insurance of the soliciting agent, which the defendant did not authorize or ratify, cannot be imputed to it. *Rhodus v. Life Insurance Co.*, 156 Mo. App. 281, 137 S. W. 907; *Kring v. Insurance Co.*, 195 Mo. App. loc. cit. 135, 189 S. W. 628; *Beswick v. National Casualty Co.*, 226 S. W. 1031; *Graham v. Insurance Co.*, 110 Mo. App. 95, 84 S. W. 93; *Insurance Co. v. Mowry*, 96 U. S. 546, 24 L. Ed. 674; *Floars v. Aetna Life Insurance Co.*, 144 N. C. 232, 56 S. E. 917, 11 L. R. A. (N. S.) 357; *Joyce on Insurance*, vol. 1, § 716.

Nor can it be said that the defendant, by accepting the \$2 premium paid its agent, ratified the alleged acts of said agent. Aside from the rule that there can be no ratification without knowledge on the part of the defendant of the act claimed to be ratified by it, the premium paid to the agent insured the plaintiff, according to the contract of insurance, beginning the 8th day of January, 1917.

There is no question of waiver by the defendant of the terms of the policy in this case. The question is simply one of evidence. Obviously the plaintiff is proposing to abrogate the terms of a written contract, plain and unambiguous on its face, by parol testimony, without pleading or showing fraud or mutual mistake. This proposition cannot be entertained. Proof of such oral testimony should have been rejected by the trial court.

It follows that the judgment of the circuit court of the city of St. Louis should be reversed; the Commissioner so recommends.

PER OURIAM. The opinion of BRUERE, C. is adopted as the opinion of the court.

The judgment of the circuit court of the city of St. Louis is accordingly reversed.

ALLEN, P. J. and BECKER and DAUES, JJ. concur.

#### PINTEARDD v. HOSCH. (No. 16653.)

(St. Louis Court of Appeals. Missouri. July 8, 1921.)

1. Municipal corporations  $\S$  706(6)—Evidence of agency of automobile driver held sufficient to justify submission of case to jury.

In an action for damages resulting from an automobile collision at a street intersection,

defendant's contention that plaintiff had failed to raise an issue as to the authority of defendant's driver to operate the car on that occasion as defendant's agent, and therefore that defendant's negligence should not have been submitted to the jury, held without merit, in view of defendant's admissions that he had sent the driver to mail a letter, and notwithstanding defendant's denial of such admissions.

2. Evidence  $\S$  222(1)—Admissions are competent.

Admissions of a party to a suit are as competent as any other form of evidence, and a cause of action may be proven thereby.

3. Evidence  $\S$  265(13)—Effect of admission not annulled by assertion that it was not true.

The evidentiary force of an admission shown to have been made cannot be annulled by a subsequent assertion that it was not true when uttered; it being for the trier of the fact to say whether it was true or false when made.

4. Municipal corporations  $\S$  706(6)—Instructions to withdraw allegations of negligence as to failure to sound warning in automobile collision case held unwarranted.

In an action for damages resulting from an automobile collision, an instruction to withdraw from the jury the allegation of the petition relating to the failure to sound a warning held properly refused, in view of substantial evidence supporting such allegation.

5. Municipal corporations  $\S$  706(6)—Instructions to withdraw allegations of negligence as to violation of ordinance in automobile collision case held unwarranted.

In an action for damages resulting from an automobile collision, an instruction to withdraw from the jury the allegation of the petition relating to violation of an ordinance requiring vehicles to keep near the right-hand curb held properly refused, in view of substantial evidence supporting such allegation.

Appeal from St. Louis Circuit Court; M. Hartman, Judge.

"Not to be officially published."

Action by Ethel Pinteardd, administratrix of the estate of Scott Pinteardd, deceased, against G. Carleton Hosch. Judgment for plaintiff, and defendant appeals. Affirmed.

Koerner, Fahey & Young, of St. Louis, for appellant.

Kelley, Starke & Moser, of St. Louis, for respondent.

DAUES, J. This is an action for damages on account of personal injuries sustained by Scott Pinteardd, now deceased, resulting from a collision between an automobile in which Pinteardd was riding and one owned by the defendant and driven by William Jackson. Pinteardd died after the trial of this case. His death was suggested to this court, and Ethel Pinteardd, administratrix of the estate of Scott Pinteardd, having filed her appearance, this cause was revived in the name of the administratrix.

The petition alleges that on November 7,

1917, defendant's automobile, while being operated westwardly on Washington avenue at the intersection of Whittier street, in St. Louis, Mo., by defendant's agent, acting within the scope of his employment, collided with an automobile in which Scott Pinteardd was riding and seriously injured him. The negligence alleged was the failure to sound a horn or give other warning, the failure to keep a vigilant watch, or any watch, for this or other automobiles, the failure to slacken the speed of defendant's automobile as it approached the one in which Pinteardd was riding, and a failure to keep the automobile under control as it approached said street intersection, negligent operation of defendant's automobile at a high rate of speed, and a violation of section 1327 of article 12 of the Revised Code of St. Louis, which provides that a vehicle, except when passing a vehicle ahead, should keep as near the right-hand curb as possible.

Defendant's answer consisted of a general denial, followed by a plea of contributory negligence, alleging that plaintiff failed to exercise ordinary care by refusing to ride with the driver of the automobile in which he was riding, and in failing to exercise reasonable control over said driver; that said automobile was not equipped with proper signal devices and failed to sound a warning; that the automobile was not equipped with sufficient lights; and that the driver of said car negligently operated said automobile at excessive speed and failed to yield the right of way, in violation of the city ordinances. The answer also alleges that at the time of said accident the chauffeur in charge of defendant's car was not acting in the scope of his employment as a servant of appellant. The reply was a general denial.

The cause was tried on January 14, 1919, before the court and jury, resulting in a verdict and judgment for plaintiff in the sum of \$1,890. Defendant appeals.

The record discloses that on the night mentioned Pinteardd was riding southwardly on Whittier street in an automobile owned and driven by one Walter Latham. The machine was a right-hand drive; Latham, the driver, being on the right side on the front seat and plaintiff on the left in said seat. Latham was proceeding southwardly on Whittier street, and attempted to turn east into Washington avenue at the intersection of these streets. There is a "jog" in Whittier street at this point; Whittier street being further west on the north side of Washington avenue than it is on the south side. Pinteardd was not operating the machine, and it appears that he knew nothing concerning how to operate an automobile.

Plaintiff testified that when the automobile reached the intersection of these streets Latham turned eastwardly into Washington avenue, and in doing so passed to the south of the center on Washington avenue before

turning east; that the machine had practically turned east when he noticed that defendant's automobile was coming west on Washington avenue, about 100 yards away; that the defendant's car was running at a speed of about 35 to 40 miles an hour; that the defendant's car swerved left, that is to say, to the south side of Washington avenue, said car at the time going westwardly, and in doing so collided with the left-hand side of Latham's machine, and as a result of which plaintiff was seriously injured; and that the car in which plaintiff was riding was, at the time, traveling at a rate of about 7 miles an hour.

Witness Latham testified that he made the turn into Washington avenue on the right side (south side), driving south on the west side of Whittier street, until he passed the middle of the intersection of Washington avenue, and then turning to the east in Washington avenue; that defendant's car was going west at a terrific rate of speed, probably 40 miles an hour, and that same turned to the left to the south side of the street as if the car wanted to pass him to the south, or left; that he (Latham) stopped his car immediately and was then struck by defendant's car, and that at the time of the collision the car in which plaintiff was riding was about 3 feet from the curb on the south side of Washington avenue and about 12 feet east of Whittier street; that the lights on his own machine were put out by the collision and that defendant's car, after turning his (Latham's) car completely around, ran up on the south side of Washington avenue over a terrace.

Respondent in his brief urges but two assignments of error as the basis of his appeal. These are as follows:

First, that there was positive evidence that the defendant's car was not performing a service in behalf of the defendant at the time of the collision, and that there is no positive evidence by the plaintiff showing that the car was being used for such purpose on the occasion of this accident, and that therefore plaintiff failed to raise an issue as to the authority of Jackson to operate the car on this occasion as the agent of the defendant, and therefore the question of defendant's negligence should not have been submitted to the jury. He relies upon the case of Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123.

The second point made is that defendant's withdrawal instructions, eliminating from the consideration of the jury certain particular acts of negligence alleged in the petition, should have been allowed because of the failure of the evidence to support such averments.

[1] An examination of the record, as complemented by the respondent's additional abstract, clearly disposes of the first insistence against the appellant.

Plaintiff introduced evidence in the form of admissions made by the defendant tending to the effect that, at the time in controversy, Jackson was driving defendant's automobile on the business and in the service of the defendant, and that he was on that occasion actually engaged in returning to the defendant's home after having gone to the station to mail a special delivery letter for defendant.

This evidence took this form: Witness Latham testified that he heard the defendant, when called to the police station after the accident, admit that he had on this night sent Jackson to mail a special delivery letter for him so that it would leave on a 2 o'clock mail train; that he had awakened his servant, Jackson, who lived in his apartment, at 12 o'clock, and told him to take the automobile and go mail the letter; that he heard defendant ask Jackson at the police station why he was so late in returning, the accident having occurred about 2:00 or 2:30 o'clock a. m., and that Jackson explained to defendant that he had had a puncture and could not remove the tire and was compelled to go to a garage to have the work done; that defendant stated to Jackson that he also had had trouble with one of the tires on the same machine and that he supposed the trouble was due to rust. Latham further testified that he heard the defendant state substantially the same facts to the assistant circuit attorney on the following day.

Defendant admitted that he owned the automobile; that it was driven by Jackson; that Jackson was his employé as a janitor, but would drive his car on specific instructions; that he would drive it to have repairs made, and occasionally for defendant's wife; that on the night of the accident he did not tell Jackson to take the car; that he had bought a chauffeur license for Jackson, but as far as his "memory served him" he could not recall having made the admissions that he had sent Jackson in the machine to mail a letter for him on this night. His repeated answer to inquiry on this point was that he could not remember, or that he could not recall. He testified to having sent Jackson to mail a letter earlier in the evening, but that nothing was said about using the automobile.

Jackson testified that he possessed a chauffeur's license procured by the defendant; that he drove the machine when directed, and admitted that he had previously stated that he was, at the time of the collision, returning from a mission for the defendant, having mailed a letter for him, but that such statement then made was untrue.

Observably, plaintiff did not rely upon a presumption that Jackson was, at the time of the accident, acting within the scope of his employment, but rather sought to make his case by introducing positive evidence to make proof of the existence of such fact.

This evidence was in the form of admissions made by the defendant concerning this fact.

[2] Admissions of a party to a suit are as competent as any other form of evidence, and may be used as original testimony, and a cause of action may be proven by evidence of admissions on the part of the party sought to be held liable. In *Black v. Epstein*, 221 Mo. 286, 120 S. W. 754, our Supreme Court said:

There is a "well-recognized and hitherto unquestioned rule of evidence, that the declarations of a party to the suit may be given in evidence against him—a rule that hitherto has had no respect for time or place, always presuming that man's statements as against himself are truthful whether made in court or out of court, on oath or in casual conversation, orally or in writing, \* \* \* and that any statements which may have been made by a party to a suit against his interest, touching material facts, are competent as original testimony."

See *Smith v. Witton*, 69 Mo. 458; *Sills v. Burge*, 141 Mo. App. 148, 124 S. W. 605.

The admissions of defendant were used as original testimony by the plaintiff to prove his cause of action. The defendant, in his own behalf, denied this admission. Though the denial is uncertain and indefinite, we consider it here as a positive denial. This did not eliminate the evidence of such admissions from the plaintiff's case, but such denial created a question for the jury to determine. *Kirkwood v. Van Ness*, 61 Mo. App. 361; *Kirkpatrick v. Railroad Co.*, 211 Mo. 68, 109 S. W. 682.

[3] As was said in the *Kirkwood Case*, supra:

"The evidentiary force of an admission shown to have been made cannot be annulled by a subsequent assertion that it was not true when uttered. It is for the trier of the fact to say whether it was true or false when made."

The *Guthrie v. Holmes Case* is singly relied upon by the appellant. In that case plaintiff relied upon a presumption of employment to make a prima facie case. There was proof that the automobile was owned by the defendant and that the chauffeur was in his general employment. Thus the court said there was raised the presumption that the chauffeur, at the time, was acting within the scope of his employment, but that such prima facie case against the owner, resting upon such presumption, disappeared when there was evidence of the real facts to the contrary, that is to say, the presumption could not prevail upon appearance of evidence of real facts to the contrary.

It is unnecessary to dwell at length upon the distinction which obviously appears between that case and the case at bar. The case at hand relies upon evidence of facts brought into the case as admissions of the defendant that the chauffeur, at the time of

the accident, was acting within the scope of his employment.

As to the second and final insistence, that the defendant's withdrawal instructions, eliminating from the consideration of the jury particular acts of negligence alleged in the petition and not supported by the evidence, should have been allowed, we are of the opinion that the record shows substantial evidence supporting these specific allegations of negligence. There was but one instruction asked by plaintiff, and that related to the measure of damages.

[4] Defendant sought by this instruction to withdraw from the jury the allegation of the petition of the failure on the part of the driver, Latham, to sound a horn or give warning. Witness Latham gave testimony on this point as follows:

"Q. Now, tell the jury whether or not the driver of the car sounded any horn. A. No, sir."

[5] Likewise, it is said that defendant's instruction E should have been given. This instruction sought to withdraw the allegation that the defendant's agent drove the automobile on the left side of the street in violation of the ordinance requiring vehicles to keep as near as possible to the right-hand curb. The ordinance was introduced in evidence, and provides that a vehicle, except when passing a vehicle ahead, shall keep as near as possible to the right-hand curb. Plaintiff testified that Jackson had swerved to the left side of Washington avenue; "instead of him staying on his right side it looked like he lost control somewhere, and shot straight in, just as though he was going to run over a mad dog." Again, the following question and answer appears in plaintiff's testimony:

"Q. How far from your machine was he when you said he made that turn to come over on the south side of the street? A. Well, I guess about 15 feet from Whittier."

Witness Latham made the following answer to a question asked him:

"Q. All right. A. And when he got there at South Whittier, he shot like he wanted to go on the left of me to the south and I said to Scott, I says, 'Look at that fellow. What is the matter with him, crazy?' And I stopped my machine, and when I stopped my machine his car hit my running board."

Latham testified further that his automobile was 3 feet from the south curb of Washington avenue and 12 feet east of Whittier street, and that the defendant's car was south of the center line of Washington avenue, when the collision occurred. This, we think, answers fully all that is urged before us by defendant touching his refused instructions.

We think, therefore, there is substantial

evidence in the record to support the allegation of the petition that defendant's automobile was being operated south of the middle line of Washington avenue going westwardly, in violation of the ordinance adduced, and that the other assignments of negligence in the petition are amply sustained. Appellant makes no contention as to the injuries sustained by plaintiff, nor as to the amount of the verdict.

Finding no prejudicial error in the case, the judgment is affirmed.

ALLEN, P. J., concurs.  
BECKER, J., absent.

#### LATHAM v. HOSCH. (No. 16708.)

(St. Louis Court of Appeals. Missouri.  
July 8, 1921.)

1. Evidence  $\S$  222(1)—Admissions are competent.

Admissions of a party to a suit are competent, and may be used to prove the cause of action.

2. Trial  $\S$  140(1) — Denial of admissions makes a jury question.

Although defendant in his testimony denies that admissions were made by him, it is for the jury to determine whether the evidence of such admissions is true or false.

3. Trial  $\S$  174—Features of case on which plaintiff cannot recover withdrawn from jury.

The defendant is entitled to have every feature of the case on which plaintiff was not entitled to recover withdrawn from the jury when a request therefor is submitted in a clear and distinct withdrawal instruction, but such instruction must be unambiguous and leave the matters to be withdrawn in no doubt nor intermingled with other matters properly in the case.

4. Municipal corporations  $\S$  706(6)—Question of negligence in automobile collision case held for jury.

In an action for damages resulting from an automobile collision at a street intersection, held a question for the jury whether it was negligence, in the absence of any ordinance, for defendant's driver to operate his car on the left-hand side of the street under the circumstances of the case.

5. Trial  $\S$  174—Instructions withdrawing issue held properly refused.

An instruction in an automobile collision case asking the withdrawal of an allegation of negligence in driving defendant's automobile on the left side of the street contrary to ordinance held properly refused, where not referring to the ordinance with sufficient definiteness, and where comprehending an allegation of negligence which was properly before the jury, and the jury could not be referred to the petition to ascertain what particular ordinance defendant was alleged to have violated.



**6. Municipal corporations ¶706(7)—Plaintiff in automobile collision case held not negligent as a matter of law.**

In an action for damages resulting from an automobile collision at a street intersection, evidence held to show that plaintiff was not guilty of contributory negligence as a matter of law.

**7. Appeal and error ¶207—Appellant must request trial court to rebuke counsel for improper remarks or ask discharge of jury.**

Where appellant objected to counsel's argument, and the court merely directed the jury to disregard any remarks not based on the evidence, whereupon appellant failed to request that the court rebuke counsel or administer a more severe reprimand, and did not ask for the discharge of the jury, he cannot complain on appeal.

Appeal from St. Louis Circuit Court; Frank Landwehr, Judge.

Action by Walter Latham against G. Carleton Hosch. Judgment for plaintiff, and defendant appeals. Affirmed.

Koerner, Fahey & Young, of St. Louis, for appellant.

Kelley, Starke & Moser, of St. Louis, for respondent.

DAUES, J. This is an action brought by plaintiff for damages on account of a collision between an automobile owned by the defendant and one owned by the plaintiff, in which collision it is alleged plaintiff's machine was damaged. The collision occurred on November 7, 1917, at the intersection of Washington avenue and Whittier street, in the city of St. Louis, and is the same accident involved in the personal injury suit of Ethel Pinteardd, Administratrix of the Estate of Scott Pinteardd, v. G. Carleton Hosch (No. 16653) 233 S. W. 81, decided by this court at this term in an opinion not yet [officially] reported.

The allegations of negligence in this case are that the driver of the defendant's car negligently failed to sound a horn, failed to keep a vigilant or any watch for automobiles at said intersection of said streets, or reduce the speed of his machine, or have same under control, operating it at a high and dangerous rate of speed, and, finally, that he negligently operated said machine south to the center line of Washington avenue in violation of section 1327 of an ordinance of the city of St. Louis, which provides that a vehicle, except when passing a vehicle ahead, shall keep as near the right-hand curb as possible.

The answer is a general denial and a plea of contributory negligence. The reply is a general denial. The cause was tried on March 24, 1919, before the court and jury, and resulted in a verdict of \$322.30 in favor of the plaintiff. Defendant appeals.

Our opinion in the case of Pinteardd v.

Hosch (No. 16653) contains a more complete statement of the facts and circumstances attending this accident, as contained in that record. The record in this case discloses that the plaintiff owned an automobile and on the night of the accident was riding with one Scott Pinteardd in his machine, intending to take him home from his work. He drove south on Whittier street to the intersection of Washington avenue, and after making the turn into Washington avenue he discovered defendant's car coming west on Washington avenue about 100 feet away, when it swerved to the left of said street at a terrific rate of speed, striking plaintiff's automobile and causing it to be damaged. Plaintiff and Scott Pinteardd were in the front seat of plaintiff's car, and defendant's car was driven by one William Jackson.

Appellant assigns as error: First, that there is not sufficient evidence in the case to raise an issue in behalf of the plaintiff as to whether or not the automobile was being operated on the occasion in question by the defendant's employé Jackson, in the scope of his employment; second, that the court erred in refusing to give a withdrawal instruction requested by the defendant, by which certain allegations of negligence were to be withdrawn from the consideration of the jury; third, that plaintiff should have been held guilty of contributory negligence as a matter of law; and, fourth, that certain remarks of counsel for plaintiff to the jury were improper.

The first complaint of appellant is that there is not sufficient evidence in the case to raise an issue in behalf of plaintiff as to whether defendant's automobile was being operated on the occasion in question by the driver, Jackson, for and in behalf of the defendant. We have discussed this question in the Pinteardd Case, and therefore will not again review authorities under that point.

It is enough to say that the case of Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123, relied upon by counsel, is not in point. The plaintiff here does not rely upon any presumption that Jackson was acting within the scope of his employment as the chauffeur for defendant, but, on the contrary, plaintiff adduced evidence in the nature of admissions made by the defendant tending to prove that on the occasion in question Jackson was operating the defendant's automobile on the business and in the service of the defendant, in that on said occasion the employé, Jackson, was returning in the defendant's automobile to the defendant's home after having gone to the station to mail a special delivery letter for and under the direction of the defendant.

[1, 2] Admissions of a party to a suit are competent, and they may be used by plaintiff in proving his cause of action. Black v.

Epstein, 221 Mo. 286, 120 S. W. 754; Smith v. Witton, 69 Mo. 458. And although the defendant in his testimony denied that such admissions were made by him, it is for the jury to determine whether the evidence of the admissions of defendant is true or false. Kirkwood v. Van Ness, 61 Mo. App. 361.

It is next argued that the court erred in refusing to give the withdrawal instruction requested by the appellant.

Plaintiff's petition alleges the violation of a certain specific duty under the common law, and, further, the violation of an ordinance of the city of St. Louis, to wit, section 1327 of the Revised Code of St. Louis, which, in effect, provides that a vehicle, except when passing a vehicle ahead, shall keep as near the right-hand curb as possible.

The plaintiff offered only one instruction, and that was on the measure of damages, and submitted the question of defendant's negligence without direction by the court. The refused instruction is in the following language:

"The court instructs you that the plaintiff in his petition charges that the defendant was guilty of negligence in the following particular, to wit: Plaintiff further states that defendant's said automobile, while being operated westwardly on said Washington avenue at or near its intersection with said Whittier street, was being negligently operated south of the center line of the said Washington avenue in violation of said ordinance."

"As to this charge of negligence the court instructs you that under the law and the evidence in this case the plaintiff is not entitled to recover, and you will therefore not consider this charge of negligence in arriving at your verdict."

The ordinance was not introduced in evidence.

Observably, this instruction sought to take from the consideration of the jury the allegation in the petition that the machine was negligently operated south of the center line of Washington avenue, and is not confined to the allegation of ordinance violation alone. To have given this instruction would have taken from the case everything referring to the alleged negligence of defendant's agent in driving and operating the car south of the center line of Washington avenue, or on the left-hand side of that street instead of the right-hand side.

[3] It is true that defendant is entitled to have every feature of the case upon which plaintiff was not entitled to recover withdrawn from the jury, when such request is submitted in a clear and distinct withdrawal instruction. Rosemann v. U. R. Co., 197 Mo. App. 337, 194 S. W. 1088; Peterson v. U. R. Co., 183 Mo. App. 715, 168 S. W. 254; Am. Auto. Ins. Co. v. U. R. Co., 200 Mo. App. 317, 206 S. W. 257. Yet such withdrawal instruction must be clear and unambiguous and leave the matters to be withdrawn in no

doubt nor intermingled with other matters properly in the case. Kendrick v. Ryus, 225 Mo. 150, 123 S. W. 937, 135 Am. St. Rep. 585; Am. Auto. Ins. Co. v. U. R. Co., 200 Mo. App. 317, 206 S. W. 257.

[4] The reference in the instruction to the ordinance is very indefinite; it does not specify any particular ordinance contained in the pleadings and applies to the defendant's alleged negligence in operating the automobile on the left-hand side of the street. It was a question for the jury whether it was negligence, in the absence of any ordinance, for the driver of defendant's car to operate same on the left-hand side of the street under the circumstances of this case. The allegation that the defendant's automobile was being negligently operated westwardly on Washington avenue south of the center line of said street was substantially supported by the evidence, and certainly was not subject to be withdrawn from the jury.

[5] We think, therefore, that the instruction does not refer to the ordinance with sufficient definiteness, and that same comprehends an allegation of negligence contained in the petition which was properly before the jury. It is hardly necessary to point out that the jury could not be referred to the petition to ascertain what particular ordinance defendant was alleged to have violated. We are of the opinion that no error was committed in refusing this instruction.

[6] The next insistence is that plaintiff was guilty of such contributory negligence as would bar his recovery as a matter of law. The record discloses no basis for such position. Under the evidence, the question of contributory negligence of the plaintiff is clearly one for the jury. There was evidence tending to show that the plaintiff was driving south on Whittier street with his right-hand wheels about 3 or 4 feet east of the west curb, running at a speed of about 8 miles an hour when he approached Washington avenue; that when he reached the south line of Washington avenue he looked both ways and saw defendant's machine approaching from the east about 100 feet away; that plaintiff started to turn into Washington avenue at about 4 or 5 miles an hour; that defendant's car was approaching at a rate of about 40 miles an hour; that defendant swerved to the south side of the street in an apparent attempt to cut to the left of the plaintiff's car; that when plaintiff saw this danger he stopped his machine about 10 feet west of the east line of West Whittier street and as close to the south curb of Washington avenue as he could get. It cannot be said that as a matter of law plaintiff was guilty of contributory negligence.

[7] It is finally urged that the judgment should be overturned because of remarks made by the plaintiff's counsel to the jury.

These remarks and the court's action on same follow:

"Mr. Kelley: \* \* \* He imported this fellow from Atlanta. We haven't got enough colored fellows here. He goes down to Atlanta to bring him up here—

"Mr. Fahey: Object to that remark—

"Mr. Kelley: Don't take this off my time.

"The Court: Your time is up now. Just confine your remarks to the evidence."

Then followed defendant's counsel's argument to the jury. Thereupon Mr. Kelley, counsel for plaintiff, made his closing argument to the jury, and in the course of said argument the following proceedings were had:

"Mr. Kelley: \* \* \* To escape the small sum of \$322.30 he will come in here and make the exhibition here of himself you have seen him do on the stand. I ask you to give us the amount of damages we have proven, \$322.30, and then people will be a little bit more careful, and so will Hosch.

"Mr. Fahey: Object to that and save my exceptions to those remarks. That is two or three times he has made that remark.

"The Court: The jury will disregard any remarks of counsel that are not based on the evidence. (To which action and ruling of the court defendant, by its counsel, then and there excepted and still continues to except.)"

It does not appear that defendant requested the court to rebuke counsel or to administer a more severe reprimand, or asked for the discharge of the jury. Under our practice, if an objection is made to the argument of counsel, and the court fails to specifically rule upon same to the extent deemed necessary by the aggrieved party to cure such injurious remarks or conduct, it is the duty of the objecting counsel to request that an additional or more severe reprimand and rebuke be administered, and, if it is deemed necessary to discharge the jury, such request must be made. Having failed to request further action of the court below, no complaint can here be made on that point. *McKinney v. Lumber Co.*, 198 Mo. App. 386, 200 S. W. 114; *Harriman v. Dunham et al.*, 196 S. W. 443; *State v. Harrison*, 263 Mo. 642, 174 S. W. 57.

Finding no prejudicial error in the case, the judgment is affirmed.

ALLEN, P. J., concurs.

BECKER, J., absent.

**YOUNG et al. v. HOME TELEPHONE CO.**  
et al. (No. 14067.)

(Kansas City Court of Appeals. Missouri.  
July 7, 1921.)

**I. Appeal and error**  $\S$  888(1)—Amendment by Court of Appeals after final judgment below not authorized.

Rev. St. 1919,  $\S$  1274, authorizing the court, at any time before final judgment, to amend any

record, pleading, process, etc., does not authorize Court of Appeals, after transfer of a case to it by the Supreme Court, to amend the petition on plaintiff's motion by striking out part of the prayer; the judgment appealed from having been a "final judgment."

**2. Appeal and error**  $\S$  888(1)—Statute permitting amendment of pleadings after final judgment authorizes only court which enters judgment.

Rev. St. 1919,  $\S$  1277, providing that after final judgment rendered the court may, in furtherance of justice, amend any record, pleading, etc., in affirmance of such judgment, refers solely to the court in which the final judgment was entered, and not to courts of appeal.

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Suit by Albert Young and another against the Home Telephone Company and another. From judgment for defendants, plaintiffs appeal. Affirmed.

See, also, 201 S. W. 635.

Pierre R. Porter and Frank Titus, both of Kansas City, for appellants.

Guthrie, Conrad & Durham, Battle McCordle, and Gleed, Palmer & Gleed, all of Kansas City, and D. A. Frank, of Dallas, Tex., for respondents.

ARNOLD, J. This is a suit brought against defendants upon an alleged implied contract for use of plaintiffs' land in the operation of certain telephone lines.

The petition alleges that prior to 1913 defendants, acting jointly and severally, entered upon the lands in question and constructed over and across same a telephone line, consisting of seven poles, with wire cross-arms and other usual appliances, and that defendants have maintained said line continuously until the filing of this suit; the defendants entered upon said land for the purposes stated, without condemnation proceedings, and have, at no time, compensated plaintiffs for the construction and maintenance of said line; that the said acts of defendants in so constructing and maintaining the said line were in violation of the Constitution of Missouri, which forbids the taking of private property without due process of law and compensation, and of amendments 5 and 14 of the Constitution of Missouri; that plaintiffs made no protest to said maintenance by defendants, thinking the line was just a neighborhood line; that in 1913 plaintiffs served notice on defendants to the effect that defendants had placed said poles and lines on said lands without the knowledge or consent of plaintiffs and demanded that same be removed, unless defendants paid plaintiffs \$5 per month per pole for the use of said lands; that notwithstanding said notice, defendants elected to continue "in their user of

said easement, and thereby agreed to pay plaintiffs by way of compensation for their (defendants') said joint and several continued use of the same and enjoyment of the revenue and profits therefrom and following said 9th day of April, 1913, the sum of \$35 per month during such continued use and enjoyment by them, \* \* \* defendants declining and failing to remove their said chattels and equipment from said lands as requested."

November 13, 1918, defendant Missouri & Kansas Telephone Company filed a separate demurrer to the petition, alleging that same does not set forth facts sufficient to constitute a cause of action in favor of plaintiffs and against defendant. January 24, 1919, defendant the Home Telephone Company filed its separate demurrer, and for grounds thereof states that said petition fails to state a cause of action in favor of plaintiffs and against defendants, and for the further reason that the petition shows upon its face that the matters therein set out are res adjudicata. On January 30, 1919, both of said demurrers were sustained and the petition dismissed at plaintiffs' cost.

Plaintiffs appealed to the Supreme Court, which said court sends the case here by mandate, holding that jurisdiction does not lie in that court because of the amount involved, being not to exceed \$4,000.

[1] March 1, 1919, plaintiffs filed a motion in this court, asking leave to amend their petition by striking out part of the prayer therein as follows, to wit:

"For the sum of \$35 for each month from the period beginning the 9th day of April, 1913, to date of judgment herein, with interest upon each several monthly installment from the time of its falling due and payable at 6 per cent. per annum until paid, together with all costs herein expended."

In support of said motion, plaintiffs cite section 1274, Rev. Stat. 1919, which reads:

"The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other proceedings," etc.

Learned counsel for plaintiffs obviously fail to construe properly the statutory language as to "final judgment." Anderson's Dict. of Law, p. 460, defines the term thus:

"It has long been well settled that a judgment or decree, to be final, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance in the appellate court the court below would have nothing to do but to execute the judgment or decree already rendered. It has not always been easy to decide when decrees in equity are final, within this rule, and there may be some apparent conflict in the cases on the subject, but in the common-law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought before the Supreme Court on a writ of error."

Plaintiffs cite section 1277, Rev. Stat. 1919, to the effect that—

"After final judgment rendered in any cause, the court may, in furtherance of justice, and on such terms as may be just, amend in affirmance of such judgment any record, pleading, process, entries, returns and other proceedings in such cause," etc.

[2] It is hardly necessary to state that this action refers solely to the court in which the final judgment was entered, and not to courts of appeal. The courts of last resort in this state uniformly have so construed this rule in accordance with the above that no citations of authority are necessary.

For reasons herein stated, the motion to amend must be overruled.

In considering the ruling of the trial court in sustaining defendants' demurrers to the petition, we need but say that a similar suit was instituted by plaintiffs on August 26, 1918, against the defendants herein. The petition in the former case was not materially different from the one in the case at bar. In the former suit demurrer to the petition was sustained by the trial court, and the ruling was affirmed by this court. *Young v. Home Telephone Co.*, 201 S. W. 635. The questions involved in the present case are the same as those determined in that case.

A careful consideration of the instant case fails to convince us that the holdings of this court in the former case should, in any way, be changed or modified.

The judgment is affirmed.

**KRIBS v. UNITED ORDER OF FORESTERS. (No. 17055.)**

(St. Louis Court of Appeals, Missouri.  
Feb. 8, 1921. Rehearing Denied  
July 15, 1921.)

1. Insurance §711, 791(1)—Certificate issued by foreign insurance company held as assessment insurance contract.

Though insurer was a foreign fraternal order authorized to do business within the state, certificates issued by it, whereby it agreed to pay only the amount realized from one assessment on its members holding certificates of that class, were contracts of insurance on the assessment plan within Rev. St. 1919, § 6155, requiring such certificates to specify the exact amount which the insurer thereby promises to pay, so that insurer is liable for the face of the certificates, though it exceeded the amount realized from one assessment.

2. Insurance §809—Misrepresentations no defense to assessment contract insurance unless premiums are returned.

Rev. St. 1919, § 6145, prohibiting the defense of misrepresentations in obtaining the insurance unless insurer returns or tenders the premiums received, applies to a contract of assessment insurance issued by a foreign fraternal benefit society, in view of section 6164.

3. Appeal and error §1052(8), 1068(3)—Errors relating to defense not maintainable are not prejudicial to defendant.

Where insurer was not entitled to rely on misrepresentations in procuring the insurance as a defense, errors in the admission of evidence or in the instructions relating to such defense are not prejudicial to defendant.

**On Motion for Rehearing.**

4. Insurance §688—Fraternal benefit society assessment contract is subject to requirement of return premiums before alleging misrepresentations.

Though fraternal beneficiary associations are exempted from provisions of Rev. St. 1919, § 6145, requiring return of premiums as a condition precedent to defending for misrepresentations in procuring the insurance, such associations are subject to that section with reference to certificates of assessment insurance issued by them.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

"Not to be officially published."

Action by Henry Kribs against the United Order of Foresters. Judgment for the plaintiff, and defendant appealed to the Supreme Court, which transferred the cause to the Court of Appeals (222 S. W. 1005). Affirmed.

Douglas W. Robert, of St. Louis, for appellant.

Conrad Paeben, of St. Louis (James T. Roberts, of St. Louis, of counsel), for respondent.

ALLEN, J. This cause has been tried five times in the circuit court, and this is its third appearance in this court. On the first trial plaintiff suffered a nonsuit, and on appeal to this court the judgment was reversed, and the cause remanded for a new trial. *Kribs v. United Order of Foresters*, 171 Mo. App. 87, 153 S. W. 571. The second trial in the circuit court resulted in a verdict and judgment for the defendant, and on plaintiff's appeal to this court that judgment was reversed, and the cause remanded. See *Kribs v. United Order of Foresters*, 191 Mo. App. 524, 177 S. W. 766. It appears that on the third trial below there was a verdict for plaintiff which was set aside by the trial court, and that a fourth trial resulted in a hung jury. On the fifth and last trial in the circuit court there was a verdict and judgment for plaintiff in the sum of \$4,250.50, and the defendant appealed to the Supreme Court. The Supreme Court, holding that the jurisdiction of the appeal was in this court, transferred the cause here.

The defendant is a corporation organized under the laws of the state of Wisconsin as a fraternal order, and as such was licensed to transact business in this state. The action is on three certificates of life insurance for \$1,000 each, the petition being in three counts. The certificates were issued by the defendant to the insured, William T. Kribs, on or about November 1, 1908; the plaintiff herein, Henry J. Kribs, and one Lizzie Gibson, uncle and aunt respectively of the insured, being designated as beneficiaries therein. The certificates are identical in form, and in each defendant agrees to pay to the beneficiaries therein named, on the death of the insured, "the net amount realized by said order in its term insurance fund from one assessment upon all its members holding limited term benefit certificates on its natural premium plan, but not exceeding the sum of one thousand dollars, less such sums, if any, that may have been paid to such member on account of disability benefits."

All of the assessments due and payable upon the certificates were paid by the insured to the date of his death on February 18, 1910. Upon demand on defendant for the payment of the insurance vouchsafed by the certificates, defendant declined to pay more than the sum of \$380.60 upon the three certificates; this being, as defendant claimed, the net amount realized by one assessment upon all of its members holding like certificates. Thereupon Lizzie Gibson assigned her interest in the certificates to the plaintiff herein, who instituted this action.

Defendant, by its answer, pleads that it is a fraternal benefit association; that in no event is plaintiff entitled to recover more

than the amount of one assessment on all of its members holding like certificates, which, it is said, is \$380.60. And the answer further sets up in defense that the certificates were obtained by fraudulent misrepresentations on the part of the insured, in that he made certain false answers in his application for the insurance, by reason whereof the certificates were null and void ab initio.

The errors assigned on this appeal are to the action of the trial court in overruling defendant's demurrer to the evidence, in giving instructions Nos. 1 and 2 of its own motion, in giving instruction No. 5 at plaintiff's request, in refusing to give instructions C, D, E, F, G, H, I, and J offered by defendant, and in admitting certain testimony over defendant's objections.

It is unnecessary to consider these assignments of error separately and in detail since the determination of certain questions in the case will dispose of all of them.

[1] In the first place, as to the character of this insurance, we may say that, although it appears that the defendant is a foreign fraternal order authorized to do business in this state, nevertheless on former appeal this court, in an opinion by Norton, J., held that the certificates here involved are contracts of insurance on the assessment plan; that, with respect to this species of insurance the defendant was engaged in issuing insurance contracts on the assessment plan. See *Kribs v. United Order of Foresters*, 191 Mo. App. 524, 177 S. W. 766. As we said on the former appeal, the character of the insurance involved is not to be determined by the character of the defendant corporation, but by the nature of the contracts of insurance which it issued. And because it appeared that, under the terms of the certificates and defendant's by-laws, the amount to be paid on each certificate was made to depend upon the collection of an assessment on persons holding similar contracts, we held that these contracts are to be deemed contracts of insurance on the assessment plan, and subject to the provisions of section 6950, Rev. Stat. 1909 (section 6155, Rev. Stat. 1919), which, as section 7901, Rev. Stat. 1899, was in force at the time of the issuance of these certificates. See *Kribs v. United Order of Foresters*, 191 Mo. App. 524, loc. cit. 541 et seq., 177 S. W. 766.

We adhere to the conclusion which we reached touching this matter on said former appeal. We see no reason for disturbing that ruling. As said in the opinion on that appeal (191 Mo. App. 524, 177 S. W. 766), it appears that the defendant, though conducting a fraternal insurance business on the whole life plan, erected within the order a special class of insurance known as its limited term insurance on the natural premium plan, the certificates in suit being of that class, and that the certificates issued by de-

fendant on that plan were, under our law, contracts of insurance on the assessment plan. It is unnecessary to set out at length the reasons for that ruling, which fully appear from the opinion of Norton, J., supra. Nor do we regard that holding as inconsistent with the recent decision of this court in *Wilson v. Brotherhood of American Yeomen*, 223 S. W. 992; for the certificates involved in the case before us were, as said, issued in 1908, before the amendment of 1909 (Laws 1909, p. 371), and before the enactment of the fraternal insurance law of 1911 (Laws 1911, p. 284 et seq.); whereas the certificate in the *Wilson* Case was issued in 1915, and was consequently affected by said amendment and by the act of 1911. For the reasons noted in the opinion in the *Wilson* Case, we think that decision therein is without influence here. And since, as we held on the last appeal, and as we now hold, these certificates are to be taken as contracts of insurance on the assessment plan, our statute expressly requires that they specify the exact amount of money which the insurer thereby promises to pay; the statute becoming a part and parcel of each contract. And in this view, as held on the last appeal, if plaintiff prevails, he is entitled to recover \$1,000 and interest on each certificate. *Kribs v. United Order of Foresters*, 191 Mo. App. loc. cit. 549, 177 S. W. 766.

What we have said disposes of the contention of defendant that, if liable at all, it is only liable for \$380.60. Furthermore, the assignment of error as to the ruling below on defendant's demurrer to the evidence is obviously without merit.

This disposes also of the assignment of error relating to the giving of plaintiff's instruction No. 5, which simply told the jury, in effect, that if they found for plaintiff then to return a verdict for \$1,000 and interest on each count. Likewise what we have said disposes of the assignments of error as to the refusal of the court to give instructions C, D, and E offered by defendant. By the first of these, instruction C, it was sought merely to tell the jury that defendant is a fraternal association and has complied with the laws of this state. There was no error in refusing such instruction. Instructions D and E proceeded upon the theory that the recovery was limited to \$380.60. For the reasons stated above, these were properly refused.

[2] The other assignments of error pertain to the giving of instructions Nos. 1 and 2, given by the court of its own motion, and the refusal of certain instructions offered by defendant. All of these instructions pertain to the defense of misrepresentation set up by defendant. As to this defense, however, defendant is met with the proposition that, since these certificates are contracts of insurance on the assessment plan, defendant

was and is precluded from asserting such defense by reason of the fact that defendant has not tendered back the premiums paid, and has not, at or before the trial, deposited such premiums in court for the benefit of the plaintiff. Touching this matter, see section 6940, Rev. Stat. 1909 (section 6145, Rev. Stat. 1919), which provides as follows:

*"Defense in Case of Suits.*—In suits brought upon life policies, heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiffs, the premiums received on such policies."

The last-mentioned section is a part of article 2 of chapter 61, Rev. Stat. 1909, on "Life and Accident Insurance"; but by section 6959 of article 3 of chapter 61, Rev. Stat. 1909 (section 6164, Rev. Stat. 1919)—said article 3 dealing with insurance on the assessment plan—it is expressly provided that all foreign companies doing business in this state under the provisions of that article shall be subject to the provisions of certain sections, including section 6940, *supra*.

[3] Since defendant has not tendered back the premiums, or deposited them in court for the benefit of plaintiff, and since defendant, in issuing these certificates, was doing business on the assessment plan, and hence was subject to our law relating to insurance on the assessment plan, the defense of misrepresentation in obtaining the certificates was not open to the defendant. Consequently defendant is in no position to urge error in the giving or refusing of instructions relating to such defense. Such errors, if any, were harmless. And likewise, since the testimony said to have been erroneously admitted pertained to the defense of misrepresentation, defendant cannot complain of the admission thereof.

These views result in the affirmance of the judgment, and it is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

On Motion for Rehearing.

ALLEN, P. J. [4] In connection with its motion for rehearing the appellant refers to the decision of the Supreme Court in *State ex rel. Brotherhood of American Yeomen v.*

*Reynolds et al.*, 229 S. W. 1057, wherein the Supreme Court, on certiorari, quashed the record of this court in *Wilson v. Brotherhood of American Yeomen*, 223 S. W. 992. In the *Wilson Case* we held that the defense of misrepresentation on the part of the plaintiff in securing the insurance was not available to the defendant for the reason that the defendant had not returned or tendered back the premiums received by it. This ruling of ours did not proceed upon the theory that fraternal beneficiary associations are within the purview of section 6940, Rev. Stat. 1909 (section 6145, Rev. Stat. 1919); for obviously such associations are exempted from the provisions of that statute. But our ruling in the *Wilson Case* proceeded upon the theory that, in the absence of any statute, it was incumbent upon the defendant to return or tender the premiums as a condition precedent to the right to make such defense. *Wilson v. Brotherhood of American Yeomen*, 223 S. W. 992, and authorities there cited. However, the matter is not of particular consequence here. It is obvious, we think, that the decision of the Supreme Court in the *Wilson Case* on certiorari cannot affect the question presented in the case before us, unless it be that we are wrong in holding that in issuing the certificates here sued upon the defendant was writing insurance upon the assessment plan. If we are correct in our ruling in that matter, then we think that with respect to this insurance the defendant is to be treated as an assessment company. And it cannot be disputed that insurance companies doing business on the assessment plan are expressly made subject to the provisions of said section 6145, Rev. Stat. 1919. It is true that this defendant is a fraternal order, but, as held on the former appeal in this case (*Kribs v. United Order of Foresters*, 191 Mo. App. 524, 177 S. W. 766), since it appears that the amount to be paid on each of these certificates is made to depend upon the collection of one assessment on persons holding similar contracts, we are of the opinion that, with respect to this particular class of insurance in which the defendant was engaged, it was doing the business of an assessment company and should be here dealt with accordingly.

With the concurrence of the other Judges, the motion for rehearing is overruled.

**QUINT v. LOTH-HOFFMAN CLOTHING CO. (No. 16655.)**

(St. Louis Court of Appeals. Missouri. July 11, 1921. Rehearing Denied July 20, 1921.)

**1. Account stated §19(3)—Evidence insufficient to establish between salesman and employer.**

In an action by a salesman to recover commissions due him, less deductions on his drawing account, evidence held not to have conclusively established a stated account between salesman and defendant employer on either of two occasions, the question of the existence of such an account being for the jury under the evidence.

**2. Account stated §1—"Account stated," a new contract involving a promise.**

A stated account is a new contract, and involves a meeting of the minds of the parties, an essential element being a promise, either express or implied, to pay the balance struck and agreed upon as correct.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

**3. Trial §141—Only where evidence undisputed is direction of verdict warranted.**

Only where the evidence is undisputed is the court warranted in instructing the jury to return a verdict for plaintiff in an action on an account stated.

**4. Account stated §19(3)—Evidence held not to show conclusively there was account stated on specified occasion.**

In an action by a salesman to recover commissions due him less deductions on his drawing account, evidence held insufficient to show conclusively that there was an account stated between the parties at a time when plaintiff agreed to pay a part of the drawing account of his brother, also a salesman for defendant, on express condition that defendant would allow him interest on his own account.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Leo Quint against the Loth-Hoffman Clothing Company. From judgment for plaintiff, defendant appeals. Reversed, and cause remanded.

Sale & Frey and David Goldsmith, all of St. Louis, for appellant.

Thomas S. McPheeters, of St. Louis, for respondent.

**BIGGS, C.** This action upon an account stated resulted in a verdict and judgment for plaintiff for the full amount claimed by reason of a peremptory instruction given by the lower court of its own motion to the effect that the verdict of the jury must be for the plaintiff for the amount sued for. Defendant appeals, asserting that the action of the

court was not justified under the facts of the case as disclosed by the evidence.

The petition was in two counts, one based on a stated account, and the other on an open account. At the close of plaintiff's case he dismissed his claim upon the open account, and stood upon the first count of the petition, which is based upon an account alleged to have been stated on or about October 31, 1917, in the sum of \$1,419.82.

Defendant's answer was a general denial, coupled with a special defense to the effect that an account was stated between plaintiff and defendant in April, 1918, and by that stated account it was agreed that defendant was indebted to plaintiff in the sum of \$1,204.47, and it is alleged that defendant had paid said sum in full satisfaction of plaintiff's claim.

The plaintiff was employed by defendant as a traveling salesman under a contract by which he received a commission of 8 per cent. on all goods sold by him and delivered by the defendant. The plaintiff's brother, Harold Quint, was also employed by defendant under the same character of contract. In January, 1918, after the plaintiff had returned from the road where he had been selling defendant's goods during the fall season of 1917, and after his brother Harold Quint had left the employ of the defendant, and while the plaintiff was in the office of the defendant company, its president, Mr. Loth, handed him a statement of his account dated October 31, 1917, and which covered plaintiff's commissions earned during the fall of 1917. This account was in the ordinary form showing credits and debits, and it appeared therefrom that there were commissions due the plaintiff amounting to the sum of \$3,308.63, from which the plaintiff had drawn \$1,888.81, leaving a balance due of \$1,419.82. According to plaintiff's testimony Mr. Loth, at the same time that he gave him a statement of his account, also handed him a statement of his brother's account, which showed that his brother was overdrawn to the extent of \$590, which account plaintiff testifies he sent to his brother, who was in the army, and that no conversation took place at that time between Mr. Loth and the plaintiff with reference to the payment of his brother's account. Mr. Loth testified that on this occasion he handed the plaintiff his statement and also a statement of his brother's account, and said to him:

"Here is a statement of your account, and also Harold's account; the amount that Harold has overdrawn I will deduct from the amount that is owing to you, and I will give you a check for the balance."

Mr. Loth testified that the plaintiff then said:



"I am going away and I don't want any money; leave it until I get back."

It was uncontradicted that the plaintiff thereafter continued to work for the defendant and made another trip on the road in the spring of 1918, and that defendant mailed to him a check for \$828.94, which was the amount of the plaintiff's account less the overdraft of his brother, which check was returned to the defendant for the reason that it was insufficient, as the plaintiff claimed that he had nothing to do with his brother's account. Nothing more was done about the matter until plaintiff again returned to the defendant's office in April, 1918, when there was another conversation between the plaintiff and the president of the company. According to plaintiff's version of this conversation, Mr. Loth said to him that he had charged the overdraft of his brother Harold to his account, and that plaintiff told him he had nothing to do with his brother's account; that he refused to pay the overdraft, and that Mr. Loth then said to him that there were some personal items on Harold's account amounting to \$215.35 which the defendant company had paid out for Harold on account of clothes, doctor bills, etc., and which had nothing to do with the business of the defendant, and which Mr. Loth said the company should not stand. Plaintiff testified that in reply to that proposition he said:

"Well, I will tell you, I won't be small about this matter. I will stand those personal items, providing you pay 6 per cent. on the money that has been due me since October 31, 1917."

Plaintiff testified that Mr. Loth did not say anything, but that he went into the office and returned with two checks, one for \$828.94, and being the same check that had been previously sent to plaintiff and returned by him, and the second check for \$375.53, making a total of \$1,204.47; that defendant also had a statement of account, on which he had entered the item \$215.35, being the personal items on the account of Harold Quint, and which showed a balance due plaintiff of \$1,204.47. Plaintiff testified that these checks were given to him; that after looking at the check and the account he found that it did not include the interest on his total account; that he then went into the office of Mr. Loth and said:

"Mr. Loth, this check does not include interest;" and he said, "Well, it is only a small matter; I will think it over and put it on your next statement;" and I said, "No; I wouldn't care to have it that way; I want it on this statement, and settle this now;" and he refused to do it. So I laid both the checks on his desk and walked out of the office."

Mr. Loth testified with reference to this conversation in April, 1918, that he told the plaintiff that Mr. Hoffman, the uncle of plain-

tiff, and who was connected with the business, had told him that the firm would not lose anything on account of Harold Quint as a salesman; that plaintiff, Leo Quint, would make good Harold's losses, and that he said to plaintiff that, as to the personal items that had been paid for Harold in the way of doctor bills, tailor bills, insurance, etc., he wouldn't expect the firm to stand for these items, and that plaintiff then said: "What does that amount to?" and that the witness then gave him an itemized account amounting to \$215.35, and that plaintiff then said: "I will pay this portion of it, and I will not pay any more." The witness then testified that he drew an additional check for \$375.53, and handed this check, together with the check for \$828.94, making a total of \$1,204.47, and also a statement of the account to plaintiff, which he accepted and went out of the inner office of the company; that shortly thereafter the plaintiff came into his (Mr. Loth's) office and stated that he wanted interest on his money, and that the witness told him it was a very small amount, and that he would consider it, but that he finally turned it down, and plaintiff brought back the checks and laid them on his desk, and said he would not pay any of his brother's accounts.

[1] Plaintiff asserts that the foregoing evidence shows conclusively that an account was stated between the parties by the first conversation referred to in January, 1918. Defendant denies this, and contends that the evidence conclusively shows that an account was stated by the parties by the second conversation and agreement made in April, 1918, followed by a payment thereof. We do not think the position of either party sound, in that the evidence did not conclusively establish a stated account between these parties on either occasion.

[2] A stated account is a new contract, and involves a meeting of the minds of the parties. One of its essential elements is a promise, either express or implied, to pay the balance struck and agreed upon as being correct. It has been defined thus:

"An agreement, between parties who have had previous transactions of a monetary character, that all of the items of the accounts representing such transactions are true, and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance." 1 Am. & Eng. Ency. Law (2d Ed.) p. 437.

In Abbott's Trial Evidence (2d Ed.) p. 568, it is stated:

"If defendant's express assent to the account is proved, he may prove in his own favor all that was said by him in the same conversation that in any way qualifies or explains the statement already in evidence, or modifies the use that plaintiff might otherwise make of it. \* \* \* If the express promise or assent is

not shown by direct evidence, the account is not conclusive, but only shifts the burden of proof. The inference of assent may be repelled not only by direct evidence of objection made before the account was rendered, or even after acting on it, but by any circumstances tending to a contrary conclusion."

In the case of *Stewart v. Railroad*, 157 Mo. App. 225, 137 S. W. 46, this court held:

"In an action on an account stated, evidence that, on plaintiff exhibiting the account to defendant, the latter, while admitting the correctness of the items, denied owing any indebtedness to plaintiff, claiming that, under a certain contract between plaintiff and defendant, plaintiff had insured defendant against any loss for any accident that might occur in doing the work out of which the account arose, and that a workman had received an injury in doing such work and had brought suit against defendant, and that defendant refused to pay the balance claimed by defendant as due, unless plaintiff would take care of such workman's claim, was insufficient to establish an account stated, there being no promise to pay, direct or implied."

It was also said in this case that a promise to pay cannot be implied, in the face of a direct and positive refusal to pay, and a denial on the part of the debtor that he owes the balance claimed to be due, as shown in the account exhibited to him.

In *Rutledge et al. v. Moore*, 9 Mo. 537, an action upon an account stated, it is ruled that the acknowledgment of the debt must be absolute, and not qualified, and not contingent or in the alternative.

In *Packing Co. v. Tallant* (O. C.) 132 Fed. 271, likewise an action upon an account stated, it is said:

"The fact that there was contention on Tallant's part, however groundless, that the sale was to the company, or for its benefit, and that the assumption of the account was that of the company, negatives the implication of such a promise by him. Accordingly, it has been held that when one to whom an account is rendered admits the correctness of the items, but denies his liability, insisting that some other person is justly chargeable, and ought to pay, the account does not become an account stated." 1 Am. & Eng. Ency. of Law (2d Ed.) 446; *Ryan v. Gross*, 48 Ala. 370.

In *Work v. Beach*, 53 Hun, 7, 6 N. Y. Supp. 27, it is held that, where an account is stated, and as a part of the transaction an express promise is given to pay upon a condition, any implied promise which would arise from such statement of account is excluded by reason of the express contract. And, further, that the fact that the balance was admitted to be correct by the defendant did not deprive him of the benefit of the condition with which that admission was coupled, that he would "pay the amount due when he could do so," and that it rested upon the plaintiffs

to show that he was in a condition to pay the balance. In this case (58 Hun loc. cit. 10, 6 N. Y. Supp. 28) the court says:

"It is true that this transaction made this an account stated when the accounts were approved by the defendant as they were, and that in the absence of any promise to pay the law would imply a promise. But where an account is stated, and as part of the transaction, an express promise is given to pay upon a condition, that excludes the implied promise, because an express contract to do a thing excludes the idea of there being an implied contract. For example, when a man purchases goods and nothing is said about prices or time of payment, the law implies a contract to pay the value of the goods upon delivery. If, however, the purchaser makes an express promise to pay in 30 days after delivery, what, under such circumstances, becomes of the implied promise? It is clear that it does not arise. So in the case at bar, if there had been a settlement of these accounts, and simply an account stated had between these parties, an implied promise to pay would naturally have arisen. But in connection with the settlement is an express promise upon the part of the defendant to pay when he is able. That is the condition upon which he consents to the accounts, and to the sale of the securities, and upon which he withdraws his defense to the joint account. Now, after the plaintiffs have accepted the withdrawal of the defense and the sale of the securities, and have accepted the assumption of liability by the defendant, it seems to be difficult to see how they can escape the condition upon which that liability was incurred. In other words, they propose to have the benefit arising from the settlement relieved from the burden which was specifically attached to it. The mere fact that the account was duly admitted to be correct by the defendant himself does not deprive him of the conditions with which that admission was coupled."

In *Cape Girardeau, etc., Railroad v. Kimmel*, 58 Mo. 83, the Supreme Court says that, in an action upon an account stated, "the first essential is, that the balance be acknowledged by the party to be charged," and that the assent or agreement to the balance "is the very bottom upon which the right of recovery rests." See, also, *Risk v. Dale* (Kansas City Court of Appeals) 188 Mo. App. 726, 176 S. W. 529.

Bearing in mind this essential element of an account stated, namely, an express or implied promise to pay the balance struck, what is the situation in the present case as to the account being stated in January, 1918? From plaintiff's version of the conversation with Mr. Loth at the time, there was unquestionably an account stated, in that Mr. Loth, the debtor, handed to plaintiff a statement of his account which showed mutual debits and credits with a balance due plaintiff, and said nothing about plaintiff's paying his brother's overdraft. Plaintiff does not contend there was an express promise to pay such balance at the time, but such would be unnecessary in the absence of anything to

the contrary, for the law would imply a promise to pay.

[3] However, when it comes to defendant's version of this conversation in January, 1918, Mr. Loth says with reference to the question of paying the balance that he would deduct the amount of the plaintiff's brother's overdraft, and pay to plaintiff the balance. This negatives the idea of an express promise to pay the full balance, and shows that the minds of the parties did not meet upon the question as to whether the defendant was to pay such balance. Plaintiff's counsel assert Mr. Loth had no right to ask plaintiff to pay his brother's account, and that there was no obligation upon plaintiff to do so. This is doubtless true; still the fact that Mr. Loth testified that he attached this condition to his obligation to pay, whether the condition be warranted or unwarranted, shows that at the time he dissented from paying the full amount, and did not at that time agree to do so. Consequently the question in this case whether or not there was an account stated between the parties embodying all of the essential elements of such contract was a disputed question of fact, and should have been left to the jury. It is only where the evidence is undisputed that the court would be warranted in instructing the jury to return a verdict for the plaintiff in a case of this character. It follows that the court was not justified in giving the peremptory instruction to find for the plaintiff.

[4] Nor do we think the evidence conclusively shows that there was an account stated between the parties in April, 1918. It is clear from plaintiff's testimony that at that time he only agreed to pay a part of his brother's account, being the personal items referred to, on the express condition that the defendant would allow him interest on his account. This the defendant refused to do, and when the account, which took credit for the amount of plaintiff's brother's personal items to the extent of \$215.35, was presented to the plaintiff, together with the two checks in payment thereof, the plaintiff, as soon as he examined same, and found that the account did not give him credit for the interest on his account, immediately returned the account, together with the checks, to the president of defendant company. It was practically one transaction, as the plaintiff took the checks, retired from the office of the president of the company, and immediately came back after discovering that the account did not give him credit for interest, and refused to accept the checks. According to this evidence the minds of the parties did not meet, as the agreement lacked plaintiff's assent, in that he did not agree to the account as stated and handed to him, as it did not give him credit for the interest on his account from October 31, 1917.

It follows that the judgment should be reversed, and the cause remanded.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly reversed, and the cause remanded.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., absent.

# HUNTINGTON v. KANSAS CITY RYS. CO. (No. 14022.)

(Kansas City Court of Appeals. Missouri.  
June 18, 1921. Rehearing Denied  
July 7, 1921.)

1. Damages  $\S$ 216(7)—Evidence held to justify instruction allowing damages for future pain and suffering.

In a personal injury action, evidence held to warrant instruction allowing damages for future pain and suffering.

2. Carriers  $\S$ 320(26)—Evidence held to sustain verdict for plaintiff based on negligence in prematurely starting street car.

In an action against a street railway for injuries to alighting passenger, in which it was claimed that the car employes were negligent in prematurely starting the car, evidence held to sustain verdict for plaintiff.

3. Trial  $\S$ 298(12)—Instruction defining "negligence" held not erroneous, in view of other instructions.

In action against street railroad for injuries to alighting passenger thrown to pavement when car was prematurely started, instruction that the words "negligently" and "carelessly" as used in the instructions meant "the failure to use the utmost care and skill which prudent men would use under the same circumstances," held not erroneous because of the use of the word "utmost" instead of the word "highest," in view of other instructions defining the issues in the case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

4. Damages  $\S$ 132(8) — \$3,500 damages for fracture of arm held not excessive.

\$3,500 damages awarded for fracture of arm, causing stiffness and lameness at elbow joint, and pain and discomfort at time of trial three years after accident, held not excessive.

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.  
"Not to be officially published."

Action by Nettie M. Huntington against the Kansas City Railways Company. Judgment

for plaintiff, and defendant appeals. Affirmed.

E. E. Ball and Gabriel & Conkling, all of Kansas City, for appellant.

Davis & Woodruff, of Kansas City, for respondent.

TRIMBLE, P. J. For the second time this case comes here on appeal. Plaintiff was a passenger on an interurban car, which, at the time of her alleged injury, was being operated on the streets of Kansas City, Mo., and under the traffic agreement between the defendant herein and the interurban company, pursuant to the ordinance regulating the same, the interurban car and its operatives were, so far as traffic on the city streets was concerned, agencies of the defendant, and it was responsible for any negligent injuries occurring during the course of such city traffic. On the former appeal the case was reversed and remanded solely because the traffic agreement and the ordinance, which made the defendant liable for any negligent injury occurring on the interurban car operating over the city streets, were not pleaded. See *Huntington v. Kansas City Rys. Co.*, 220 S. W. 1011. On the second trial, from which this appeal comes, the petition was amended so as to cure the defect, and the case now comes to us on the merits.

The petition alleges that when the car on which plaintiff was riding as a passenger reached Nineteenth and Walnut streets, in Kansas City, it was brought to a stop for the purpose of allowing plaintiff and other passengers to alight; that when the car stopped plaintiff went to the exit provided therefor, and—

“while plaintiff was in the act of alighting from said car, and before she had alighted, \* \* \* the agents \* \* \* of defendant who were then in charge of and operating said car negligently and carelessly started said car, thereby throwing plaintiff violently to the pavement and injuring her,” etc.

The answer was a general denial. The evidence tends to show that plaintiff was a passenger on the car at the place above mentioned. According to plaintiff's evidence the car came to a stop at Nineteenth and Walnut streets. Plaintiff walked out to and down the steps to the last one on the car and was just in the act of stepping from it to the ground when the car started, throwing her to the pavement; she striking on her left elbow. A gentleman preceded her and was the only other passenger who got off there. As plaintiff walked to the steps, she passed immediately in front of the conductor, who was standing in the vestibule from which the steps led to the ground. She said she walked down the steps and had her right foot on the last step and had her left foot in the air in the act of stepping to the ground when the car started, and it threw her feet from under her

and she “came down in a flash on the pavement, alighting on my left elbow, with my full weight on my left elbow and stretched full length on the pavement,” her head toward the east, her feet toward the west, and her face to the south. The car had stopped at the usual stopping place. It was standing perfectly still while she walked from her seat to the steps and down them, and remained motionless until she reached the last step, as above stated.

The gentleman who preceded plaintiff testified that he had gotten off the car and was from 10 to 15 feet from it, and, turning around, saw the car was beginning to move and plaintiff was in the act of falling. He said it was hard for him to state how far the car had gone, but thought it was not less than 5 nor more than 10 feet. It was just moving. As he remembered, she fell off in a southeasterly direction to the step “rather off with—and about half directly the opposite way from the car was moving.” After she fell the car went on around the curve a little and then the conductor got off and came back to where she was. Witness was the only passenger who got off besides the plaintiff. He stated on cross-examination that he “stepped back and turned around facing the car immediately,” and the lady was then falling. She had not yet struck the ground. He had not gotten to the sidewalk when he turned around. Her feet, or at least one of them, were on the lower step when he turned around.

Plaintiff introduced the evidence of two other witnesses and defendant offered the evidence of another witness, but, although the record shows that these witnesses testified and were cross-examined, their evidence is not preserved or brought up in the abstract. We have no means of knowing what was the subject-matter of these witnesses' testimony.

According to defendant's evidence as given by the conductor, he was a school teacher and had only worked four weeks as a conductor. He testified that his car made a “safety stop” at Nineteenth and Walnut and then “just beyond” is the regular stop; that the first time he noticed plaintiff particularly was just after the car had started up after its stop at the regular stopping place; she was then standing just inside the car door, that is, just inside the body of the car; that he gave the signal to start and the car was barely moving when she came out on the platform and stood on the first step and hesitated, leading him to think she did not want to get off there; that he was standing on the platform about two feet from her; that she stood there a few seconds, looked straight out of the car, not down at the steps, and then took the other step out before he could stop her; that he gave the emergency stop signal and the car stopped in the next five or six feet; that before it stopped he jumped off and ran

back to her, and found her lying in the street partly dazed, and when asked as to her injuries complained of her arm; that at the time she left the car the front trucks were probably on the curve and the car was in motion. On cross-examination he said the vestibule was about three feet by four in size, that he was standing in the vestibule and plaintiff came in front of him; that he thought she was going to stand at the steps and ride to the next stop, a "pretty long block" away; that he had allowed passengers to do that before the accident, but the plaintiff's injury had taught him a lesson. He said the car stopped for the purpose of allowing passengers to alight. He was then asked:

"Q. And you were, of course, in the habit of watching passengers until they get clear of the car, weren't you? A. I am now. [Italics ours.]

"Q. But you did not at that time? A. I cannot say that I did. As I say, I had only been working four weeks. The work was entirely new to me, and there is quite a bit to watch.

"Q. I see. So this accident taught you that lesson too, did it? A. It taught me several."

The only other witness to the injury whose evidence is preserved in the record is that of a man on the sidewalk, who was approaching the corner. When he first saw plaintiff she was "making, it looked like, a nose dive right out of the car, and it seemed like she was getting off backwards." The car was in motion and was making the turn. He did not see what position she was in when the car started.

Plaintiff was helped to a nearby seat. She was moaning and complaining of her arm. Afterward she went a block and a half to her nephew's. She reached there in a shocked and unstrung condition. An automobile took her home. Dr. Curley was called, and he reached her within 15 minutes. He placed a bandage about her arm. Dr. Curley did not testify, as he was in France at the time of the first trial and out West at the time of the second. At the time of his visit the arm was swollen and pained her greatly, and continued so through the night. It pained her so severely that the bandage had to be removed.

The accident occurred June 16, 1917. The arm continued in a swollen and painful condition, and finally an X-ray picture was taken, disclosing a fracture of the "olecranon process of the ulna, or forearm." This assists in forming the elbow joint, as it hooks over the ball of the bone in the upper arm, thus helping in the formation of the ball and socket arrangement there. The process was broken in two, and the fracture could not be reduced by manipulation, nor could the broken parts be held together when placed in proper position, so she was taken to the hospital, and an operation performed upon the broken bone by drilling holes therein and

wiring the broken parts together with a silver wire. Her arm was then placed in a cast, with an opening through which the wound could be dressed. During this time she suffered pain. She was not able to use her arm for six months, and at the second trial, three years after the injury, the arm could not be normally extended and there was a stiffness and lameness at the elbow joint and a numbness of the arm. Plaintiff also says she has been very nervous since the "terrible jar" she received, something with which she was never troubled before, and the arm "hurts a great deal too."

[1] It is urged that plaintiff's instruction No. 3 is erroneous, in that it allowed damages for future pain and suffering, but we do not think the record is devoid of evidence from which the jury could find that plaintiff would continue to suffer when she is still suffering three years after the injury. So far as remedying the situation by surgical or medical attention, that has been completed as far as possible, and yet she continues to suffer pain, discomfort, and nervousness three years after the injury. The doctor who assisted Dr. Curley in performing the operation said the arm was in an abnormal condition, in that it would not straighten out, and that such condition was permanent. Even if we could ignore the omission of testimony from the record and any possible bearing it may have on this feature of the case, still it would seem that there is enough in the record to permit the submission of future pain and suffering as one of the elements to be considered in connection with the question of her damages. 17 C. J. 765, 766, 1075; Frazier v. St. Louis Smelting, etc., Co., 150 Mo. App. 419, 130 S. W. 485; Bradford v. City of St. Joseph, 214 S. W. 281, 285; Campbell v. Springfield Traction Co., 178 Mo. App. 520, 163 S. W. 287; Kroell v. Lutz, 210 S. W. 926, 929; Burns v. Polar Wave, etc., Co., 187 S. W. 145. However, unless we assume that the evidence of plaintiff's witnesses, which is omitted from the abstract, had no bearing on this feature—an assumption we have no grounds for making—how can we ignore the omission and say the evidence did not justify such an instruction? 4 C. J. 549, 553; Schoen Plumbing Co. v. Empire Brewing Co., 126 Mo. App. 268, 102 S. W. 1064; Davis v. Boyers, 140 Mo. App. 593, 120 S. W. 631; Gooden v. Modern Woodmen of America, 194 Mo. App. 666, 189 S. W. 394.

[2] We are unable also to see wherein the evidence, as disclosed in the record, falls to support the verdict, or is so wholly insufficient to sustain the judgment as to justify our interference with the action of the trial court thereon. Schwabe v. Estes, 218 S. W. 908; Lehnick v. Metropolitan St. Ry. Co., 141 Mo. App. 158, 124 S. W. 542; Gilbert v. Mississippi River, etc., Co., 226 S. W. 263. Furthermore, what we have said with reference to the omission of the evidence of the wit-

nesses applies with greater force, if possible, here than it does to the point under consideration where the effect of the omission is discussed.

[3] Complaint is made of plaintiff's instruction No. 2, which reads as follows:

"The court instructs the jury that the words 'negligently' and 'carelessly,' as used in these instructions, mean the failure to use the utmost care and skill which prudent men would use under the same or similar circumstances to those shown by the evidence."

The objection is that the instruction in using the word "utmost" instead of "highest" tended to make the carrier an insurer and was contradictory of defendant's instructions 2 and 3, since it would lead the jury to think that defendant would be liable because the conductor, in the exercise of the "utmost" care, did not reach out and catch plaintiff or warn her that the car was in motion.

But we find no reasonable basis for such a contention. Plaintiff's instruction 1, which covered the case and directed a verdict, based the question of her right to recover on whether the operatives "negligently and carelessly started the car," and said nothing about the conductor's failing to warn or catch plaintiff. Defendant's instruction 1 told the jury that if plaintiff stepped off the car while it was in motion, then, "regardless of every other question in the case," plaintiff could not recover. In its instructions 2 and 3 defendant told the jury it was not the duty of the operatives to catch or hold or warn plaintiff that the car was in motion, and that it was not negligence in the conductor to fail to do these things if she started to alight while the car was in motion. So that we cannot see

how plaintiff's instruction 2 and defendant's instructions 2 and 3 can be regarded as contradictory or confusing to the jury. They could not help but understand that the pivotal and only question was whether the car was negligently started while plaintiff was in the act of alighting and before she had succeeded in doing so. And when the plaintiff's instruction 2 said that negligence meant the failure to use the "utmost care and skill," it was not the utmost care and skill possible to human endeavor, but the utmost care and skill "which prudent men would use under the same or similar circumstances." And under the instructions the jury could not fail to understand that the utmost care and skill was not required to be expended in any effort to catch or warn her but to prevent the car from starting while she was in the act of alighting. The instruction cannot be held to constitute reversible error. *Skiles v. St. Louis, etc., R. Co.*, 130 Mo. App. 162, 168, 108 S. W. 1082; *Ilges v. St. Louis Transit Co.*, 102 Mo. App. 529, 77 S. W. 93; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573, 77 S. W. 314; *Walker v. Quincy, etc., R. Co. (Sup.)* 178 S. W. 108; *Stauffer v. Metropolitan St. Ry. Co.*, 243 Mo. 305, 147 S. W. 1032.

[4] It is urged that the verdict is excessive. It was for \$5,000, but a remittitur of \$1,500 was enforced by the court, which reduced it to \$3,500. We are unwilling to say that, as it now stands, it is excessive. *Roberts v. City of St. Joseph*, 185 S. W. 1197; *Anderson v. American Sash, etc., Co.*, 182 S. W. 819; *Howard v. City of New Madrid*, 148 Mo. App. 57, 127 S. W. 630.

The judgment is affirmed.  
The other Judges concur.

**ESTES et al. v. J. B. LAMB & CO.**  
(No. 70.)

(Supreme Court of Arkansas. June 27, 1921.)

**1. Sales 4460 — Parol reservation of title valid and effectual against bona fide purchaser.**

A parol reservation of title in personal property, made at the time of the sale, is valid and is effectual against a bona fide purchaser for value to same extent as such a reservation in a written contract.

**2. Sales 4469 — Parol reservation of title effectual, though note given for price.**

The giving of a promissory note for price of mules sold, with parol reservation of title, does not render the contract one of absolute instead of conditional sale.

**3. Payment 4417—Giving of note no payment of debt without agreement.**

The giving of a promissory note for a debt is no payment, unless by the agreement of the parties the notes are taken in payment of the debt.

**4. Sales 4475—Seller reserving title may retake chattels on default, though note for price has been transferred as collateral.**

Where seller of mules reserves title and takes promissory note for price, the fact that he transfers the note as collateral security does not affect his right to retake the mules on default of buyer.

Appeal from Craighead Chancery Court; Archer Wheatley, Chancellor.

Suit by J. B. Lamb & Co. against Albert Estes and others. From a decree for complainants, defendants appeal. Reversed and remanded, with directions.

Appellees brought this suit in equity against appellants to obtain judgment for an account due them and for the foreclosure of a chattel mortgage given to secure the same. In their complaint they alleged that Albert Estes executed a chattel mortgage on two mules to secure an account for merchandise and supplies to be furnished him in 1919; that subsequently Estes sold the mules to J. A. Coward; that J. A. Coward sold the mules to J. H. Coward; and that said mules are now in the possession of J. H. Coward. Appellants defended the suit on the ground that prior to the execution of the mortgage by Estes to appellees J. A. Coward had sold the mules to Estes and had reserved title in them until they were paid for.

According to the testimony of appellees they constitute a mercantile firm at Bono, Ark., and on March 11, 1919, Albert Estes executed a mortgage on the mules in controversy to them for supplies to be furnished him in making a crop. Estes did not inform them that Coward had sold him the mules and had reserved title in himself until they were paid

for. On the other hand, Albert Estes testified that at the time he executed the mortgage he told appellees that he had purchased the mules from Coward, and that Coward had retained title in them until they were paid for, and that he had paid nothing towards the purchase price thereof.

Both Albert Estes and J. A. Coward testified in regard to the execution of the contract, and their testimony is in all essential respects the same. According to their testimony J. A. Coward sold to Albert Estes the mules in controversy, a wagon, harness, and tools for \$730, and retained title in the property until the purchase price was paid. It was a part of the agreement that Estes should execute a note for the purchase price to be signed by Arthur Smith and Joe Smith.

Pursuant to the agreement, in a few days Estes brought back and delivered to Coward his note for the purchase price of the property signed by Joe and Arthur Smith. The note is as follows:

"\$730.00

1—22—1919.

"Ten months after date, we promise to pay to the order of J. A. Coward seven hundred and thirty dollars, for value received, negotiable and payable without defalcation or discount and with interest from date at the rate of ten per cent. per annum and if the interest be not paid annually to become as principal and bear the same rate of interest.

Albert Estes.

"A. D. Smith.

"Joe Smith."

Arthur Smith was present when the contract was made, and corroborated the testimony of Coward and Estes. He stated that he and his brother would not have signed the note if Coward had not retained title in the property until the purchase price was paid. Estes was unable to pay the note when it became due, and by agreement with Coward turned over to him the mules in question. J. A. Coward then sold the mules to his brother, J. H. Coward, who had possession of them at the time appellees sought to foreclose their mortgage and recover possession of them for that purpose. On April 25, 1919, J. A. Coward transferred the note copied above as collateral security to the Jonesboro Trust Company.

The chancellor found the issues in favor of appellees, and a decree was entered in their favor for the amount sued for and for a foreclosure of their mortgage on the mules. The case is here on appeal.

H. W. Applegate, of Jonesboro, for appellants.

Sloan & Sloan, of Jonesboro, for appellees.

HART, J. (after stating the facts as above). [1] Following the rule of the common law, this court has held that a parol reservation of title in personal property

made at the time of the sale is valid, and that such oral reservation of title is effectual as against a bona fide purchaser for value to the same extent as such a reservation in a written contract. *Jones v. Bank of Commerce*, 131 Ark. 362, 199 S. W. 103. To the same effect, see *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125.

[2] Counsel for appellees recognize this to be the rule, but claim that the rule is not applicable in the present case, because at the time the agreement for the oral reservation of title was made it was also agreed that the purchaser should execute his note for the purchase price and that the note executed pursuant to the agreement is a plain note of hand signed by the purchaser with two sureties.

It is generally held that the giving of a note to represent the purchase price does not change a contract which would otherwise be one for a conditional sale to one of absolute sale. *International Harvester Co. v. Pott*, 32 S. D. 82, 142 N. W. 652, Ann. Cas. 1916A, 327, and note at page 331.

In *Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828, it was expressly held that the taking of notes for the purchase price and the taking of a collateral security did not in any way qualify the conditional sale features of such contracts. In that case the court said:

"Parties can agree to pay the value of goods upon what consideration they please, \* \* \* and when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does."

[3] The giving of a promissory note for a debt is no payment, unless by agreement of the parties the notes are taken in payment of the debt. *Triplett v. Mansur-Tebbetts Implement Co.*, 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284. In that case the court held that, where goods are sold on condition that the title shall remain in the vendor until the purchase notes are paid, the execution of renewal notes for the debt is not a payment, unless by agreement of the parties the notes are taken as such.

[4] It is true that in all the cases above cited the contracts of conditional sale were in writing, but the courts do not seem to have made any point of that fact. The cases all turn on the rule that the giving of the promissory note does not discharge the debt for which it was given, unless such be the express agreement of the parties. It only operates to extend the time of payment until the note is due. Our own court has not recognized any difference in this, respect between oral and written contracts for the reservation of title for the conditional sale of personal property.

In *Rex Buggy Co. v. Ross*, 80 Ark. 388, 97 S. W. 291, Ross bought a carload of buggies from the Rex Buggy Company, with the understanding that the title to the property should remain in the vendor until the purchase price was paid. Ross agreed to execute his promissory note for the price of the buggies upon receipt thereof payable in four months after date. The court held that, upon executing the notes, he was entitled to the possession of the buggies and to retail them in due course of trade until he failed to comply with the conditions of the sale to him. The statement of facts does not show whether the contract for the conditional sale of the buggies was a written or oral one.

The undisputed evidence establishes the oral contract of sale in the instant case with the reservation of title in Coward until the property was paid for. The undisputed evidence also shows that Estes did not pay for the mules, and by agreement turned them back to Coward. The evidence also shows that the agreement to execute the note was made at the same time the oral contract for the conditional sale was made.

The mortgage to appellee was executed subsequent to the contract of conditional sale between Coward and Estes. Estes acquired an interest in the property which he could sell or mortgage to appellees without the consent of Coward, but Coward's right to recover the property if the purchase price was not paid could not be prejudiced by such sale or mortgage. *Clinton v. Ross*, 108 Ark. 442, 159 S. W. 1103. Neither was the right of Coward affected by the fact that he transferred to the bank as collateral security the note given by Estes for the purchase price of the property. The reservation of title in the instant case appears from the oral contract for the conditional sale, but not in the purchase money notes. In such cases the seller may transfer the notes as collateral security and on default of the buyer retake the property. The reason is, he is interested in the payment of the notes so as to relieve him from liability as indorser, and he therefore has the right to retake possession of the property. 35 Cyc. 702; *McDonald Automobile Co. v. Bicknell*, 129 Tenn. 493, 167 S. W. 108, Ann. Cas. 1916A, 265, and *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 South. 857.

No complaint is made that a judgment is rendered in favor of appellees against Estes for the amount he owes them.

From the views we have expressed, it follows that the chancellor erred in rendering a decree for appellees, and for that error the decree must be reversed and the cause will be remanded, with directions to enter a decree in favor of J. H. Coward for the possession of the property and for further proceedings not inconsistent with this opinion.



**FARMER v. EVANS. (No. 2966.)**

(Supreme Court of Texas. June 22, 1921.)

**Chattel mortgages — 82—Not enforceable in state to which property removed against innocent purchaser for value without notice.**

A chattel mortgage duly filed and recorded in Oklahoma cannot be enforced in Texas against the property removed to that state as against an innocent purchaser for value without notice in such state, though the removal was without the knowledge or consent of the mortgagee, and there was no negligence on his part in failing to ascertain the fact of removal.

**Certified Questions from Court of Civil Appeals of Seventh Supreme Judicial District.**

Action by J. L. Evans against Ben F. Farmer and another. A judgment for plaintiff against the defendant named was reversed by the Court of Civil Appeals (192 S. W. 342), and the case certified to the Supreme Court for answer to a certified question. Question answered in favor of defendant.

H. L. Adkins, of Higgins, for appellant.  
Hoover & Dial, of Canadian, for appellee.

**PIERSON, J.** The opinion of the Court of Civil Appeals for the Seventh District in this case is reported in 192 S. W. 342, and the facts briefly are as follows: —

In Harper county, Okl., one R. W. Warren executed and delivered to appellee, Evans, his certain promissory note secured by a chattel mortgage on six head of live stock. Said mortgage was executed in Harper county, Okl., where both parties lived and where the property was situated. Appellee had said chattel mortgage registered in Harper county as required by the law of Oklahoma, to give notice to subsequent purchasers. Thereafter said Warren brought two black mules, being a part of the live stock covered by the mortgage, into Lipscomb county, Tex., and sold them to appellant, Ben F. Farmer, without the knowledge or consent of appellee. Some months afterwards Farmer sold the mules to F. F. Schick. No record of the mortgage was made in Texas. Appellee brought suit in Lipscomb county to recover the balance due on his note and to foreclose his mortgage on the mules as against Farmer and Schick in satisfaction of said balance.

It appears that appellant, Farmer, was an innocent purchaser without notice, but that he bought the mules within about a month after they had been brought out of Oklahoma into Lipscomb county by said Warren. The trial court held that appellee, Evans, was not negligent in not having filed his mortgage of record in Lipscomb county before appellant, Farmer, purchased the mules, but

that he was negligent in not having filed his mortgage for record in Lipscomb county prior to the purchase by defendant Schick. It denied recovery as against Schick, but held that appellee under the rule of comity between states was entitled to recover as against appellant, Farmer. Appellant, Farmer, prosecuted his appeal to the Court of Civil Appeals for the Seventh Supreme Judicial District, and that court reversed and rendered the case in his favor, upon the ground that under our statutes, appellant, Farmer, being an innocent purchaser for value without notice he should be protected in his purchase, and that the doctrine of comity between states "should not be applied when to do so would conflict with the public policy of the state of the forum, and when the effect of enforcing it is to injure or destroy the rights of local citizens innocently acquiring the property or some interest therein." On motion for rehearing Associate Justice Boyce dissented, and, there being a conflict between the majority opinion in this case with the opinion of the Court of Civil Appeals for the Fifth District in the case of Blythe v. Crump, 28 Tex. Civ. App. 327, 66 S. W. 885, and with the opinion of the Court of Civil Appeals for the Second District in the case of Scaling v. First National Bank, 39 Tex. Civ. App. 154, 87 S. W. 715, the Court of Civil Appeals certified the case to this court upon the following question, to wit:

"Whether the holder of the Oklahoma mortgage, duly filed in accordance with the laws of that state so as to make the mortgage valid, in so far as those laws can have such effect, may enforce the same against property covered thereby, removed to this state, without the knowledge or consent of the mortgagee, and without negligence on his part with respect to ascertaining the fact of removal, in the hands of an innocent purchaser of such property for value, without actual notice of the mortgage."

This case is fully controlled by the principles and rulings announced in cause No. 3340, Consolidated Garage Co. v. Ray Chambers, 231 S. W. 1072, in which an opinion was delivered by this court on this date, June 22, 1921. It was held that to hold valid and effective a chattel mortgage duly executed and recorded according to the laws of another state where same is executed and the property located, as against a purchaser in good faith in this state, to which the property has been removed by the mortgagor, is contrary to the statutory law, and contravenes the settled policy, of this state. On the authority of that case, we answer that the holder of a mortgage duly filed and recorded in the state of Oklahoma cannot enforce same against property covered thereby removed to this state as against an innocent purchaser for value without notice in this state.

**AMERICAN STATE BANK OF HARRISBURG v. HARDING et al. (No. 8069.)**

(Court of Civil Appeals of Texas. Galveston.  
June 2, 1921. Rehearing Denied  
June 23, 1921.)

**Chattel mortgages** §47—Mortgagee of machinery held entitled to lien on that not included in prior mortgage of mill in which contained.

Where a bank took a note secured by a chattel mortgage on a "Wheeland sawmill complete," and thereafter the mortgagor gave another bank a note secured by a chattel mortgage on a boiler, engine, and other machinery and equipment, which the first bank claimed were included in the mortgage of the mill, and the jury found that the description used in the first mortgage did not include such articles, and that the second bank before taking its mortgage pursued a proper inquiry to ascertain whether the other bank had one on the same property, such second bank was acquitted of any knowledge or notice of such claim beyond what was embraced in the descriptive term used in the first mortgage, though the latter was recorded, and was entitled to a lien for the balance.

Appeal from District Court, Harris County; W. E. Monteith, Judge.

Action by the American State Bank of Harrisburg against Will Harding and another. From a judgment on the findings of a jury in response to special issues, plaintiff appeals. Affirmed.

Cooper & Merrill, of Houston, for appellant.

Hill & Hill, of Houston, for appellees.

**GRAVES, J.** As presented on appeal, this cause represents a contest between two banks, American State Bank of Harrisburg, appellant, and the Gulf State Bank of Houston, appellee, over whether or not the court below entered, as between them, the right judgment upon the findings of a jury in response to special issues.

The pertinent facts are that Will Harding, on June 2, 1919, gave appellant bank his note for \$2,000, secured by a chattel mortgage on "1 Wheeland sawmill complete, located at the Clinton community three miles below Harrisburg," which note and mortgage that bank declared upon in this suit and sought judgment and foreclosure; on January 28, 1920, Will Harding and another gave the appellee Gulf Bank their note for \$3,442.21, together with a chattel mortgage to secure it upon "one 80-horse power return tube Atlas boiler, one 35-horse power Erie Iron Works Steam engine, one Wheeland sawmill and carriage complete, one edger, one cut off saw, certain shafting, belts, pulleys, fixtures, fittings, and

appurtenances, located at or near the town of Clinton about two miles below Harrisburg," the latter bank in like manner setting up its note and mortgage and asking the same character of relief.

Appellant further alleged that at the time Harding executed the note and mortgage to it he represented that the term "1 Wheeland sawmill complete," which were the only descriptive words contained in the mortgage itself, embraced and included all the machines, equipment, appurtenances, and appliances connected with and located in his sawmill plant at Clinton; that all such property accordingly became subject to the mortgage, and that, as the instrument was forthwith recorded, the appellee bank in taking its later mortgage was both charged with knowledge of and put upon such inquiry about as would have disclosed that fact. The Gulf Bank denied that it was either charged with or in fact had any such knowledge or notice.

The issues between the two banks thus raised were, among other matters not material here, submitted to the jury in the following special issues:

"Special Issue No. 1: Does the description used and set out in the chattel mortgage dated June 2, 1919, and executed by Will Harding to the American State Bank include all the machinery, appliances, and equipment connected with and used in the sawmill at Clinton, Tex.? Answer Yes or No, as you find the fact to be.

"Special Issue No. 2: If you have answered the foregoing issue in the negative, and only in that event, then you will answer the following: Did or did not Will Harding inform the officers of the plaintiff bank, at the time the mortgage and note of June 2, 1919, was drawn and executed, that the term '1 Wheeland sawmill complete' included all the machinery, tools, and appliances constituting and embraced in said sawmill at Clinton, Tex.? Answer Yes or No, as you find the facts to be."

"Special Issue No. 8: Is or is not the phrase 'Wheeland sawmill complete' a technical and trade term? Answer Yes or No as you find the fact to be.

"Special Issue No. 9: If you answer the preceding special issue Yes, then say what particular pieces of machinery are included in its terms.

"Special Issue No. 10: At the time the Gulf State Bank took its note and mortgage from Will Harding and Mack Harding, did it have knowledge of sufficient facts to put a reasonably prudent person on inquiry as to whether the American State Bank had a mortgage on all the sawmill property of Will Harding? Answer Yes or No, as you find the facts to be.

"Special Issue No. 11: If you answer the foregoing issue in the affirmative, then you will answer the following issue: Did the Gulf State Bank, before it took its note and mortgage from the said Harding, pursue with reasonable diligence a proper inquiry to ascertain whether the American State Bank of Harrisburg had and claimed a mortgage on said property? Answer Yes or No, as you find the fact to be."

The first was answered, "No," the second, eighth, tenth, and eleventh, "Yes," and the ninth, "Husk, carriage, feed dogs and carriage track."

Appellant by motion requested, pursuant to the findings, foreclosure of its claimed lien upon all the property at the sawmill plant as against both Harding and the appellee bank, but the court refused the motion, and entered judgment in its favor against Harding, with foreclosure upon "1 Wheeland sawmill complete, consisting of 1 circular saw, 1 mandrel, husk, carriage, dogs feed and carriage tracks," subject, however, to the lien of the Gulf Bank upon all the balance of the property so situated, which it adjudged to be first and superior in favor of the latter.

On appeal the American Bank complains of the refusal of its motion for judgment in its favor, contending that the judgment rendered did not follow the verdict, in that the jury found that Harding informed its officers on executing the mortgage to it that the term "1 Wheeland sawmill complete" included all the property in the plant at Clinton, which fact as between that bank and Harding gave it a valid mortgage on the whole of the equipment, and that the Gulf Bank, on taking its later note and mortgage, had knowledge of sufficient facts to put it on inquiry of the actual status of the first bank's claim. The trouble with this position is that the jury also found in answering special issues Nos. 1, 8, and 11, and, there being no statement of facts, we must presume, upon sufficient evidence, that the description used in appellant's mortgage did not include all the machinery in the plant, and so not that as to which the appellee recovered, that the phrase therein employed, "Wheeland sawmill complete," was a technical and trade term, and that the Gulf Bank before taking its mortgage pursued a proper inquiry to ascertain whether the other bank had and claimed one on the same property.

If the terms of appellant's mortgage, although recorded as stated, did not cover the property appellee claimed, and the latter in advance of taking its own mortgage pursued proper inquiry to determine whether appellant had and claimed any mortgage on it, the conclusion must follow that the inquiry gave the Gulf Bank no further information; it was therefore acquitted of any knowledge or notice of a claim upon appellant's part beyond what was embraced in the descriptive term so used in its then recorded mortgage. In this state of the record before us, since there is neither statement of facts nor contrary showing, we conclude that the trial court did not err in refusing appellant's motion and in entering judgment in favor of the appellee.

A separate discussion of further assignments of error becomes unnecessary; all assignments are overruled, and an affirmance ordered.

Affirmed.

#### TUELL v. ROBERTS et al. (No. 8064.)

(Court of Civil Appeals of Texas. Galveston.  
May 26, 1921. Rehearing Denied  
June 23, 1921.)

1. Venue  $\S$ 22(1)—That one defendant may be sued in one county does not authorize maintenance against other defendants residing in different counties.

The fact that suit may be brought against one of several defendants in one county does not authorize its maintenance against other defendants who reside in different counties, unless the defendant of whom the court has jurisdiction resides in the county in which the suit is brought, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1830.

2. Venue  $\S$ 22(1)—One acquiring mortgaged chattel out of county not party to chattel mortgage for purpose of suit in county where mortgage was executed.

One acquiring mortgagor's title to an automobile with knowledge of the mortgage and notes, did not thereby make himself a party to the contract evidenced by the mortgage and notice, so as to give the mortgagee the privilege of bringing suit to foreclose in the county where the mortgage and notice were executed, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1830.

Appeal from Harris County Court; Roy F. Campbell, Judge.

Action by W. C. Roberts against C. M. Tuell and another. From judgment for plaintiff, the named defendant appeals. Reversed and remanded, with instructions.

Cooper & Merrill, of Houston, for appellant.

Fouts & Patterson, of Houston, for appellees.

PLEASANTS, C. J. This suit was brought by appellee W. C. Roberts against B. L. Horton and C. M. Tuell, to recover from Horton the sum of \$850 due upon 10 promissory notes executed by him in favor of Roberts, and payable in Harris county, and to foreclose against both defendants a mortgage lien, given by Horton to secure the payment of the notes, upon an automobile described in the petition. The petition alleges:

"That at the time said mortgage was executed, the said B. L. Horton was a president of Harris county, Tex., and said automobile was situated in Harris county, and said chat-

tel mortgage was forthwith filed for registration in said county. That afterwards said B. L. Horton removed the property from Harris county, Tex., without the knowledge or consent of appellee Roberts, and that the same was at the time of the filing of said suit in the possession of the appellant, C. M. Tuell, in the city of Amarillo, Potter county, Tex., and that appellant was asserting some title or claim thereto."

The residence of the defendant Horton is alleged to be unknown.

Appellant in due time filed a plea of privilege to be sued in the county of his residence. To this plea appellee Roberts filed a controverting affidavit, and upon a hearing on the plea and the contest thereof, judgment was rendered overruling the plea, from which judgment this appeal is prosecuted.

The only question presented by the appeal is the proper construction of the fourth exception to our general venue statute (article 1830, Vernon's Sayles' Civil Statutes), which provides that where there are two or more defendants residing in different counties suit may be brought in the county in which any one of the defendants resides. This is the only provision of our venue statute under which appellee claims the right to maintain his suit against appellant in Harris county, and we think it clear that this statute cannot be so construed.

[1] The facts are undisputed. Appellant lives in Potter county where he purchased the automobile from Horton, and now has it in his possession. The residence of the defendant Horton being unknown, suit against him could be maintained on that ground in Harris county, where plaintiff resides, as well as on the ground that the notes executed by him were payable in said county. But the fact that the suit can be brought against one of several defendants in one county does not authorize its maintenance against the other defendants, who reside in different counties, unless the defendant of whom the court has jurisdiction resides in the county in which the suit is brought. The language of the statute is plain and unambiguous, and leaves no room for construction. *Behren Drug Co. v. Hamilton & McCarty*, 92 Tex. 284, 48 S. W. 5.

[2] Appellee contends that—

"Appellant, by acquiring the mortgagor's title to the automobile upon which is sought a foreclosure of the lien sued upon, did so with knowledge of appellee's chattel mortgage and the notes sued upon, and thereby made himself a party to the contract evidenced by said chattel mortgage and notes, and took title to said automobile in acquiescence and subject to every contract right vested in appellee by virtue of said chattel mortgage and said notes, in-

cluding the privilege of bringing this suit in Harris county."

This contention was upheld by the Court of Civil Appeals for the Third District in the case of *Oxsheer v. Watt*, 42 S. W. 121, in which the court, in discussing the questions, says:

"There was no error in overruling the plea of W. W. Oxsheer [the purchaser of the mortgaged property] to the jurisdiction of the court over his person. He was properly joined as defendant, being in possession of the property upon which it was sought to foreclose the mortgage; and, the notes sued on being made payable in McLennan county, the suit was properly brought in that county on the notes and to foreclose the mortgage. This necessarily drew W. W. Oxsheer to the jurisdiction of the county where the suit was brought, he being a necessary party to the suit. *Sayles' Rev. Civ. St. art. 1198, subd. 5; Hall v. Hall*, 11 Tex. 526; *Delespine v. Campbell*, 45 Tex. 628; *Ewell v. Anderson*, 49 Tex. 698; *Templeman v. Gresham*, 61 Tex. 53. If W. W. Oxsheer was not a necessary, but only a proper, party to the suit of foreclosure, the court where the suit was properly brought against the other two defendants would also have jurisdiction of his person, though he resided in another county; and the venue as to him would be properly laid in the county where the suit was brought. The suit should not have been split into two suits, because one proper defendant resides in a county other than that in which the suit is instituted."

Upon writ of error to the Supreme Court the judgment in this case was affirmed, but the opinion of the Supreme Court does not discuss the question of venue. In the later case of *Drug Co. v. Hamilton & McCarty*, supra; the Supreme Court expressly overrules the holding in the *Oxsheer* Case on the question of venue. The *Drug Company* case is, we think, conclusive of the question presented by this appeal. It may be that there is no sound reason for not permitting a defendant to be sued out of the county of his residence in a case of this kind, but the Legislature has not seen fit to make such an exception to the general statute which protects the citizen in the valuable right to have suits against him tried in the county of his residence, and the courts cannot engraft such an exception upon the statute.

These conclusions require that the judgment of the court below be reversed and the cause remanded, with instructions to the trial court to sustain appellant's plea of privilege, and unless appellant is dismissed from the suit to transfer the cause to the county court of Potter county, and it has been so ordered.

Reversed and remanded, with instructions.

**PAYNE, Director General, v. WEISIGER.**  
(No. 1233.)

(Court of Civil Appeals of Texas. El Paso.  
May 26, 1921. Rehearing Denied June 23,  
1921.)

**1. Trial  $\Leftrightarrow$  351(5)—Special interrogatory held properly refused, where covered by another interrogatory submitted.**

In a railroad employe's action for injuries from an explosion while attempting to start a gasoline engine, by pouring gasoline into an extinguished generator which was still hot, it was not error to refuse to submit the question as to whether plaintiff was familiar with gasoline, and knew that it was liable to explode in coming in contact with hot metals; such question having been sufficiently submitted in one as to whether he was ignorant of the danger attendant on a relighting of the generator in its then condition.

**2. Master and servant  $\Leftrightarrow$  286(41)—Negligence in failing to warn employe, injured by explosion of gasoline, held for jury.**

In an action by a roundhouse hostler, injured by an explosion while he was attempting to start a gasoline engine by pouring gasoline on a hot generator, evidence on the question of his ignorance of the danger and defendant's failure to warn, held sufficient to go to the jury.

**3. Master and servant  $\Leftrightarrow$  155(2) — Danger of attempting to start gasoline motor held not so open as to relieve master of duty to warn.**

In a railroad employe's action for personal injuries sustained by the explosion of gasoline while he was attempting to start a motor by pouring gasoline on a hot generator, the danger held not so open and apparent as to relieve the master of the duty to warn.

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Action by E. S. Weisiger against John Barton Payne, Director General. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Hawkins, W. M. Peticolas, and Del W. Harrington, all of El Paso, for appellant.

Hudspeth, Wallace & Harper, of El Paso, for appellee.

**HARPER, C. J.** This suit was instituted by E. S. Weisiger against the Director General of Railroads for damages for personal injuries alleged to have been caused by being burned by an explosion of gasoline on the night of November 29, 1919. Several grounds of negligence were pleaded and all of them submitted to the jury upon special issues, and all found against appellee except the following:

Appellee was directed to start a gasoline engine for the purpose of pumping water; that he heated up the generator, and when attempting to turn on the air found the pipe

disconnected; that after he had repaired the pipe he attempted again to light the generator with gasoline from a can; that it exploded, and seriously and permanently injured him; that he was inexperienced in the work, unfamiliar with the danger; and that appellant knew of the danger; and knew that appellee was ignorant of it, and failed to warn him.

Defendant answered by general denial; that plaintiff was 45 years old, had had experience, and was fully aware of the danger incident to pouring gasoline upon the generator after it had been once lighted and had thereby become heated; that the appliance was simple; that he therefore assumed the risk; that he had been fully instructed and warned with reference to the manner of starting and operating the machine; that he had operated a similar engine for many months prior to the accident, and knew and appreciated the danger arising from pouring gasoline upon a heated generator, and therefore assumed the risk.

The court submitted the following questions pertinent to the ground of negligence above noted:

Question No. 2½: "Do you find from a preponderance of the evidence that at the time of the happening of the accident the plaintiff was inexperienced and ignorant of the danger, if any, of relighting the generator in its then condition, and that this inexperience and ignorance, if any, was known to the defendant at the time he was directed to run the pump in question?"

This question the jury answered, "Yes."

Question No. 3: "Do you find from a preponderance of the evidence that defendant and his employes failed to notify or warn plaintiff of the danger of lighting the generator, as he attempted to do, and that if they did fail it was negligence on their part, under the circumstances, to fail to so warn and notify plaintiff, and that such negligence, if any, was a proximate cause of plaintiff's injuries?"

This question the jury answered, "Yes."

Question No. 4: This question simply asked how much the damages were, and the jury answered, \$10,000.00."

At the defendant's request, the court submitted defendant's question No. 1 as follows:

"Did the plaintiff, Weisiger, know at the time he poured gasoline, which exploded, on the generator, that it was dangerous to throw gasoline thereon, at the time and under the circumstances when he did throw it on?"

This question the jury answered, "No."

Also, at defendant's request, the court submitted question No. 2, as follows:

"Would an ordinarily prudent person, under the circumstances present and at the time when Weisiger threw the gasoline that exploded on the generator, have known and appreciated the danger in so doing?"

This question the jury answered, "No."

Both of the above questions were asked by the defendant only in the event that his peremptory instructions were refused. Judgment was entered for plaintiff for \$10,000, from which an appeal is perfected.

Taking up the assignments in the order which we deem most convenient:

[1] The fourth assignment charges error in refusing to give the following special charge requested by appellants:

"Was the plaintiff at the time of the accident familiar with gasoline, and did he know that in coming in contact with hot metals, sparks, or flame it was likely to explode and was dangerous?"

This question would have, if submitted, called for a finding as to the general knowledge of appellee concerning the likelihood of an explosion from gasoline when coming in contact with heat and fire in a general way, and of course this is a matter of common knowledge; but the general charge, Nos. 2½ and 3, submit the specific issue pleaded, to wit, Was he ignorant of the danger attendant upon a relighting of the generator in its then condition? and we think sufficiently and properly submitted the issue.

[2] By the eighth and ninth it is urged that the court erred in refusing to submit two special charges to the effect that:

"The defendant owed the plaintiff no duty to instruct him as to the danger of gasoline exploding upon coming in contact with hot metal sparks or flame, because, defendant's appliances being safe and in good condition, the danger arose, not from anything done or left undone by the defendant, but from plaintiff's own act, and defendant could not reasonably anticipate that plaintiff would pour gasoline on an appliance where gasoline had been poured and lit shortly before."

The other specifications of error are substantially to the same effect, "That the court should have instructed a verdict for the defendant," and that it was error to submit the question of ignorance of appellant of the danger and failure to warn, etc., because the facts in evidence are insufficient to support a verdict for plaintiff.

The plaintiff testified that he was 45 years old; that at the time of the accident and for 2 years prior thereto he had worked for the Director General of the Southwestern Railroad as hostler, and in the water service as repairman; by hostling he meant handling engines, moving them in and out of the roundhouse, and from one place to another; that during all the time he was working as hostler he had not come in contact with the operation of gasoline or oil burning engines, that he knew nothing about that, and further testifying he said:

"I don't know whether my foreman, at the time I met with my accident, knew of my previous experience with the Southwestern or not. He could have known; the records were open.

At the time I met with my accident, November 28, 1919, I was directed by my foreman to pump that night. My foreman, Mr. Eubanks, told me to do the work. I was off in a house about 100 yards from where I got hurt, cleaning up the house. He came to me and told me that I had to relieve the day man that day at 7 o'clock. I better go home and get my supper, and get back to relieve the day man. At that time he did not give me any instructions or warning as to how to operate that machine. He certainly did know at that time that I had never had any experience in running a gasoline engine. When I came back to work, I relieved Mr. Hamilton, the regular pumper, the day pumper. He had been on that job for, I suppose, 14 or 15 years, and during that time I had known him intimately. He knew the kind and character of work I had been doing, and he knew, when I went down there, that I knew nothing about the engine. No, sir; he didn't give me any instructions or warning as to how to start the engine. The engine was not running at that time. I had attempted to start the engine about two or three times before the time I got hurt. I had started it by heating the generator. I got my information as to how to heat the generator by just happening to see some one heating it that way. I was not familiar with the mechanism of the generator at that time. When I took the job that night from this foreman, he did not say anything to me about the generator, whether it was clean or dirty. I did not know at that time that a generator of that character I was working with that night, to start this particular engine where I got hurt, would accumulate carbon or soot, and be required to be cleaned out, and I did not know that the carbon and soot, if allowed to accumulate, would hold fire. When I went down there that night, the engine was standing, and I had to heat it up with the generator. This generator was up probably to the top of my head, it was about even with the top of my head, and it got heated up. I heated it up with gasoline. I got a tomato can about three-fourths full, and poured a little on it and heated it up, and got it ready to start my engine, and got down to turn the air on to blow it. As I turned the valve on, I discovered I was losing air about 15 feet from the engine. I shut the valve off, and got a wrench, and took out a nipple, and got a 1¼-inch plug, and plugged the air line up. I should judge I had been 15 minutes—15 or 20 minutes—doing that work. The generator had cooled off, and I put more gasoline on. I got my gasoline in the tomato can, about three-fourths full of gas, and got it and couldn't see any blaze or anything, and poured a little gas on the generator; as I done that it ignited, and the blaze run in the can and exploded and set on fire. You have to have the air to blow the engine. I don't know who disconnected that pipe, and I did not know it was disconnected when I went to work. The man I relieved did not tell me it was disconnected. They had been working around the engine that day; the foreman and five or six men worked on this other engine until 10 o'clock that night. The explosion occurred at 11 o'clock. When they went off work, they did not tell me they had disconnected some part of the machinery and appliances. This air pipe sets off 15 feet, in behind another engine. As

to when I discovered the pipe was disconnected, when I turned the air valve onto the air drum, I heard it hissing. Then I shut it off and went and plugged it up. I saw the foreman who was in charge of that work before or at about the time he left the works, and he didn't say anything to me about that being disconnected. The first time I discovered it was when I went to turn the air onto the drum. The purpose of that is to blow the generator and heat the hot head. I should judge it was 15 or 20 minutes from the time I discovered that the air was disconnected up until the time I met with my accident; not any longer. At the time I discovered that the pipe was disconnected, I should judge it had been about 15 minutes since I had poured the gasoline in the generator and set it afire. When I started away to fix this pipe, the gasoline in this generator seemed to be burning a little, but not much. The generator was about even with the top of my head. It was a very cold night, freezing, and it was cold where the generator was. It got in through a double door. It was 15 or 20 minutes from the time I left it to fix the pipe until I got back and started to pour the gasoline in the generator the second time. When I came back to relight the generator, I just glanced at it, and couldn't see any fire. Then I poured the gas on it—started to pour it on—and, as I stated, the explosion occurred. At that time I had not received any warning or instruction from my superior as to how to handle this generator in the event it became necessary to relight it. I never was instructed, nothing was said. I did not know about the danger of relighting the generator. I had not received instruction or warning as to how to use the generator, and the time necessary to intervene from the time it was first lighted until the time I might want to light it the second time. As to how I looked to see whether or not there was any fire in the generator at the time I poured the gasoline on, well, I got up as far as I could. This generator was setting about the top of my head, and there was no way to get up to see over the generator to see the condition, how the condition was. I got as high as I could to look into the generator. It was dark in there, so, as far as I knew at that time, there was no blaze of fire in that generator. As to the claim that, prior to that time, I had worked on an engine of a similar character at Columbus, N. M., the Columbus engine is altogether a different engine from the Hachita plant. The Columbus engine is a Stover engine, and the Hachita is a Crescent. There was a difference in the manner of starting the two engines. The Stover is lit with a blow torch; the one at Columbus, you pick it up and pack it around. The Columbus engine is lit different from the Hachita; it is lit with a blow torch, and the Hachita is lit with a generator. You do not take gasoline the same way with the two; starting the two, it is two different ways. The blow torch is a little round ball filled with gas, and you pump air in, and it blows the hot ball; that is different from the Hachita engine. I worked at the Columbus plant two months. Before I went to work there, I had instructions as to how to handle that engine; they put a man with me and he stayed one day. He gave me full instructions as to how to start it. I had never attempted to relight this particular engine at Hachita before the time I got

hurt; that is the first time I ever relit that engine. I should think the tomato can was about half full of gasoline at the time it exploded. The tomato can would probably hold a quart. I don't know why I used a tomato can, instead of some other appliance to pour this in there; that is all that there was. This fire run down in the can; that exploded and threw the gas on my clothes."

On cross-examination he testified:

"I worked 10 or 11 years as a hostler. I entered the service as water service man August 1, 1918. I got hurt on November 28, 1919. I don't remember whether in September, 1918, I worked as repairman in the pump station at Columbus. In October, 1918, on the 1st, 2d, 10th, 15th, 16th, 17th and 31st, I worked at Hachita, installing this particular pump. In February, 1919, I helped install the pumping plant and engines at Columbus. In March, 1919, I worked, installing the Columbus plant. On the 29th and 30th of that month I worked at Hachita as repairman on the engines. In April, 1919, on the 17th, 18th, 23d, and 24th, I worked repairing the engine at Columbus. May 18th and 20th I worked repairing engine at Hachita. From June 10 to 19, 1919, I guess I did run the booster engine at Hachita. In July, 1919, on the 26th and 27th, from the 28th to 31st, I worked repairing the engine at Hachita. In August and September, 1919, I was in charge by myself, as day pumper, of the oil engines at Columbus. On October 15 and 17, 1919, I worked repairing the engines at Hachita. In November, 1919, the month I got hurt, on the 2d and from the 3d to the 8th, and from the 16th to the 17th, I was running this particular engine at Hachita. The engine at Columbus was a Stover and the one at Hachita was a Crescent. This particular engine was called the 'booster' engine, and there is one other main engine in that building. To light the generator you pour gasoline on it and light your gasoline. When it gets hot, you turn on air from the compression tank. That gives a blue flame, shooting out like a blow torch. This blue flame heats a round piece of iron, called a 'hot head' or 'hot ball.' After you have lit your generator, turned on your air, got your blue flame, and your hot ball hot enough, you then rock your flywheel to start the engine. Then you turn off the blow torch. The heat, I suppose, from the hot ball, keeps the engine running. You get the hot ball red hot. The engine introduces the oil into the cylinder; it strikes the hot metal, and explodes, and shoots the piston. Another charge is introduced, and strikes the hot metal, and explodes again. The Crescent engine uses a generator attached to the engine, and the Stover uses a blow torch. The blow torch on the Stover and the blow torch on the Crescent heat the hot ball by compressed air blowing the flame. I went that night, and poured gasoline on the generator, and lighted it. I opened my air valve, and didn't have any pressure, and could hear it hissing out somewhere else. I went and stopped up the disconnection. I came back, glanced at the generator, to see if there was any flame in it, got my quart can half full of gasoline, threw it on there, and then the trouble commenced. At the time I poured the gasoline on the first time, the hood of the generator was open. When I

went over to plug my pipe, I left the hood open. It was still open when I came back, and I left it open when I poured the second gasoline on it, and when I went to Columbus to work Homer Clark instructed me about the running of these engines and the use of the gasoline torch, and I ran them very successfully for two months myself. I had no idea that gasoline was dangerous when thrown on a flame or hot metal. I had a house burn down once, though, through a gasoline explosion. I wasn't home at the time, but was told about it afterwards. Between August 31, 1918, to November 29, 1919, I worked as a water service repairman at times, and at other times as actual operator of one of these engines at Columbus and Hachita. In November I worked 10 or 15 days prior to this accident, running this particular engine. I never had to start the engine at Hachita, but at Columbus I had to start it myself. I have seen the engine started. I have never seen a man take a ball of waste and soak it in gasoline and start it. Most anybody would know it is a fact that the engine is run by the hot metal and the hot ball exploding the gasoline. I didn't know that gasoline, thrown on hot metal, might explode, or that, if thrown on a flame or spark, it might explode. I don't know exactly the time my house burned down, but it was four or five years ago. I wasn't there. The way my wife told me, she had a can of gasoline setting outside, and a can of coal oil, and she went out to start the fire, and got the gasoline can, and went in and poured it on the fire she had started that morning, thinking it was coal oil, and it blew up and set the house on fire."

It is conclusively established that it was extremely dangerous to pour gasoline in this generator to relight it so soon after it had gone out, in the way it was done in this instance, both by the testimony and the fact of the explosion. The court did not submit the disconnected air-pipe as negligence, because it was clearly not the proximate cause, and the other acts of negligence charged have been eliminated by findings of the jury, leaving only the question of duty to warn appellee of the danger of gasoline exploding when brought in contact with hot metal, in the performance of his work in operating this particular engine. Labatt's Master and Servant says:

"The question whether the master, at the time of engaging the servant or afterwards, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury."

Appellee says he was employed as a hostler, and his immediate work was to handle engines, move them in and out of the roundhouse, and the evidence discloses that he did a general repair work, cleaning, etc.; that he was unfamiliar with the ways and means of operating oil and gasoline engines; that on the night in question he was taken from

his regular work, and put to operating this engine to relieve the regular engineer; and that he knew how to start it by having seen some other person do so.

There is evidence, circumstantial, which tends to show that he knew of and should have appreciated the danger of restarting the generator in the way he did; but it is admitted that he was not instructed concerning the dangers, so it simply presents a question of conflicting testimony upon the issue, and we are not authorized to disturb the verdict in such cases. *Texas & Pac. Ry. Co. v. Bursey*, 192 S. W. 809; *M., K. & T. Ry. Co. v. Walker*, 26 S. W. 513; note, 28 L. R. A. (N. S.) p. 1253; also, note, 45 L. R. A. (N. S.) 653.

[3] We are not prepared to hold that the danger in this instance was so open and apparent as to relieve the master of the duty to warn. *Curran v. Seattle & S. F. Ry. et al.*, 34 Wash. 512, 76 Pac. 87; *Tex. & N. O. Ry. Co. v. Gardner*, 29 Tex. Civ. App. 90, 69 S. W. 217; *Yellow Pine Oil Co. v. Noble*, 101 S. W. 276; note, 35 L. R. A. (N. S.) 679; *Bollington v. Railway Co.*, 125 Ky. 186, 100 S. W. 850, 8 L. R. A. (N. S.) 1045; *Allegheny Imp. Co. v. Weir*, 96 Ark. 500, 132 S. W. 462; *H. & T. O. Ry. Co. v. Malloy*, 54 Tex. Civ. App. 490, 118 S. W. 721; *I. & G. N. Ry. Co. v. Wray*, 43 Tex. Civ. App. 380, 96 S. W. 74.

The judgment is therefore affirmed.

#### DAVIDSON et al. v. WRIGHT et ux. (No. 6324.)

(Court of Civil Appeals of Texas. Austin.  
July 2, 1921.)

1. Limitation of actions  $\S$ 24(6)—Four-year statute applies to guaranty of quantity in deed.

The four-year statute of limitation applies to a cause of action based on alleged guaranty in the deed as to the amount of land conveyed.

2. Limitation of actions  $\S$ 28(1)—Two-year statute applicable to representations on sale of land.

As respects right of recovery based on verbal representations and oral agreement that land sold to plaintiffs was of a specified acreage, the two-year statute of limitations is applicable.

3. Limitation of actions  $\S$ 183(3)—Allegation that action accrued more than four years before suit includes averment of two-year statute.

In grantee's action on verbal representations and oral agreement as to quantity of land, an allegation that the cause of action accrued more than four years before suit includes an averment that it accrued more than two years before suit, and thus pleads the two-year statute of limitations.



Error from McLennan County Court; Jas. P. Alexander, Judge.

Action by U. S. Wright and wife against W. B. Davidson and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Sanford & Harris, of Waco, for plaintiffs in error.

Witt, Terrell & Witt, of Waco, for defendants in error.

KEY, C. J. We copy from the brief of plaintiffs in error as follows:

"This is a suit by U. S. Wright, and wife Agnes Wright, originally filed on the 24th day of July, 1919, defendants in error's amended petition having been filed on the 29th day of November, 1919.

"Defendants in error alleged that on the 22d day of July, 1915, plaintiffs in error made, executed, and delivered a deed to plaintiffs, conveying a certain tract of land out of block A of the Davidson subdivision of the Jacob Walker survey, by metes and bounds, containing four acres.

"It is further alleged that defendants in error received the deed and entered into possession of the land on or about the 1st day of August, 1915.

"It is further alleged that the plaintiffs in error represented to the defendants in error that the tract of land contained 4 acres, 'and that said conveyance so warranted and covenanted that said tract of land contained 4 acres of land, and same was sold to these plaintiffs at the price of \$300 per acre, and was purchased and paid for by the acre.'

"It is further alleged that on the 22d day of July, 1919, the defendants in error had the land surveyed, and it was found to contain only 3.3 acres, defendants in error seeking a recovery for seventh-tenths of an acre, amounting to \$210, with interest thereon from August 1, 1915.

"Plaintiffs in error answered by general demurrer, special exception pleading the bar of the statute of limitation of four years, general denial, and special answer setting up the bar of the statute of limitation of four years.

"The cause was tried before the court without intervention of a jury on the 20th day of December, 1919, and the court rendered judgment for the defendants in error in the sum of \$180, with interest thereon at the rate of 6 per cent. per annum from August 1, 1915, to which action of the court plaintiffs in error excepted and gave notice of appeal to the Court of Civil Appeals at Austin.

"Plaintiffs in error filed petition for writ of error and writ of error bond on the 30th day of January 1920.

The defendants in error concede the correctness of the foregoing statement of the nature and result of the suit, with one correction, which is that they did not allege delivery of the deed on the 22d day of July, 1915, but alleged that, although it bore that date, the deed was not delivered, and the transaction was not consummated until the 1st day of August, 1915, and they brought

this suit before the expiration of four years from the latter date.

### Opinion.

[1] Plaintiffs in the court below, who are defendants in error in this court, alleged two separate and distinct grounds for recovery, one being that the defendants in the court below, who are plaintiffs in error in this court, had incorporated in the deed conveying the land to the plaintiffs a written warranty or guaranty that the tract of land contained four acres; and the other ground alleged was that the tract of land referred to was represented by the defendants, and was understood by the plaintiffs, to contain four acres of land, and that the contract of sale was a sale by the acre, at a specified sum per acre. The latter contract or agreement was not in writing. The four-year statute of limitation was pleaded, but there was no plea specifically invoking the two-year statute. The four-year statute has application to the cause of action, in so far as it was based upon the alleged written guaranty contained in the deed. However, the deed referred to was introduced in evidence, and contains no such stipulation, and that fact eliminates that phase of the case.

[2, 3] The plaintiffs in error have by different assignments of error and in different forms challenged the holding of the trial court to the effect that the plaintiffs' cause of action was not barred by limitation. The proof sustains that holding, if the four-year statute is applicable to that branch of the case which rests upon verbal representations and oral agreement. Also, if the two-year and not the four-year statute is applicable to that phase of the case, and the defendants had no plea justifying the application of that statute, the proper judgment was rendered, and it should be affirmed. It is believed that *Bass v. James*, 83 Tex. 110, 18 S. W. 336, and *Gordon v. Rhodes & Daniel*, 102 Tex. 300, 116 S. W. 40, settle the question to the effect that the two-year statute of limitation has application to that phase of the case. As stated above, that statute was not specifically pleaded by the defendants, but, if it was included in the plea of four-year limitation, we see no reason why the defendants are not entitled to its benefit. Upon that subject we quote as follows from 25 Cyc. p. 1408:

"Where a party pleads a statute of limitations not applicable to the cause of action claimed to be barred, he cannot invoke the protection of another statute not pleaded. For instance a party who pleads a shorter period of limitation than the one applicable to the case waives the benefit of the longer and correct limitation which might have been pleaded. The majority of the cases hold, however, on the theory that the greater includes the lesser, that an answer setting up that the cause of action did not accrue within a specified number of years is a good plea of the statute of limi-

tations for any period not over that number of years."

In support of that proposition, the following authorities are cited: *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146; *McCray v. Humes*, 116 Ind. 103, 18 N. E. 500; *Right v. Martin*, 11 Ind. 123; *Davis v. Hascall*, 4 Mo. 58; *Camp v. Smith*, 136 N. Y. 187, 32 N. E. 640; *Reilly v. Sabater* (Sup.) 43 N. Y. Supp. 383; *Van Hook v. Whitlock*, 7 Paige (N. Y.) 373; *Id.*, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246; *State v. Newman's Ex'r*, 2 Ohio St. 567; *Sargeant v. Johnson*, 1 McCord (S. C.) 336; *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263; *Phelps v. Elliott* (C. C.) 35 Fed. 455. *Contra*—*Smith v. Joyce*, 10 Ark. 460; *Boyd v. Barrenger*, 23 Miss. 269; *Riggs v. Quick*, 16 N. J. Law 160; *Murphy v. DeFrance*, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861.

These authorities have been examined, and, as stated by Cyc., the majority of the cases hold that, inasmuch as the greater includes the lesser, a plea alleging that the plaintiffs' cause of action accrued more than four years before the suit was brought necessarily includes an averment that it accrued more than two years before the action was commenced. No particular form of pleading is required in this state, and if a particular plea contains all the allegations necessary to constitute a valid cause of action or defense, such plea will entitle the party to present his proof showing such cause of action or defense.

From what has been said, it follows that, in our opinion, the judgment is not supported by the testimony, and for that reason it is reversed, and the cause remanded.

Reversed and remanded.

### **CAMPBELL et ux. v. McFARLANE.** (No. 8049.)

(Court of Civil Appeals of Texas. Galveston.  
April 28, 1921. Rehearing Denied  
June 2, 1921.)

1. Frauds, statute of §63(4)—Verbal agreement not to take possession of property under written contract could not divest rights of life tenant.

Where a written contract between defendants and plaintiff conveyed to plaintiff a life estate in certain property, plaintiff's verbal agreement that he would not occupy the premises, but would allow defendants to lease it for his benefit, was void under the statute in the absence of an estoppel, and could not divest plaintiff's title and right of possession.

2. Life estates §28—Evidence held to support instructed verdict for life tenant suing to recover possession.

In a suit to recover the possession of property in which defendants had conveyed a life

estate to plaintiff, defended on the ground that following the execution of the written contract, it was agreed, in consideration of defendants' collection of the rents for plaintiff, that plaintiff thereby renounced his right of possession, evidence held to justify the court in instructing a verdict for plaintiff.

Appeal from District Court, Anderson County; John S. Prince, Judge.

Suit by J. E. McFarlane against J. A. Campbell and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Campbell, Greenwood & Barton, of Palestine, for appellants.

Seagler & Pickett, of Palestine, for appellee.

**PLEASANTS, C. J.** This suit was brought by appellee against the appellants to recover possession of certain premises situated in the city of Palestine, Tex., and damages for the alleged breach by appellants of the covenants of their contract by which they conveyed to appellee the premises in controversy.

The substance of plaintiff's petition is sufficiently stated in appellants' brief as follows:

"That on May 14, 1914, appellee and appellants entered into a written contract wherein appellants, in consideration of the payment to them of \$2,250, agreed to lease to appellee for the term of his natural life lot 3 in block 4, according to the original map and plot of the city of Palestine, in Anderson county, Tex., together with the improvements situated thereon. Appellants bound themselves to pay taxes, insurance, and to keep up the improvements on said property. That appellants agreed to furnish board, room, and proper laundry for appellee during his life. That by the terms of said contract appellants became bound to surrender the possession of said property to appellee, same to be held during his natural life, and that all rents and revenues accruing from said property were to become the property of appellee. Appellee alleged that said instrument was a continuing contract. Appellee alleged that possession was delivered to him upon the execution of said contract, and that he continued to hold same up to May 1, 1916, when appellants took possession of same. Appellee further alleged that appellants, under the terms of said contract, furnished his room, board, and laundry up to November 28, 1915. That on or about the last-named date appellants ordered him from their home and breached said contract. That appellee was entitled to recover the sum of \$1,530 for failure to furnish him board, room, and laundry. Appellee prayed for judgment for possession of the property, described as aforesaid, for the term of his life, and for \$1,530 damages for breach of said contract as above set out."

The answer of defendants admits the execution of the contract as alleged in the petition, and in avoidance thereof pleads:

"That immediately after the execution of said contract appellee entered into a separate and distinct verbal contract superseding the written contract pleaded by appellee herein, whereby it was agreed and understood that appellee did not desire to hold the possession of the property aforesaid, but refused to do so, and it was thereupon agreed by and between appellants and appellee that appellants would collect the rents from said property and turn them over to appellee or his agent, and that at no time would plaintiff demand possession of same, and that, in consideration of the collection of the rents by appellants for appellee, he forever renounced his right of possession. That, in pursuance of said last-named contract, appellants diligently collected the rents and turned same over to appellee up to the time suit was filed."

They further pleaded the statute of limitation of four years.

The cause was tried in the court below with a jury, and after hearing the evidence the trial judge instructed the jury to return a verdict for the plaintiff for the possession of the premises. He further instructed the jury that, if plaintiff had voluntarily left the home of the defendants, he could not recover upon his claim for damages, and that in no event could he recover more than the value of a room, board, and laundry for four years before the filing of the suit.

Under this charge the jury returned a verdict in favor of plaintiff for possession of the premises and for damages in the sum of \$250, and judgment was rendered in accordance therewith.

The only assignment of error presented in appellants' brief complains of the charge of the court instructing the jury to return a verdict for the plaintiff for possession of the premises, on the ground that the evidence was sufficient to raise the issue of the modification of the original contract pleaded by the defendants, and that issue should have been submitted to the jury.

[1] We do not think the assignment should be sustained. The written contract between the parties conveys to the appellee a life estate in the property therein described. Appellee's title and right of possession to the estate could not be divested by a verbal agreement that he would not occupy the premises, but would allow appellants to lease it for his benefit, and this is the effect of the agreement set out in the answer and testified to by appellants.

Aside from the question of want of consideration for the alleged agreement, any attempted verbal relinquishment of a life estate is void under the statute of frauds unless such agreement can be enforced upon the principle of estoppel, and estoppel is not raised by the pleadings or the evidence.

[2] The evidence relied on by appellants to sustain their contention that appellee has lost his right of possession of the property

admittedly conveyed to him by them is as follows:

W. R. Petty testified as follows:

"I am a practicing lawyer at this bar. I heard a conversation between Mrs. Campbell and Mr. McFarlane with reference to the renting of this house. It was at the time the contract was executed. It was while Mrs. Campbell was writing her name in the contract, was when the conversation came up there between McFarlane and her. He made the remark, addressing Mrs. Campbell, says, 'Florence I am not going to take the rent of that house;' says, 'I don't want the rent of the house.' I said, 'Mr. McFarlane, I understood you to say that you were to have the rent on this house is the reason I drew it this way.' He says to Mrs. Campbell, 'You can have the control of the house all the time, and rent it to whoever you please.' That was after she signed the instrument. They were at the home of Mr. and Mrs. Campbell when this conversation took place, about this verbal contract."

Appellant Florence E. Campbell testified:

"Mr. McFarlane never demanded possession of this house from me until this suit was filed. Immediately after this contract was signed I had an agreement and understanding with Mr. McFarlane with reference to the collection of the rent. It was a verbal agreement we went into, when we was building the house there. The agreement was made when we were signing up the contract. After the contract was signed up, until the house was ready to rent, I had it in my mind all the time to rent the house and collect the rent and get a tenant for it. As I told you, we just talked a verbal contract; that he didn't want anything to do with the house, and said for me to take it and rent it, and I did it."

J. E. McFarlane testified as follows:

"I heard the testimony of Mr. Petty this morning to the effect that there was a conversation taken place about the time we were signing up these papers with reference to some kind of verbal agreement by which I was to let them have charge of this rent house. It is not true. As I said before, there was no agreement between me and Mrs. Campbell with reference to their holding possession of this building under the contract."

J. A. Campbell testified:

"After this contract was signed it came up then about renting the house, and we put in a plea of wanting to handle the house, on account of the children and the keeping up the house, and Mr. McFarlane said that was all right with him. I don't want to enter into any of our arguments in order to get me to sign it, but after this he said he would not exact the rent of the house off of us, only as he would need money, for us to take the house and handle it, and turn him over the money whenever he wanted money. I don't know as the word 'possession' was used, any more than he told us to take the house and handle it to suit ourselves. We have always since that time handled the house with that understanding. After

the signing of this contract Mr. McFarlane authorized us to collect the rent. Mr. Petty was there on the gallery when this conversation came up."

We think upon this evidence the trial court properly instructed the jury to return a verdict for the plaintiff for possession of the property.

It follows that the judgment should be affirmed, and it has been so ordered.

Affirmed.

**GULF, C. & S. F. RY. CO. et al. v. BOSTICK.**  
(No. 6379.)

(Court of Civil Appeals of Texas. Austin.  
June 29, 1921.)

1. Railroads  $\Leftrightarrow$  5½, New, vol. 6A Key-No. Series—Judgment against carrier, handling shipment during federal control, unauthorized.

In an action for injury to cattle against carrier and Director General of Railroads, the successor to the Director General being made a party defendant, judgment against the carrier is unauthorized, where at time of shipment government was in charge of railroad.

2. Carriers  $\Leftrightarrow$  228(5)—Delivery of cattle held shown by the evidence.

In action for injury to cattle from rough handling and delay, evidence held sufficient to show that cattle had been delivered to the carrier.

3. Appeal and error  $\Leftrightarrow$  100(1) — Little evidence required to sustain verdict, where defendant offered no evidence.

Where successor to Director General of Railroads claimed, on appeal from judgment for plaintiff in action for delay and negligent handling of cattle, that there was no evidence that carrier received the cattle, but the fact, easily disproved, was not disproved, little evidence is required to uphold the verdict and judgment.

4. Appeal and error  $\Leftrightarrow$  880(1) — Failure of proof as to coparty immaterial on other party's appeal.

Where, on appeal from judgment against carrier and successor to Director General of Railroads, judgment is rendered on confession of error that plaintiff take nothing by his suit against the carrier, it is immaterial whether the particular carrier sued carried the goods between the places alleged; all the roads between such places being within the control of the government.

5. Evidence  $\Leftrightarrow$  44 — Judicial notice taken of government control of railroads.

Judicial notice will be taken that Walker D. Hines, as Director General of Railroads, had control of all railroads from Fort Worth to Temple and from Temple to Lampasas in the state of Texas.

6. Evidence  $\Leftrightarrow$  5(1)—Judicial notice taken of common knowledge.

The court will take judicial cognizance of facts that may be regarded as forming part of

the common knowledge of every person in the community of ordinary understanding and intelligence, as the court is presumed to know what everybody in that community of ordinary intelligence and information ought to know.

7. Trial  $\Leftrightarrow$  335—Failure to separate damages in suit for delay and rough handling of cattle fatal, where no evidence of delay.

In an action against the successor to the Director General of Railroads for damages to cattle, occasioned by delay and rough handling, in which there was no evidence of delay, judgment against the successor cannot be sustained, where the jury answered "Yes" to special issue whether cattle were damaged by negligence, either by delay or rough handling or both, and then found one sum as damages, and judgment was entered, making a joint and several liability as to such sum.

Appeal from District Court, Lampasas County; F. M. Spann, Judge.

Action by John Bostick against the Gulf, Colorado & Santa Fé Railway Company and Walker D. Hines, Director General of Railroads, in which John Barton Payne, as the successor to Walker D. Hines, was made a party. From a judgment for plaintiff against both defendants, they appeal. Reversed as to the Santa Fé Company, and action as to it dismissed, and reversed and remanded for a new trial as to John Barton Payne.

Terry, Cavin & Mills, of Galveston, Roy L. Walker, of Lampasas, and Lee, Lomax & Wren, of Fort Worth, for appellants.

H. F. Lewis, of Lampasas, for appellee.

JENKINS, J. Appellee sued Gulf, Colorado & Santa Fé Railway Company and Walker D. Hines, Director General of Railroads, to recover damages for injury to cattle shipped from Fort Worth to Lampasas, by reason of the alleged negligence of defendants. Such negligence is alleged to have consisted in rough handling and unreasonable delay of the shipment. John Barton Payne was made party defendant, as the successor of Walker D. Hines. The case was submitted to a jury upon the following special issues:

"No. 1. Do you find from the evidence that the defendant railway company was negligent in the time taken in transporting the cattle of the plaintiff from Fort Worth, Texas, to Lampasas, Texas?"

To which the jury answered: "Yes."

"No. 2. Was said railway company, or its agents or employes, negligent in handling the train on which said cattle were shipped?"

To which the jury answered: "Yes."

"No. 3. Were the cattle composing said shipment damaged by such negligence, if any, either by delay in the time of shipment, or in the manner of handling, or both, as alleged by plaintiff?"

To which the jury answered: "Yes."

"No. 4. What amount of money will compen-

sate the plaintiff for the damage to his cattle, if any?"

To which the jury answered: "\$691.50."

"No. 5. Was any part of the damages, if any, sustained by plaintiff's stock, proximately due to the inherent vice of such stock, and their propensities to lay down in the cars and be trampled by other stock in the cars, and to injure themselves?"

To which the jury answered: "No."

Upon the findings of the jury, the court rendered judgment against defendants, jointly and severally, for the sum of \$691.50.

[1] Appellee confessed error as to the judgment against the railway company, for the reason that it alleged, and the undisputed proof shows, that at the time of the shipment the railway was in charge of the government, under its Director General. For this reason, the judgment against the railway company is reversed, and here rendered, that appellee take nothing by its suit against said appellant, but that it go hence without day and recover of appellee its costs in this behalf expended.

There is no assignment of error to the effect that the verdict and judgment are wholly unsupported by the evidence, but appellant Payne insists that such is the state of the record, and that this is fundamental error appearing from the face of the record, and should be considered without an assignment. He insists: (1) That it appears from the statement of facts that there was no evidence that the Gulf, Colorado & Santa Fé Railway Company ever received the cattle; (2) if so, there was no evidence as to the condition of such cattle when so received; and (3) that there is no evidence showing unreasonable delay.

[2, 3] As to the first two of the above-propositions we cannot agree that such is the state of the record. The evidence shows that appellee unloaded the cattle at Lampasas November 29, 1919, and drove them to a ranch about 8 miles south of Lampasas, and that he had about 102 three year old steers. S. R. Payne, witness for appellee, testified that about December 4, 1919, appellee put in Payne's pasture about 100 three year old steers "that he had shipped from Fort Worth over the Santa Fé." We think this is some evidence in support of the allegation that the cattle were so shipped. It should require but little evidence to sustain a verdict and judgment, when there is nothing to the contrary, and when such allegation could be easily disproved, if not true. If the Gulf, Colorado & Santa Fé Railway does not run through Fort Worth to Lampasas, via Temple, this fact could easily have been shown; also, we think the proof is sufficient to sustain the allegation that the cattle were delivered to the railway company in good condition. As this case is to be reversed upon another point, doubtless

proof as to these points will be strengthened on another trial.

[4, 5] As this is a judgment, as it now stands under our decision, against appellant Payne only, we think it is immaterial over what road the cattle were shipped from Fort Worth to Lampasas. We take judicial cognizance of the fact that Payne's predecessor, Hines, as Director General of railroads, had control of all railroads from Fort Worth to Temple, and from Temple to Lampasas, and if the cattle were injured by his negligence, as alleged, it is immaterial over what road he made the shipment.

[6] The court will take judicial cognizance of facts that may be regarded as forming part of the common knowledge of every person in that community of ordinary understanding and intelligence; or, in other words, the court is presumed to know what everybody in that community of ordinary intelligence and information ought to know. *Cyclopedia of Law*, vol. 16, p. 852; 1 *Wharton on Evidence*, § 339; 1 *Greenleaf on Evidence*. This principle of law has been applied in this state in the following cases: *Railway Co. v. State*, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815, in which is made the following citation from *Wharton on Evidence*:

"A judge in trying a case must not only exercise his own logical faculties in construing and applying evidence, but he must draw on his own sources of knowledge for such information as is common to all intelligent persons in the same community."

In support of this proposition, the court cites the following cases: *Trenier v. Stewart*, 55 Ala. 458; *Gibson v. Stevens*, 8 How. 399, 12 L. Ed. 1123; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737; *Steinmetz v. Turnpike Co.*, 57 Ind. 457; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Walker v. Allen*, 72 Ala. 456; *Oppenheim v. Wolf*, 3 Sandf. Ch. (N. Y.) 571; *Neaderhouser v. State*, 28 Ind. 257.

In referring to the statement in 16 *Cyclopedia*, supra, Mr. Justice Harper, in *Ex parte Botts*, 69 Tex. Cr. R. 161, 154 S. W. 221, 44 L. R. A. (N. S.) 629, says that authorities in support of this proposition are cited in that work from Alabama, California, Connecticut, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, Oregon, Virginia, Washington and the United States Supreme Court. In *Gaddy v. Smith*, 116 S. W. 164, this court applied this principle as to location of the city of Waco, citing *Carson v. Dalton*, 59 Tex. 502; *Solyer v. Romanet*, 52 Tex. 567.

It is true that Mr. Justice Brown, speaking for the court in *Telegraph Co. v. Smith*, 88 Tex. 13, 30 S. W. 550, said:

"The distance between Dallas and Waxahatchie, the means of travel, and the time it would

require to make the trip, were not matters of such common knowledge that the jury could determine the issue without evidence."

We take it that the words "means of travel" did not refer to the absence of testimony as to whether or not a railroad ran from Dallas to Waxahachie. The findings of fact by the Court of Civil Appeals show that there was such a road, operating both passenger and freight trains. But there was no evidence as to the schedule of such trains, the distance between the points, or the usual time of making the trip. The case was reversed upon the ground that the evidence as to the contract sued on was variant from that alleged in the petition. What Judge Brown said upon the point above referred to was very proper, as informing the trial court what evidence would be necessary to sustain a judgment upon another trial.

In *Railway Co. v. State*, supra, our Supreme Court held that it would take judicial cognizance of the fact that certain railroads in this state were parallel lines. After quoting from Wharton on Evidence, as hereinabove set out, and citing the cases hereinabove cited, Mr. Justice Gaines, speaking for the court, said:

"The authorities cited show that we must take notice of the geography of the state, and at least of its navigable streams. It is a matter of history that important lines of railroad, once established, have remained as fixed and as permanent in their course as the rivers themselves. They supersede, in the main, all other modes of travel between the points which they touch, and become as well, if not better, known than any other geographical feature of the country. Their locality becomes 'notorious and indisputable.' For instance, can we doubt that the Houston & Texas Central road runs from Houston to Dallas, and that the Gulf, Colorado & Santa Fé touches with its lines the same points?"

We do not think that the decision in *Telegraph Co. v. Smith*, supra, was intended to overrule or limit the doctrine as to judicial knowledge announced in *Railway Co. v. State*, supra. In *Miller v. Railway Co.*, 83 Tex. 520, 18 S. W. 954, it was said:

"The court would take notice of the locality of defendant's line of railways, for it is a physical and geographical fact of undisputed notoriety."

In *Ex parte Botts*, supra, the court said:

"This court, soon after its organization, adopted the general rule laid down by Mr. Greenleaf: 'Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction.' *Moore v. State*, 7 Tex. App. 20. And this has always been the rule in this court and the Supreme Court."

[7] It will be seen from the findings of the jury as above set out that there was no

separation of damages occasioned by rough handling and by delay. The finding is that the damages were occasioned by both causes, or, if by only one, it is left uncertain by which. There was no evidence as to the distance from Fort Worth to Temple, or from Temple to Lampasas, and no evidence of the usual time consumed in making shipments between these points.

Upon authority of *Telegraph Co. v. Smith*, supra, we sustain appellants' fourth assignment of error, which, in effect, is that the judgment should be set aside because there was no evidence as to the matters above referred to.

For the reasons stated in the next preceding paragraph of this opinion, this case is reversed and remanded for a new trial herein.

Reversed and remanded.

### STRAUSS v. SLONE. (No. 8062.)

(Court of Civil Appeals of Texas. Galveston. April 28, 1921. Rehearing Denied June 2, 1921.)

**Trespass to try title — 10—Purchaser in possession having paid price and made improvements has equitable title supporting action for possession.**

Where purchaser had been placed in possession of the land by the vendor, who had shown him the corners and boundaries, and he had paid the purchase price and made valuable improvements, he had an equitable title superior to the vendor's legal title, and the purchaser's petition in suit to recover title and possession, alleging such facts, was not demurrable, nor, although it stated that the deed given him by the vendor misdescribed the land, was it open to the objection that it showed the suit was one to reform the deed, which right was barred by limitations; for, being in possession, the purchaser's right to the land was independent of any reformation of the deed.

Appeal from District Court, Jackson County; John M. Green, Judge.

Action by N. Strauss against J. R. Slone. From judgment of dismissal, plaintiff appeals. Reversed and remanded.

Proctor, Vandenberg, Crain & Mitchell, of Victoria, and McCrery & Vance, of Edna, for appellant.

Cline & Ingram, of Wharton, for appellee.

LANE, J. This suit was instituted in the district court of Jackson county by appellant, N. Strauss, on the 1st day of January, 1920, against appellee, J. R. Slone, for the recovery of title and possession of 80 acres of land, a part of section 14 of the Morris & Cummings survey in Jackson county, Tex.

The plaintiff alleged that in September,

1895, appellee was the owner of a certain 200 acres of land, a part of said section 14, claiming under those who had theretofore purchased the same from the state of Texas; that on the 8th day of January, 1898, appellee sold 80 acres out of said 200 acres to one H. T. Rackley, and that in the year 1902 Rackley reconveyed the same to appellee; that on the 3d day of August, 1903, appellee conveyed said 80 acres to the plaintiff and placed him in possession thereof, and that plaintiff took possession of said 80 acres and made valuable improvements thereon, and that thereafter, on the 27th day of April, 1910, for and in consideration of the execution and delivery by appellee to plaintiff of his certain promissory notes, aggregating \$5,700, secured by a vendor's lien on said property, plaintiff conveyed the same to appellee; that thereafter, on the 4th day of March, 1913, appellee, joined by his wife, re-deeded said 80 acres to plaintiff in payment of the aforesaid notes and interest due thereon and again placed plaintiff in possession thereof; that all of said conveyances were made subject to certain purchase money due the state of Texas; that in all of the deeds relating to said 80-acre tract above mentioned by mutual mistake of the parties the said 80 acres actually sold, and of which the several purchasers were placed in possession, was misdescribed as follows:

"All that certain 80 acres, a part of section No. 14, Morris & Cummings surveys, in Jackson county, Tex., and by metes and bounds thus described: Beginning at the southeast corner of said section No. 14; thence north 45 degrees east 1,434.16 varas to stake for corner; thence north 45 degrees west 314.9 varas to stake for corner; thence south 45 degrees west 1,434.16 varas to stake for corner; thence south 45 degrees east 314.9 varas to the place of beginning"

—that the 80 acres actually sold by said several conveyances, and of which the several purchasers were placed in actual possession, is described as follows:

"Beginning at the southeast (or east) corner of said section No. 14; thence north 45 degrees west 1,434.16 varas to stake for corner; thence south 45 degrees west 314.9 varas to stake for corner; thence south 45 degrees east 1,434.16 varas to stake for corner; thence north 45 degrees east 314.9 varas to place of beginning."

He further alleged that he purchased from appellee the land and premises last described, and that upon his first purchase of the same in August, 1903, he was placed in possession of the same; that he took actual possession thereof; that he placed valuable and permanent improvements on it and used and cultivated it and exercised exclusive and absolute possession, control, and dominion over it up to the time of his sale thereof to appellee on the 27th day of April, 1910; that upon the second sale of said land by appellee to plaintiff, on the 4th day of March,

1913, appellee again placed plaintiff in possession of the identical 80-acre tract sued for, and in doing so appellee pointed out to plaintiff the four corners and boundaries thereof; that plaintiff then and there took possession of said land and remained in the full possession and enjoyment of the same, using and cultivating the same and exercising dominion thereover, and placing permanent and valuable improvements thereon, with the knowledge and acquiescence of defendant, until the 15th day of October, 1919, at which time the defendant forcibly entered upon said premises without the consent of plaintiff, and began exercising acts of dominion and control over the same, and over plaintiff's protest is plowing up said land, and has ousted plaintiff and his tenants from the possession thereof, to plaintiff's great damage in the sum of \$1,000.

By paragraphs 11 to 14 of his petition the plaintiff made the following allegations and prayer:

"That subsequent to said reconveyance to plaintiff by defendant dated March 4, 1913, defendant pointed out to plaintiff and his tenant, one and both of them, on the ground, said 80 acres of land in accordance with the field notes as above correctly given, pointed out stakes which he himself had set for corners and boundaries, and directed where the line was between plaintiff's and defendant's land and where plaintiff should erect his levee, which was subsequently erected by plaintiff at much expense, and affirmatively stated to him and them that same belonged to plaintiff, was owned by plaintiff, and that he (defendant) had no claim or interest in said land, or in the fence and improvements then thereon; that at the time and also subsequent to said reconveyances defendant and plaintiff agreed that each should pay his part, according and in proportion to acreage owned by each, of the sum due the state of Texas, and in accordance and compliance with such agreement plaintiff paid the sum of \$200 to the state of Texas upon and in satisfaction of the sum due it upon said 80 acres of land, which sum has been placed by the state to the credit of defendant upon the whole tract of 200 acres; that under said conveyance and under positive assertions by defendant to plaintiff and third persons of plaintiff's ownership of said 80 acres of land, and with absolute and continued acquiescence of defendant, who lived only a short distance therefrom, in plaintiff's possession, ownership, control, and absolute dominion thereover, plaintiff, by reason thereof, built fences, houses, and placed valuable and permanent improvements thereon, as before alleged, and that such conveyance and express recognition by defendant of plaintiff's rights in and to said land and positive assertion of ownership, possession, and right to possession of said 80 acres in and by plaintiff, and the continued acquiescence therein by defendant until very recently, has occasioned the payment of money by him, plaintiff, to the state as above alleged, and has further occasioned material changes as above alleged in plaintiff's condition with reference to said 80 acres of land, which would oth-

erwise not have occurred and otherwise would not exist.

"XII. Plaintiff alleges that he is the owner of the 80-acre tract of land, subject only to the indebtedness thereon due the state of Texas, and, that defendant's trespass and taking possession thereof is wrongful, but that, unless restrained by order of this court, the defendant will continue his wrongs and trespass against this plaintiff, will eject plaintiff's tenants and servants from said land, and will prevent the cultivation and use thereof by plaintiff, all of which defendant is threatening and intending to do.

"XIII. Plaintiff further alleges that defendant is asserting some claim of title to the said 80 acres of land, which claim constitutes a cloud upon plaintiff's title. Plaintiff alleges that by reason of the promises he is entitled to the full and complete possession and use of the premises described, and that the defendant, by reason of the acts complained of, is wrongfully depriving plaintiff thereof.

"XIV. Wherefore plaintiff prays, defendant having been served with citation and having answered herein, and a temporary injunction having been heretofore granted and issued in this cause against defendant restraining him from in any wise trespassing upon said 80-acre tract, or in any wise interfering with the use and possession thereof by plaintiff or his tenants, or from in any wise molesting plaintiff or his tenants in the use and enjoyment thereof, that upon final hearing hereof said injunction be made permanent, and plaintiff have judgment against defendant for said 80-acre tract as correctly described herein, divesting out of defendant all claim or title thereto, and fully and absolutely restoring all rights, claim, and title to said land in this plaintiff; that, moreover, plaintiff have judgment against defendant for his damages, and all costs of suit, and for such general and special relief as he may be entitled to in law or in equity."

The defendant, J. R. Slone, presented a general demurrer and one special exception to the plaintiff's petition, insisting: First, that the allegations of the petition are insufficient to entitle the plaintiff to any relief whatever; second, that the suit of the plaintiff as shown by his petition is one for the reformation of the deed by which the defendant sought to convey the land involved herein to the plaintiff, and, since it is shown upon the face of the petition that more than four years had elapsed between the date of the execution of said deed and the filing of the plaintiff's suit, it is apparent from the petition that the cause of action attempted to be set up by the same was at the time of filing the suit barred by the four-year statute of limitation, and that therefore the petition is subject to defendant's demurrer; and, third, that since there is no prayer for a reformation of the deed in question, no such relief can be had in the suit.

The court sustained both the general demurrer and the special exception, and upon the refusal of the plaintiff to amend his pleadings the cause was dismissed.

N. Strauss has appealed from the judgment of dismissal, and insists that his suit as made by his petition was not one for the reformation or correction of a deed, but that it was and is a suit for the recovery of the land properly described in his petition and of which he was placed in possession by the defendant after he had purchased the same from defendant, and after he had been shown the corners and boundaries thereof by defendant, and after he had in good faith entered thereon and thereon made valuable improvements and paid to defendant the purchase price therefor, and therefore the demurrer and special exception of defendant were erroneously sustained by the court.

We think the petition alleged a good cause of action, and that the court erred in holding to the contrary. The plaintiff pleaded an equitable title to the land in controversy superior to the legal title held by the defendant, and if the allegations of the petition can be sustained by proof, the plaintiff should be awarded a recovery. *Gilmore v. O'Neil*, 107 Tex. 18, 173 S. W. 204; *Wooldridge v. Hancock*, 70 Tex. 21, 6 S. W. 818; *Lodge v. Leverton*, 42 Tex. 18.

It is held in the cases cited and in many others which might be cited, that where a purchaser takes possession of land under an oral contract of purchase and sale, pays the purchase money therefor, and makes valuable improvements by reason of said contract, he has an equitable title superior to the legal title remaining in the vendor. It would seem unconscionable that the party who has received the advantages of the contract, as alleged by the plaintiff in this case, should be permitted to say that, notwithstanding the fact that I made the sale as alleged by the plaintiff, that he paid me for the land, and I put him in possession thereof, and thereafter he made valuable improvements thereon, still I am the owner of said land, because I have never conveyed it to the plaintiff by an instrument of writing. This is the effect of what appellee has said by his demurrers which were sustained by the trial court.

In *Gilmore v. O'Neil*, supra, quoting from *Vardeman v. Lawson*, 17 Tex. 10, it is said:

"The defendant being in possession under a contract to convey, and having paid the consideration, is the equitable owner of the land. His is superior to the legal title remaining in his vendor; and, there being no possession adverse to his right, the statute of limitations does not run against it."

Again:

"This equity to the one-third of an acre would have been incapable of enforcement as a title in Mrs. Duey's hands, because she had no possession; and, being out of possession, the reformation of the deed executed by Jones and wife would have been necessary to invest her with title. But had she taken possession, accompanied by improvements, having already



paid the full purchase price of the land, there could be no doubt of the perfection of her equity into an equitable title, superior to the legal title in Jones and wife, and entitled to prevail against it in the hands of any subsequent owner not protected as an innocent purchaser."

Again:

"His entry into possession and his ownership were unquestioned by the Jones heirs, or any one else, until shortly before the institution of this suit. It is evident under this state of facts that, independent of the deed from Jones and wife to Mrs. Duey, O'Neil held a perfected equitable title to the land in controversy superior to the legal title in Jones or his heirs, or in the hands of any one acquiring it from them with notice of the equity."

If appellant's title was the superior title, as alleged by him, and was, as we have found, capable of enforcement against the legal title remaining in appellee, his right to be quieted in it would follow. Asserting, as he has, a superior equitable title independent of the deed executed by appellee as the basis of his suit, in what way was the reformation of such deed essential to the establishment of his demand? Having reached the conclusion that the plaintiff's petition alleged a cause of action, and that the trial court erred in sustaining the demurrer and exception addressed thereto and in rendering judgment dissolving the temporary injunction theretofore granted and dismissing said cause, we further conclude that the judgment should be reversed, and the cause remanded for trial upon its merits, and it is so ordered. Reversed and remanded.

# J. M. RADFORD GROCERY CO. v. NOYES. (No. 6388.)

(Court of Civil Appeals of Texas. Austin.  
June 29, 1921.)

## 1. Landlord and tenant §83(1)—Contract for renewal held not to have existed.

Where a tenant negotiating for leasing of a building for another year prepared duplicate contracts and presented them to the landlord for his acceptance, and the landlord refused to accept the proposed contract without provision therein for six months' notice by tenant of intention to renew for the subsequent year, and both contracts remained in the possession of the landlord and his agents, and the duplicate was never delivered to the tenant, who was never notified that the proposed agreement was acceptable to the landlord, who refused to accept it unless the stipulation was placed therein, no contract for the renewal tenancy ever existed between the parties.

## 2. Appeal and error §662(4)—Statement of facts cannot be impeached by Court of Civil Appeals.

The Court of Civil Appeals cannot impeach the truth of the statement of facts agreed upon

by the parties and signed by the judge, though it may be looked to in connection with the bill of exceptions in construing the latter.

## 3. Appeal and error §664(4)—Court of Civil Appeals cannot give effect to recitals in qualification of bill of exception contradictory of approved statement of facts.

Where, from the state of the record, the Court of Civil Appeals cannot tell which is a true recital of the facts, the approved statement of facts, or the trial court's qualification to a bill of exception, in so far as such facts may be important, the Court of Civil Appeals cannot give effect to the recitals in the qualification of the bill.

## 4. Evidence §429—Testimony not inadmissible as varying contract of tenancy.

In an action for rent of business premises, testimony supporting defendant tenant's answer that, though it prepared duplicate contracts for a renewed term, such contracts were refused by plaintiff landlord as prepared, etc., held not inadmissible as an attempt to vary a written contract, going to show there was never any meeting of the minds of the parties, and therefore no contract.

Appeal from District Court, Runnels County; J. O. Woodward, Judge.

Suit by Gus Noyes against the J. M. Radford Grocery Company. From judgment for plaintiff, defendant appeals. Reversed, and cause remanded.

Davidson & Hickman, of Abilene, for appellant.

BRADY, J. Appellee sued appellant for the recovery of \$600, as one year's rental of certain business premises in the town of Ballinger, Tex. The petition declared upon a written lease contract, alleged to have been entered into on the 5th day of December, 1917, for the period of one year beginning February 1, 1918. In addition to general demurrer and general denial, appellant defended upon substantially these grounds: That during the year 1917 it had occupied the premises as a tenant of appellee; that in the latter part of 1917 it began negotiations with appellee for the leasing of the building for 1918; that it prepared duplicate contracts and had the same presented to appellee at Ballinger, for his signature and acceptance, with instructions that duplicate copy be returned to it upon execution by appellee; that appellee refused to execute and accept the proposed contract as prepared and presented by appellant, unless a provision should be placed therein that appellant would give appellee six months' notice of its intention to exercise a certain option in such agreement for the renting of the premises for the year 1919; that both contracts remained in the possession of appellee and his agents, and a duplicate copy was never delivered to appellant, who was never notified

that the proposed agreement was acceptable to appellee, but, on the contrary, that appellee refused to accept the proposed agreement unless such stipulation was placed therein, for which reason no contract ever existed between the parties. This plea was duly verified.

The court gave a peremptory instruction to the jury to find for appellee for the amount sued for, with interest.

[1] The questions raised on this appeal relate to the ruling and action of the trial court in refusing to permit certain witnesses to testify to facts which substantially would have made out the defenses above indicated, in accordance with the theory of appellant. In our opinion, the facts pleaded in the verified answer constituted a good defense to appellee's suit; therefore, if the testimony which was rejected was admissible to establish the defenses, it was reversible error to refuse to permit the witnesses to so testify, and to exclude such testimony from the jury. The bill of exception discloses that appellant offered the testimony of the witnesses, R. G. Erwin, C. W. Gill, and F. H. Smith, to the effect that there was never any execution or delivery of the contracts, but that the appellee had delivered the same to his agent, Mr. Erwin, with instructions not to deliver them to appellant, nor permit the same to become effective as a contract unless and until a clause should be inserted in the agreement, providing for at least six months' notice of the intention of appellant to exercise the option contained in the contract. The bill further shows that the witnesses Gill and Smith, if permitted by the court, would have testified to the effect stated, but that appellee objected to this testimony, because it was an attempt to vary the terms of the written contract by parol testimony. This specific objection was sustained, and the testimony excluded from the jury.

In qualifying the bill of exception, the trial court made substantially this explanation: That Mr. Erwin had testified that he, as agent for appellee, received the contract from appellant, the original copy having already been signed by it; that he presented same to appellee, who signed it, stating at the time that he wanted a clause inserted requiring 60 days' notice by appellant of its intention to exercise the option, instead of 6 months, as pleaded and as claimed by appellant, but that appellee further stated to Mr. Erwin that, if appellant was not agreeable to the clause being inserted as stated, to deliver the contract regardless of such clause; that Mr. Erwin notified Mr. Smith, the agent of appellant, that the contract was there, that it had been signed by appellee, and was ready for delivery. The explanation further states that Mr. Smith also testified that Mr. Erwin had notified him that the contract was signed by appellee and was ready for delivery. The trial judge attached

a copy of the lease to the bill, and specifically refers this court to the testimony of Mr. Erwin concerning the contract.

It appears that the statement of facts does not support the bill of exception in certain particulars which may be important. The statement of facts is in the usual form, is signed by counsel for both parties, and approved by the trial judge. It purports to be a statement of all the facts proven upon the trial. The testimony of Mr. Erwin, as disclosed by the statement of facts, does not show the specific instructions from appellee to Mr. Erwin, as stated in the bill of exception, but merely shows that, at the time Mr. Noyes signed the lease contract, he gave Mr. Erwin "instructions with reference to the contract." Furthermore, the statement of facts does not contain any testimony given by Mr. Smith, the agent of appellant. Apparently his entire testimony was rejected.

[2, 3] Under the principles announced in *Wiseman v. Baylor*, 69 Tex. 63, 6 S. W. 743, and *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780, we cannot impeach the truth of the statement of facts, agreed upon by the parties and signed by the judge, although it may be looked to in connection with the bill of exception in construing the latter. From the state of the record here, we cannot tell which is the true recital of the facts—the approved statement of facts, or the recital in the court's qualification to the bill of exception; therefore, in so far as these facts may be important, we cannot give effect to the recitals in the qualification to the bill. Especially do we think this since the trial judge has specifically referred us to the statement of facts for the testimony.

It is fairly disclosed, however, from the bill of exception itself, that the trial court refused to permit the testimony in question, and excluded it from the jury, upon the theory that, the lease contract having been signed by the parties, and the agents for both having testified that Mr. Erwin had notified appellant's agent that the contract was signed and ready for delivery, the testimony would be inadmissible as being an attempt to vary a written contract.

[4] With this view we are unable to agree. The defenses urged did not question the fact that the parties had signed the written instrument, but the claim was that there was never any delivery of the same unconditionally and according to the proposal of appellant; in other words, it was claimed that there was never any meeting of the minds of the parties, and therefore no contract. The testimony excluded tended to establish this theory. If the testimony had been admitted, and the jury had accepted the facts as established, it is clear to us that there would have been a perfect defense. The effect of this testimony would not have been to vary a written contract, but to establish the conclusion that the contract was never consum-

(333 S.W.)

mated. If there was no meeting of the minds, and no completed contract, how could the testimony vary the terms of a written contract? The answer appears obvious.

As we have indicated, the court erred in refusing to permit the witnesses to testify to the facts shown in the bill of exception, and in excluding the same from the consideration of the jury, and therefore in peremptorily instructing a verdict for appellee. For this error the judgment will be reversed, and the cause remanded.

Reversed and remanded.

# MICHNA et al. v. STATE et al. (No. 6377.)

(Court of Civil Appeals of Texas. Austin.  
July 2, 1921.)

**Boundaries** ¶41—Party producing evidence on issue is entitled to special charge thereon.

Where, in a boundary dispute, there was evidence produced by a party in support of an issue by him as to a particular location, he was entitled to a special charge thereon in addition to the general charge.

Error from District Court, Travis County; George Calhoun, Judge.

Action by the State of Texas and others against E. Michna and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Weeks, Morrow & Francis, of Wichita Falls, for plaintiffs in error.

C. M. Cureton, Atty. Gen., and E. F. Smith, W. W. Meachum, Jr., and T. L. Beauchamp, Asst. Attys. Gen., for defendants in error.

**JENKINS, J.** The only issue in this case is as to whether the land described in defendants in error's petition, and which they sue herein to recover as vacant land, is embraced within the boundaries of the patented survey in the name of F. W. Huseman. The court in its charge to the jury stated the law of boundary correctly, as far as it went. The jury found in favor of defendants in error. The evidence is sufficient to sustain the verdict. But we think the court committed material error in refusing to give special charge No. 2, requested by plaintiffs in error, as follows:

"If you believe from the evidence that J. P. Earle, in surveying the F. W. Huseman survey, located the northwest corner thereof at a point on the bank of Red river where there is

now situated a stone from which an elm bears south  $38\frac{1}{4}^{\circ}$  west 143 vrs., or if you find from the evidence that said surveyor located said northwest corner of the Huseman survey at any point north of said stone, then you will find for the defendants."

The field notes of the Huseman survey show that it was made by J. P. Earle, February 21, 1874. They call for the N. W. corner of survey No. 818 as the beginning corner of this survey. There does not seem to be any substantial dispute as to the location of this corner. The calls are:

"Thence south 4,845 vrs., a stake in prairie; thence west 1,900 vrs. to a stake in the east boundary line of the Lewis Powell survey; thence north with said Powell 8,925 vrs., a stake in bank of Red river; thence down said river with its meanders as follows: N. 64 E. 2,111 vrs. to the place of beginning."

If Earle surveyed this land and actually made its corners on the ground, the corners so made are the corners of the Huseman survey. Neither Earle nor any one who assisted in making this survey testified in this case. It is the contention of plaintiffs in error that Earle made the northwest corner of the Huseman survey at the northeast corner of the Powell. This corner is found and identified, and, if it is also the northwest corner of the Huseman, there is no vacancy. Plaintiffs in error introduced in evidence the field notes of an abandoned survey in the name of Elizabeth Rehorse, made by J. P. Earle, April 9, 1874, which begins at the same place as the Huseman survey, and calls to run—

"Thence south 3,407 vrs. to stake; thence west 1,900 vrs. to stake in the east line of the Lewis Powell; thence north with the east line of same 2,487 vrs. to the N. E. corner of same on the bank of Red river; thence N. 64 E. 2,111 vrs. to the beginning."

This evidence tended to support plaintiffs in error's contention that Earle made the N. W. corner of the Huseman survey at the N. E. corner of the Powell. The plaintiffs in error had the right to have this feature of their defense affirmatively presented, as would have been done had the requested charge hereinbefore set out been given, and it was error to refuse this charge. *Trac-tion Co. v. Adams*, 107 Tex. 614, 615, 183 S. W. 155, and authorities there cited.

For the error in refusing to give the special charge herein referred to, the judgment of the trial court is reversed, and this cause is remanded for a new trial.

Reversed and remanded.

**WILLIAMS v. FOSTER. (No. 1555.)**

(Court of Civil Appeals of Texas. Amarillo.  
June 15, 1921.)

1. Appeal and error  $\Leftrightarrow$ 1217—Execution obtained through processes issued out of court having original record.

The execution of judgment at common law was obtained through processes issued out of the court having the original record, and this is true in Texas procedure under Rev. St. art. 1646, relating to execution on judgments of Court of Civil Appeals.

2. Appeal and error  $\Leftrightarrow$ 1217—County court proper place to institute proceedings for violation of agreement in proceedings on mandate from Court of Civil Appeals.

When the Court of Civil Appeals affirmed judgment of the lower court appointing a guardian of a minor, it became the duty of the county court, under the mandate issued from the Court of Civil Appeals, to give effect to such judgment, which required other proceedings in the county court, such as fixing the amount of the guardian's bond, etc.; an agreement made between the guardian and another party filed in the county court and approved by the county judge, relative to the minor remaining in school until the end of her term, was a part of such subsequent proceedings, and if violation of such agreement subjects the parties violating it to a charge of contempt, the appropriate place to institute contempt proceedings against them is in the county court, and not in the Court of Civil Appeals.

3. Appeal and error  $\Leftrightarrow$ 1217—Jurisdiction of appellate court does not end with its mandate.

Rev. St. art. 1592, gives the Courts of Civil Appeals power to issue such writs as are necessary to enforce the jurisdiction of the court, and the jurisdiction of such a court does not end with the issuance of its mandate.

4. Appeal and error  $\Leftrightarrow$ 1206—Appellate court need not move where obstruction of execution of judgment is act of mere individual.

There is no necessity for any procedure in the appellate court where the obstruction to the execution of the judgment of the lower court, affirmed by the appellate court, is the act of a mere individual, and is not caused by the refusal of the lower court to issue execution, etc.

5. Judges  $\Leftrightarrow$ 45—Judge held not disqualified by relation by "affinity" to litigant.

The county court judge whose daughter was the wife of a litigant's son was not related by "affinity" to the litigant to disqualify him from sitting in the cause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Affinity.]

6. Judges  $\Leftrightarrow$ 19—Litigant who consented to appointment of special judge cannot in contempt proceedings impeach such judge's acts.

A litigant in a guardianship matter, who by his agreement entered into with the other party and filed in the county court recognized the authority of a special judge to act in such case, cannot in contempt proceedings in the Court of Civil Appeals for violation of the

agreement, impeach the acts of such special judge, though in fact the regular county court judge was not disqualified from relationship to the other litigant by affinity, and there was no need for the appointment of the special judge.

Error from District Court, Floyd County.

Proceedings between S. E. Williams, and J. J. Foster in the matter of the minor Alta Grace Williams. From the judgment, Williams brings error. Motion by J. J. Foster to have S. E. Williams and B. Frank Buie, his attorney, held in contempt of the Court of Civil Appeals. Motion denied and proceedings dismissed.

Hendricks & Mood, of Amarillo, for plaintiff in error.

A. P. McKinnon, of Floydada, for defendant in error.

BOYCE, J. Defendant in error, J. J. Foster, has filed this motion to have the plaintiff in error, S. E. Williams, and his attorney, B. Frank Buie, held in contempt of this court. The history of the case, down to the filing of this motion, is set out in the opinion in the disposition of another proceeding, in the case Williams v. Foster, 229 S. W. 896, and need not be repeated. It appears that J. J. Foster, after the former order of this court above referred to, duly qualified as guardian of the person of the minor, Alta Grace Williams, and that thereafter said J. J. Foster, as guardian, and S. E. Williams and his wife, executed the following agreement:

"In the Matter of Guardianship of the Minor, Alta Grace Williams. In the County Court of Floyd County, Texas, January Term, 1921. It is hereby agreed, the Hon. J. N. Stallbird, special judge approving the same, that, whereas said minor, Alta Grace Williams, is now in school at Canyon and that it is to the best interest of said minor to remain in said school until the present term expires, which will be some time during the next month, said minor being now with her grandparents, S. E. Williams and his wife, Sarah Williams: Now the said J. J. Foster, guardian of said minor, agrees that said S. E. Williams and wife shall keep said minor and send her to school where she has attended until the expiration of said school, on condition that said Williams and wife will, within three days after said term of school shall expire, bring said minor, Alta Grace Williams, to Floydada, Texas, and have her before said special county judge, Hon. J. N. Stallbird, giving notice of the exact date on which said minor is to be brought before said court, to all of which said S. E. Williams and wife, Sarah Williams, agree, and all parties have signed, this the 14th day of April, 1921, same being filed among the papers of this cause. This agreement not to affect the legal right of either party when said minor is produced in court."

The agreement was signed by said parties and approved by the said J. N. Stallbird, and filed in said cause. It further appears that

the said S. E. Williams, acting under the advice of his attorney, B. Frank Bule, has refused to comply with said agreement and has refused to produce said minor in said county court, or deliver her to the said J. J. Foster. It is alleged that this action places said parties in contempt of this court. The respondents, in their reply to the motion, deny the jurisdiction of this court in such matter, and for answer justify their failure to comply with the said agreement on the alleged ground that all proceedings had before said J. N. Stallbird, as special judge, which included the qualification of the said J. J. Foster as guardian, are void because of the fact that the appointment of the said J. N. Stallbird as special judge was unauthorized. In this connection it is alleged and shown that W. B. Clark was the duly qualified and elected county judge of Floyd county at the time of these proceedings; that the said W. B. Clarke, whose daughter was the wife of J. J. Foster's son, certified to the Governor of the state that he was disqualified for such reason. Upon such certification the Governor appointed said J. N. Stallbird special judge in such proceeding, who duly qualified according to law.

[1, 2] We are of the opinion that we should not take cognizance of this proceeding. The execution of judgment at common law was obtained through processes issued out of the court having the original record. Freeman on Executions, § 13. And this is true in our procedure. R. S. art. 1646; Henson v. Byrne, 91 Tex. 627, 45 S. W. 382; Henry v. Red Water Lumber Co., 46 Tex. Civ. App. 179, 102 S. W. 749. The appellate court issues its mandate to the trial court, and it is the province of such court to execute the judgment through proper orders and process. When this court affirmed the judgment of the lower court, appointing J. J. Foster guardian of the person of the minor, Alta Grace Williams, it became the duty of the county court, under the mandate issued from this court, to give effect to the judgment. This required other proceedings in that court, such as fixing the amount of the guardian's bond, approval of same, issuance of letters of guardianship, and further supervision of the proceeding in accordance with law. The agreement made between the guardian and S. E. Williams, filed in the county court, and approved by the county judge, was a part of these subsequent proceedings. If the violation of such agreement subjects the parties violating it to a charge of contempt, the appropriate place for instituting contempt proceedings is in the county court. We need not decide what, if any, power and the proper method of exercising it the county court has to secure the custody of the minor, after it has appointed a guardian and he has qualified. The point is not briefed, and the authorities, on a cursory examination, may be confusing. Ex parte Reeves, 100

Tex. 617, 103 S. W. 480; Anderson v. Cossey, 214 S. W. 624; Stirman v. Turner (App.) 16 S. W. 787; Fitts v. Fitts, 21 Tex. 511.

[3] But if the execution of the judgment appointing the guardian involves the placing of the minor in the actual custody of such guardian, the appropriate proceeding, whatever that may be, to accomplish this result, should be taken in the court of original jurisdiction. If the county court be in the first instance without power to secure such custody, by proceedings in that court or process issued by it because its exercise would be an encroachment upon the jurisdiction of the district court, as conferred by article 5, § 8, of the Constitution, the appellate court in an appeal in such proceeding would be similarly limited as to its powers. The proposition, however, that the jurisdiction of the appellate court ends with the issuance of the mandate as thus broadly stated, is not correct. The Courts of Civil Appeals are given power to issue such writs as are necessary to enforce the jurisdiction of said court. R. S. art. 1592. The Supreme Court, in the case of Wells v. Littlefield, 62 Tex. 30, said of the jurisdiction of that court:

"Jurisdiction [of this court] continues until the case, as made by the appeal or writ of error, is fully determined by this court and its judgment is completely executed by the court below. \* \* \* This court can see that the party in whose favor its decision has been given has the benefit of all proceedings below necessary to enforce its judgment."

In the exercise of this power the appellate courts may, by mandamus, require the trial court to carry out the judgment and provide for the issuance of proper process for the enforcement thereof, and any other courts may be prohibited by a writ of prohibition from interfering with the execution of the judgment by the lower court, or with the process issued out of such court. A failure of the trial court to carry out the judgment of the appellate court, or the interference with the processes of the trial court by any other court, is regarded as a "violation of the jurisdiction of the appellate court." Hovey v. Shepherd, 105 Tex. 237, 147 S. W. 224; Millam County Oil Mill Co. v. Bass, 106 Tex. 260, 163 S. W. 578; Conley v. Anderson (Sup.) 164 S. W. 986; Cattlemen's Trust Co. v. Willis, 179 S. W. 1115; Birchfield v. Bourland, 187 S. W. 425. These authorities we were of the opinion warranted us in issuing the writ of prohibition granted in the other proceeding in this case already referred to, which prohibited the county judge of Randall county from assuming to take jurisdiction of the guardianship of such minor, which he was proceeding to do by the appointment of a temporary guardian and entertaining a proceeding to appoint a permanent guardian for such minor. But in all the above-cited authorities there was a necessity for some action by the appellate court be-

cause of the fact that some judicial authority, either the trial court itself or some other court, was preventing the execution of the judgment; in some cases the trial court either refused to enter the proper orders or issue the proper process to enforce the judgment of the appellate court; in other cases some other court was interfering with the execution of the process issued by the trial court in the enforcement of the judgment.

[4] But it would seem that there would be no necessity for any procedure in the appellate court, where the obstruction to the execution of the judgment is the act of a mere individual. The trial court, having the duty of the execution of the judgment, has ample power to protect its proceedings and process in such case. The movant does not show that he has applied for or been denied the benefit of any appropriate process or proceeding to secure the custody of his ward, or that any constituted authority is obstructing the enforcement of whatever rights he has under the judgment. Under the circumstances we are of the opinion that we should not entertain this motion, and these proceedings will be dismissed.

[5, 6] It is not necessary to decide the other question as to the validity of the proceedings before the special judge, but in view of further action in the case we deem it proper to say that we are of the opinion that the regularly elected judge was not disqualified. The facts stated as grounds for his disqualification do not show any relation by affinity to the said J. J. Foster. *Seabrook v. First National Bank*, 171 S. W. 248; *Words & Phrases*, title "Affinity"; definition of "Affinity" in *Bouvier's Law Dictionary*. But no objection was made to the appointment of the said Stallbird as special judge. The certificate of disqualification states that his appointment was agreeable to all parties, and the said S. E. Williams, by the agreement entered into and filed in the county court, recognized the authority of the said special judge to act in such case. He is not in position at this time and place and in this manner to impeach the acts of the said special judge. *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Hall v. Jankofsky*, 9 Tex. Civ. App. 504, 29 S. W. 515; *Texas Central Railroad Co. v. Rowland*, 3 Tex. Civ. App. 158, 22 S. W. 134; *Coles v. Thompson*, 7 Tex. Civ. App. 666, 27 S. W. 46; *Campbell v. McFadden*, 31 S. W. 437; *Ford v. First National Bank*, 34 S. W. 686.

#### GULLY v. NYSTEL. (No. 6353.)

(Court of Civil Appeals of Texas. Austin.  
June 1, 1921.)

1. Witnesses §240(4)—Question held objectionable as leading.

The question whether a written instrument embodied the terms of the agreement between

the parties, being susceptible of a simple affirmative or negative answer, is leading.

2. Appeal and error §1048(3)—It is reversible error to permit a leading question on material issue over objection.

It is reversible error to permit a leading question over objection on a controverted material issue.

3. Witnesses §271(1)—Questions designed to show that writing did not embody intention of parties not improper.

Where plaintiff contended that a written instrument prepared by an attorney embodied the agreement between the parties and the attorney so testified, the exclusion of questions whereby the attorney was asked if certain portions of the written statement were not different from the oral agreement was improper.

4. Witnesses §255(5)—Original memoranda, and not itemized account, should be used to refresh memory.

In an action for work done, an itemized account filed by plaintiff should not be used to refresh his memory where it was prepared by plaintiff's counsel from memoranda furnished by plaintiff, who testified that the same was at his house; it not appearing where his house was or that the memoranda was lost.

5. Mines and minerals §113 — Provision in contract for operation of lease allowing sale within 90 days held not to prevent acquisition of lien.

A provision in a contract with lessee for the operation of an oil lease allowing sale of the lease by lessee within 90 days does not prevent acquisition of a mechanic's lien on the lease, particularly where it does not appear that the property was sold within the 90-day period.

6. Escrows §13—Deed delivered in escrow relates back.

Where a deed is delivered in escrow, and the terms of the escrow are afterwards complied with, it relates back to the date of execution and conveys title from that time.

Appeal from District Court, Brown County; J. O. Woodward, Judge.

Action by T. O. Nystel against W. D. Gully. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Harrison, Cavin & Key, of Brownwood, for appellant.

#### Findings of Fact.

JENKINS, J. Appellant was the owner of an oil lease, which he had obtained from one J. R. Stewart, owner of the fee. He entered into an agreement with appellee with reference to operating this lease. They stated the terms of their contract to Mr. Courtney Gray, an attorney, who made memoranda of the same, as he understood it, and therefrom drew up the following written document:

"This memorandum of a contract and agreement made and entered into by and between W.

D. Gully, of Brown county, Tex., party of the first part, and T. O. Nystel, of Brown county, Tex., party of the second part, witnesseth:

"That whereas, party of the first part is the owner of an oil and gas mineral lease covering about fourteen acres of land, situated about two miles southwest of the town of Brownwood, Brown county, Tex., being a part of the M. L. McAnally pre-emption survey, abstract No. 694, and known as the J. R. Stewart lease, and on which there are now a number of producing oil wells;

"And, whereas, party of the first part has entered into a contract with party of the second part, by which said party of the second part is to take over the care, management, operation, and further development of said lease for the consideration and upon the terms and conditions hereinafter set out as follows, to wit:

"(1) Party of the second part agrees and obligates himself to move his drilling equipment, which includes all such apparatus and appliances as he now owns and commonly used for drilling, operating, and cleaning oil and gas wells, to said premises and install the same thereon on or before the 25th day of August, A. D. 1919. Party of the second part shall on or before said date assume the care, management, and operation of all the producing wells now on said premises, and shall undertake and prosecute such further and other drilling operations as may be mutually agreed to by the parties hereto and J. R. Stewart, owner of the fee. Said drilling operations, if any, shall be done with equipment belonging to party of the second part, and at his own expense as hereinafter set out; provided, however, that should additional equipment be necessary and required, party of the second part may purchase same in an amount not to exceed five hundred dollars, same to be paid for out of his part of the production as hereinafter set out. Should equipment of the value of more than five hundred dollars be necessary and required, party of the first part must be consulted and a mutual understanding had.

"(2) This contract is for a period of ninety (90) days from the 25th day of August, 1919, but may be extended by mutual agreement of the parties hereto. However, it is expressly understood and agreed that party of the first part may sell said lease within said time and terminate this contract. Party of the second part shall immediately after moving upon said lease take such steps as may be necessary to increase the wells thereon to their maximum production, which shall include the cleaning and proper pumping of same, and shall use all due diligence in the care, management, and operation of same during the life of this contract. He shall make a report to party of the first part each and every Saturday night as to work done during the current week and as to condition of the wells.

"(3) The consideration for this contract is that party of the second part shall receive five-eighths (5/8) of the gross production from the wells now on said lease and from such other wells as party of the second part may drill. But, in the event that a sale of said lease shall be made before the termination of this contract, party of the second part shall have a commission on said sale as follows:

"If the said lease sells for less than ten

thousand dollars, party of the second part shall have such commission thereon as may be mutually agreed upon; if said lease shall sell for ten thousand dollars and no more, party of the second part shall have a commission of 5 per cent. or five hundred dollars; if the said lease shall sell for more than ten thousand dollars, party of the second part shall have the option of accepting five hundred dollars as above provided, or he may take in lieu thereof 25 per cent. of the difference between ten thousand dollars and the sale price.

"(4) In the event of the purchasing of additional equipment as above provided for, the purchase price thereof shall be charged to the five-eighths interest in the production herein set over to party of the second part. But should a sale of the lease be made before party of the second part shall have realized sufficient funds from his five-eighths interest to pay for said equipment, party of the first part shall refund to party of the second part such an amount, which, plus five-eighths of the production or its value, will equal the amount so expended for such equipment. Party of the first part shall further pay party of the second part for his time, and for the use of his tools, rigs, and equipment, at the regular customary rate for such time, tools, rigs, and equipment from the date of this contract to the time of such sale and delivery of the premises to such purchaser. Party of the second part shall also have his commission on such sale as provided for above.

"(5) All pumps, casing, and other equipment now on said lease shall be utilized by party of the second part in the care and operation of the wells now drilled and to be drilled, and in case additional wells shall be drilled by party of the second part, as herein provided, party of the first part shall furnish all necessary casing and pumps for same.

"This contract done in duplicate.

"In testimony whereof, we hereunto sign our names, this the 18th day of August, A. D. 1919.

"\_\_\_\_\_  
Party of the First Part.

"T. C. Nystel,

"Party of the Second Part."

Appellee brought suit against appellant to recover for work done on this lease, alleging that the instrument above set forth constituted a written contract with reference thereto. Appellant denied that this instrument constituted a written contract, but alleged that when the same was presented to him he refused to sign it, for the reason that it did not embrace the oral contract entered into between the parties. He set out what he claimed to be the substance of the oral contract so made.

In addition to the special plea above referred to, the appellant pleaded a general demurrer, general exception, and several special exceptions. The exceptions were all overruled.

The contract, whether same was written or oral, was entered into about the 18th of August, 1919. There was no specific renewal of the contract, but appellee continued to work upon the lease until shortly before

April 6, 1920. On the date last mentioned he made out what purported to be an itemized statement of his account against appellant for work done on the lease, and filed the same, together with the purported written contract above set out in the office of the county clerk of Brown county. On March 29, 1920, appellant delivered in escrow to the Citizens' National Bank his deed in writing, assigning said lease to Herrick and Turner. The bank was authorized to deliver this deed to Herrick and Turner, upon the payment of \$5,000, on or before 60 days thereafter, and of \$8,000, on or before 120 days from said date; \$500 was paid by Herrick and Turner in cash at the time said deed was delivered in escrow. The court instructed a verdict in favor of appellee for the amount of his itemized account, to wit, \$2,711, and also foreclosure of a mechanic's lien on said lease. Appellee entered a remittitur of \$360.

#### Opinion.

[1] Upon the trial hereof, the court permitted appellee, after he had identified the written instrument set out in the findings of fact as the instrument which he claimed to be the contract between the parties, to answer, over appellant's objection, the following question:

"Did that (meaning said writing) embody the terms of the agreement (meaning the agreement between plaintiff and defendant, on which this suit is predicated)?"

To which appellee answered "Yes."

Also the court permitted Courtney Gray, the attorney who drew said written instrument, after he had been shown and examined and identified the writing, claimed by plaintiff to embody the contract between himself and defendant, to answer the following question:

"Did that (meaning said writing) correctly reflect the agreement between plaintiff and defendant, as stated to you by them at the time you made the memoranda from which said contract was drawn?"

To which the witness answered "Yes."

Each of these questions was objected to, because: (a) It was leading; (b) it called for the opinion and conclusion of the witness; (c) it elicited the conclusion and opinion of the witness on a mixed question of law and fact, the very question the jury would have to decide in this case; and (d) because said writing was not signed by the defendant.

We sustain appellant's exceptions to the action of the court in permitting the witnesses to answer as above indicated. A question is leading when it can be answered by "Yes" or "No," and when, by a simple affirmative or negative answer, it reflects back the language of the question, the same being framed in such manner as to indicate the answer desired. *Railway Co. v. Dahwigh*,

92 Tex. 656, 51 S. W. 500; *Lott v. King*, 79 Tex. 290, 15 S. W. 231; *Railway Co. v. Hammon*, 92 Tex. 509, 50 S. W. 124; *Baker v. Thomas*, 201 S. W. 216; *Railway Co. v. Taylor*, 203 S. W. 90.

[2] It is reversible error to permit a leading question, over objection, on a controverted material issue.

[3] Also the court sustained an objection to questions propounded to the witness Gray, which sought to obtain an admission from Gray that the written instrument did not truly reflect the agreement between the parties made in his presence. This was sought to be done by reading to him certain portions of the written statement, and asking him if the oral agreement was not different from the clauses of the written instrument read. No brief for the appellee has reached us, and we do not know upon what ground the court refused to permit the witness to answer the questions above referred to. We infer from appellant's brief that the ground for the court's ruling was that the instrument was a written contract, to be construed by the court, and not by the witness. The effort was not to have the witness construe the legal meaning of the written instrument in so far as the court or jury was concerned, but to prove by him that this instrument, as he understood it, did not embody the true agreement between the parties. It was error to sustain the objection to these questions.

[4] The appellee, when on the stand, was permitted to see the itemized account filed by him, as a means of refreshing his memory as to the work done by him. This was objected to on the ground that it was shown that this itemized account was written by appellee's attorney from memoranda furnished by appellee, and which memoranda the appellee testified were at his house. It does not appear from the record where his house was, but, if the original memoranda made by appellee have not been lost, it would be more reliable evidence than the account made by the attorney, and, if he desired to refresh his memory as to the items, he should be required to produce the original memoranda made by him.

[5] It is the contention of the appellant that the contract, whether the same was written or oral, excluded the idea that appellee was entitled to a mechanic's lien, for the reason that it provided that the appellant might sell the lease within 90 days. The lease was not sold within 90 days. If it had been, the contention of appellant would be plausible, if not sound. Inasmuch as the lease was not sold in 90 days, we think the proviso in the contract that the appellant might sell the same within that time would have no effect upon the proposition as to whether or not appellee was entitled to enforce his mechanic's lien against the leased premises.



It is also the contention of appellant that, inasmuch as appellant had sold the lease before the attempt to fix a mechanic's lien, it could not be enforced against his assignees; it being appellant's contention that appellee knew of such sale before he attempted to fix his mechanic's lien.

[6] Where a deed is delivered in escrow, and the terms of the escrow are afterwards complied with, it relates back to the date of its execution, and conveys title from that date. *Sykes v. Fischl*, 212 S. W. 219; *Ketterson v. Inscho*, 55 Tex. Civ. App. 150, 118 S. W. 626; *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533.

Upon another trial of this case, if it shall appear that appellant had sold the lease and delivered a deed to the same in escrow, and that the assignees complied with the terms thereof, and that appellee knew of such sale before he attempted to fix his mechanic's lien, no judgment should be entered foreclosing the mechanic's lien.

For the reasons stated, the judgment of the trial court is reversed, and this cause is remanded for a new trial, in accordance with this opinion.

Reversed and remanded.

### ELECTRIC GIN CO. et al. v. HOUSTON COUNTY OIL MILL & MFG. CO. (No. 8058.)

(Court of Civil Appeals of Texas. Galveston.  
May 19, 1921.)

Sales ~~418~~(1)—Attorney's fees not recoverable as element of damages in buyer's action for breach of contract.

Buyer, suing for breach of sales contract, could not recover, in the absence of a stipulation in the contract, his attorney's fees, as an element of the damage sustained; *Vernon's Sayles' Ann. Civ. St. 1914, art. 2178*, providing for recovery of attorney's fees as damages in certain cases having no application in such case.

Appeal from Houston County Court; Nat Patton, Judge.

Suit by the Houston County Oil Mill & Manufacturing Company against the Electric Gin Company, and others. Judgment for plaintiff, and defendants appeal. Reformed and affirmed.

Aldrich & Crook, of Crockett, for appellants.

John I. Moore, of Crockett, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellants, Electric Gin Company and J. R. Smith, to recover damages in the sum of \$384.18 for the alleged failure of the appellants to comply with a

contract made by them with appellee to deliver to it at Crockett, Houston county, Tex., a quantity of cotton seed sold by appellants to appellee, and for which appellee had paid them the agreed purchase price.

The appellants presented in due course of pleading a plea of privilege to be sued in Jones county, where they have their residence. This plea was contested by appellee and upon a hearing of the contest the plea was overruled by the court. Thereafter the case was tried upon its merits, and judgment was rendered in favor of plaintiff for damages in the sum of \$393.60, and for the further sum of \$25 attorney's fees. It would serve no useful purpose to set out or discuss in detail the several assignments of error presented in appellants' brief. We have carefully considered each of the assignments, and in our opinion none of them should be sustained, except the assignment complaining of the judgment awarding the plaintiff \$25 attorney's fees.

As before stated, this is a suit for damages for breach of contract. The contract itself does not stipulate that the defendants shall be liable for attorney's fees in event suit is brought and recovery had thereon, and under the well-settled rule of decisions attorney's fees are not generally an element of damage for breach of contract. Article 2178 of *Vernon's Sayles' Civil Statutes*, which provides for the recovery of attorney's fees as damages in certain cases, has no application to a case of this kind.

The judgment of the court below will be reformed, by deducting from the amount thereof the \$25 awarded plaintiff as attorney's fees, and, as so reformed, will be affirmed; and it has been so ordered.

Reformed and affirmed.

### HEMPHILL v. ROMANO et al.

(Court of Civil Appeals of Texas. Galveston.  
May 19, 1921.)

1. Appeal and error ~~846~~(6)—Judgment affirmed in absence of findings of fact or law if facts support it.

On appeal from judgment rendered by the court after trial without a jury, without making findings of fact or law, where the record does not disclose the ground upon which the court rested its conclusions, the judgment must be affirmed, if a state of facts appear which will support it.

2. Master and servant ~~302~~(6)—Automobile driver not within scope of employment while engaged in personal enterprise.

Where an employee, who was employed solely for the purpose of operating an automobile as a jitney on a particular route, used the car without the employer's knowledge or consent in a personal enterprise of his own, and

in so doing caused an accident some distance from such route, he was not at the time of such accident acting within the scope of his authority or employment.

3. Municipal corporations  $\S$ 703(1)—No liability on jitney bond designating route where accident occurred while driver in personal enterprise was some distance therefrom.

Surety on bond limiting its liability to operation of automobile while in jitney service on designated route was not liable, where accident occurred while driver, without employer's knowledge or consent, was using the car in a personal enterprise of his own some distance from such jitney route.

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Action by R. B. Hemphill against Joe Romano and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Elbert Roberts, of Houston, for appellant. Vinson, Elkins & Wood and Turnley & Clark, all of Houston, for appellees.

GRAVES, J. In this cause appellant sought compensation in damages from appellee Romano and the Interstate Casualty Company for injuries resulting to his automobile from a collision between it and one belonging to Romano and operated at the time by S. P. Brown.

The court trying the case without a jury denied the claim and rendered judgment in favor of the appellees. The appeal complains of that action.

Only two assignments of error are presented; the sole contention under both being that the judgment was contrary to the evidence in that it undisputedly appeared that Romano's driver caused the collision by swerving his car to the left and into appellant's car.

[1] The position cannot be sustained. The record does not disclose the ground upon which the court rested its conclusions, and, there having been neither jury nor findings of fact or law by the court, if a state of facts appeared which will support the judgment rendered, it must be affirmed. *S. W. T. & T. Co. v. Thompson*, 142 S. W. 1000; *Kittrell v. Irwin*, 149 S. W. 199.

Without attempting to recapitulate it here, it is deemed sufficient to say that, while there was a conflict in the testimony as to the cause of the accident, there was sufficient evidence to support a conclusion that it resulted from the fault or negligence of the appellant.

[2] Moreover, the court might have found that Brown, the driver of Romano's car, was not at the time acting within the scope of his authority or employment but was engaged in a personal enterprise of his own. He was employed by Romano solely for the purpose of operating the car as a jitney on the Leland avenue route within the city of Houston,

whereas, without his principal's knowledge or consent, and with his jitney sign removed, he was returning with some soldiers from Ellington Field and collided with the other car at a point on McKinney avenue some distance away from his jitney route.

[3] In so far as concerns the casualty company alone the bond declared upon against it limited its liability to the operation of a particular car while in the jitney service on the designated Leland avenue route within the city of Houston. The undisputed evidence not only showed the car involved not to have been operating in the jitney service on that route at the time of this accident, but further wholly failed to demonstrate that it was the same car the bond declared upon covered. In these circumstances no liability was fastened upon the casualty company. *Motor Car Indemnity Exchange v. Chas. A. Lillenthal*, 229 S. W. 703, decided by this court March 19, 1921.

The judgment will be affirmed. Affirmed.

#### LUMMUS COTTON GIN SALES CO. v. MILLS. (No. 8065.)

(Court of Civil Appeals of Texas. Galveston. May 12, 1921. Rehearing Denied June 2, 1921.)

1. Corporations  $\S$ 503(2)—Part of cause of action for breach of contract held to arise in county in which agent made sale subject to approval.

Where defendant's agent was authorized to, and did, sell machinery subject to defendant's approval, a part of the cause of action for breach of the contract of sale accrued in the county where the agent made the sale, within Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, subd. 24, relative to the venue of actions against private corporations, though defendant's approval of the contract occurred in another county, as the provision for approval of the contract related to the time and place it was made, and its approval by defendant was but a ratification of it.

2. Corporations  $\S$ 503(2)—Cause of action for breach made up of breach and contract.

As respects venue under Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, subd. 24, a cause of action for the breach of a contract of sale is made up of the contract and its breach, and it takes both to constitute the whole cause of action.

3. Appeal and error  $\S$ 1024(3)—Finding as to venue, supported by evidence, not disturbed.

Where the evidence on the trial of a plea of privilege was sufficient to support a finding that part of the cause of action arose in the county where the action was brought, the Court of Civil Appeals cannot reverse such finding.

Appeal from District Court, Brazoria County; M. S. Munson, Judge.

Action by Minnie Mills against the Lummus Cotton Gin Sales Company. From a judgment overruling defendant's plea of privilege, it appeals. Affirmed.

Spence, Haven & Smithdeal, of Dallas, for appellant.

Rowe & Kay, of Houston, and W. W. Campbell, of Lubbock, for appellee.

LANE, J. This is an appeal from an order of the district court of Brazoria county, overruling the plea of privilege of the Lummus Cotton Gin Sales Company, a Texas corporation domiciled at Dallas, Tex., hereinafter called the Gin Company, filed in a suit brought by Minnie Mills, a resident of Brazoria county, against it in said district court. The plaintiff alleged that on or about the 28th day of June, 1919, she and the defendant Gin Company entered into a contract, in Brazoria county, Tex., by the terms of which the Gin Company contracted and agreed to sell and deliver to her certain gin machinery in said county, and for which she agreed to pay the agreed contract price therefor, and that the Gin Company failed and refused to deliver said machinery, to her damage in the sum of \$2,586.

The Gin Company filed its plea of privilege to be sued in the county of its domicile. It was alleged therein "that none of the exceptions to exclusive venue in the county of one's residence, mentioned in articles 1830 and 2308 of the Revised Statutes, existed in this cause." This plea was duly verified as required by law. Minnie Mills contested this plea, and, among other things, alleged that the contract in question was made in Brazoria county.

It was shown upon the hearing of the contest of the plea of privilege that one H. C. Miller, an agent of the Gin Company, who was, as such agent, authorized to make sales of gin machinery and take orders therefor, subject to the approval of the Gin Company, went to Brazoria county and there sold to the plaintiff, Minnie Mills, the gin machinery in question, subject to the approval of the Gin Company; that he took the written order of Minnie Mills therefor, and forwarded the same to the Gin Company at Dallas, Texas, and that in a few days thereafter the Gin Company approved the contract so made with Minnie Mills by its agent, H. C. Miller, and accepted the order for same by letters which read as follows:

"June 30, 1919.

"Minnie Mills, Anchor, Texas—Dear Madam: We acknowledge with pleasure receipt of your order of June 28th, covering cotton gin machinery, tendered us through our representatives, H. C. Miller & Son. Your order has been passed to our credit and mechanical depart-

ments, and they will write you further and more fully with reference to same.

"Thanking you, we are yours truly."

"Dallas, Tex. July 23, 1919.

"Minnie Mills, Anchor, Texas—Dear Madam: Referring to your valued order for ginning machinery, we are gratified to state that your references are found most satisfactory, and we therefore hereby gratefully accept the order and the same is passed to our files for proper attention. Taking this opportunity to express our very hearty appreciation of your kindness, assuring you that in all details the order will have our best attention, and that it will be our endeavor to merit a continuance of your favors, and asking that you further command us if we can render you service in any way, we beg to remain,

"Yours truly,

"Lummus Cotton Gin Sales Co.,

"George H. Ford, Manager."

The court rendered judgment overruling the plea of privilege, and from this judgment the Gin Company has appealed, and by its appeal contends that the court erred in overruling its plea of privilege, in that:

"The undisputed evidence in this case showing that appellant had no agent in Brazoria county, Texas; that H. C. Miller, Jr., a resident of Washington county, was authorized by appellant only to receive and transmit to it orders for its goods; that the appellee, in Brazoria county, signed and delivered to H. C. Miller, Jr., an order for machinery; that this order was sent in by Miller to appellant's office in Dallas county, Texas; and that appellant later accepted said order by a letter mailed to appellee from Dallas, Texas—the contract for the sale and delivery of the machinery upon which appellant sues was made in Dallas county, and not in Brazoria county, Texas."

[1] The contention of appellant cannot be sustained. We think the evidence shows that H. C. Miller was the agent of appellant to make sale of the machinery so sold by him, and that he did make such sale in Brazoria county, subject to the approval of appellant, and that appellant approved such sale. By subdivision 24 of article 1830, Vernon's Sayles' Civil Statutes, it is provided that suits against private corporations may be commenced in any county in which the cause of action or a part thereof arose. The contract of sale of the property in question was made in Brazoria county by H. C. Miller, the authorized agent of appellant.

[2, 3] The cause of action in this cause is made up of the contract and its breach. It takes these two parts to constitute the whole cause of action, within the meaning of the statute quoted, and since the contract was made in Brazoria county, a part of the cause of action arose in that county. The provision in the contract for its approval by appellant in Dallas related to the time and place it was made, and its approval by appellant at Dallas was but a ratification of it. *Westinghouse Electric Co. v. Troell*, 30

Tex. Civ. App. 200, 70 S. W. 324. We must hold that the evidence was sufficient to support a finding that a part of the cause of action arose in Brazoria county, and we are therefore not at liberty to reverse the findings of the trial court upon that issue.

The judgment of the trial court is affirmed.

Affirmed.

### KETON v. PATTON et al. (No. 6354.)

(Court of Civil Appeals of Texas. Austin.  
June 29, 1921.)

#### 1. Landlord and tenant §199½—Closing of bakery by authorities for bad sanitary conditions held not to excuse nonpayment of rent.

Where tenant's bakery was closed by government military authorities, because of bad sewerage and water connections, and bad ventilation, the tenant is not released from paying rent, unless he proved that the order closing the bakery was permanent, and not temporary, and condition on improving the bad conditions, and that to put the place in repair would have involved a prohibitive expense to him.

#### 2. Landlord and tenant §152(4)—Lease held to require tenant to abate a nuisance at his own expense.

Where a lease provided that the lessee should execute and fulfill all orders and requirements imposed by the board of health, sanitary, and police departments for the correction and abatement of nuisances at his own expense, the spirit of this clause required that the tenant should at his own expense abate the nuisance of bad ventilation and bad water and sewer connections, on account of which his bakery was closed by the federal military authorities.

#### 3. Landlord and tenant §170(2)—Failure of tenant to notify landlord of nuisance releases landlord from obligation to abate nuisance.

Where the landlord is under a duty to make changes to abate a nuisance caused by bad sewerage connections, bad water connections, and bad ventilation, failure of the tenant to notify the landlord of the premises having been closed by the government excuses the landlord for failure to abate the nuisance.

#### 4. Landlord and tenant §230(3)—Claim of tenant for reimbursement on account of use of his light meter by other tenants held not sufficiently pleaded.

In an action for rent, the answer alleged that the lessors represented to defendant that separate electrical meters were provided for the several tenants, and that, relying on that fact, he paid the light bills of other tenants; that on discovery of the mistake he notified the lessors, and requested them to protect him. There was no allegation that the alleged representations of the lessors as to separate meters were untrue, or that the lessors promised to reimburse the tenant. *Held*, that the answer was insufficient to warrant recovery by way of counterclaim.

Appeal from McLennan County Court; Jas. P. Alexander, Judge.

Action by A. C. Patton and others against Frank Keton. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

G. W. Barcus and Alva Bryan, both of Waco, for appellant.

Sanford & Harris, of Waco, for appellees.

BRADY, J. By a written lease appellant rented from appellees a building in the city of Waco, for a term of two years, at \$110 per month for the first year, and \$120 a month for the second year, with a provision for extension of the lease for an additional year. The date of the lease was February 15, 1916, and the tenancy began under this lease March 1, 1916. The contract provided that the premises were to be occupied as a bakery and not otherwise.

Appellant defended specially upon the grounds that, after he had abandoned the premises, appellees took possession thereof and rented the same to another man by the name of Rich, and further that appellees were not entitled to recover, because, after the premises were rented to appellant, an army camp was established at Waco, and that by reason of the unsanitary condition of the sewerage connections, water connections, and ventilation that the building was condemned, and, by order of the federal authorities, he was forced to close his bakery, and appellees refused to put the building in condition to meet the demands of the military authorities before it would be permitted to be further occupied as a bakery.

Appellant also pleaded by way of cross-action, and as an offset to the rental claim, an item of \$85, which it was claimed he had paid for the benefit of appellees to the Texas Power & Light Company, for light which was used by tenants on the floor above, and which he had been caused to pay by reason of the misrepresentations of appellees, and their negligence in the manner of connecting the meter upstairs with the meter below.

The case was tried without a jury, and the court rendered judgment for appellees for the sum of \$240, the amount sued for, with interest; the same being the balance claimed for the rent for the months of January and February, 1919. The questions chiefly presented on this appeal may be summarized in the claim of appellant that, the government, through no fault of his, having ordered his bakery closed because of the unsanitary condition occasioned by the faulty construction of the sewerage connections, water connections, and ventilation, he was discharged from performance of the contract, and was not further liable upon the lease.

[1] Founded upon the old maxim that as a person blinds himself so shall he be bound, it

is the general rule that subsequent impossibility of performance does not discharge a party to a contract. It is also the general rule that a contract is not invalid, nor is a promisor discharged, merely because it turns out to be difficult, unreasonable, dangerous, or burdensome. 9 Cyc. 625. There is, however, a well-considered line of cases holding that there is an exception to the general rule that subsequent impossibility of performance does not discharge, where the performance is rendered impossible by law, either by reason of (a) a change in the law; or (b) because of action taken by or under the authority of the government. 9 Cyc. 630. The same authority, however, states that the exception does not apply where the impossibility created by law is only temporary, or where the change merely makes performance more burdensome. 9 Cyc. 631. See, also, 13 Corpus Juris, 646, § 720 (E).

While counsel for appellee dispute the existence of the rule of law claimed by appellant, and also contend that the facts were disputed as to the cause of closing the bakery, and that the trial court's implied conclusion as to the cause is binding on us, we shall assume that the rule contended for by appellant is correct, and also that it was sufficiently shown that the bakery was closed under the authority of the government, as a military measure. However, we have reached the conclusion that appellant has not shown himself entitled to the benefit of the exception stated, for at least three reasons:

(a) It was not shown that the order closing the bakery was not merely temporary. The facts show that appellant occupied the premises until some time in June, and paid the rent to January 1, 1919; the notice requiring him to close the bakery having been posted in June. As far as the evidence discloses, if it be conceded that there was impossibility of performance at all, it may have been but temporary, since permission to continue the bakery would have been given, had the nuisance been abated.

(b) It was not in fact shown that performance was rendered impossible by the action of the authorities. At most, it was established that appellant's use of the premises as a bakery was rendered more burdensome and expensive by reason of the demands of the military authorities or food administration. Appellant's own testimony shows that he himself considered the advisability of making the changes demanded, and having the plumbing changed and connections made, so that he could continue to conduct the bakery, but that his investigation disclosed the changes would be "too expensive to tackle." There is no evidence of what the cost would have been, nor the relative expense to appellant as compared with his rental for the remainder of the lease, which would have amounted to about \$1,000. To bring himself

within the exception, it was incumbent upon appellant to at least prove that the expenditure would have been prohibitive. This he did not do. It may be that the clause in the contract requiring him to make repairs did not of itself compel him to make the changes indicated, but certainly before he could claim impossibility of performance he was required to show a state of facts amounting to more than a mere increased burden and expense, regardless of the express stipulations of his contract.

[2, 3] (c) Paragraph 8 of the lease contract is as follows:

"That the lessee shall promptly execute and fulfill all the ordinances of the city corporation, applicable to said premises, and all orders and requirements imposed by the board of health, sanitary and police departments, for the correction, prevention, and abatement of nuisances in or upon or connected with said premises during the said term, at his own expense."

The spirit of this clause of the contract, we think, if not its letter, required appellant to correct and abate the nuisances complained of by the military authorities at his own expense. This was a sanitary and health measure, and we believe it falls fairly within the spirit of the contract. Furthermore, the evidence of appellees, which the court was privileged to accept, was to the effect that they never heard of appellant's having been closed up by the government until long afterwards, and that he did not notify them. Hence, if appellees were under any duty to make the changes and to abate the nuisance, appellant gave them no opportunity to do so, and no information upon which to act.

It follows, from these conclusions, that the judgment for appellees should stand.

[4] As to the cross-action of appellant, we shall assume that the evidence shows that appellees would be liable for this item upon legal or equitable principles, which, however, are not clearly disclosed by the argument. Nevertheless the presence alone of evidence in the record showing liability will not suffice. It is fundamental that there must be a sufficient pleading to support the claim. A careful scrutiny of the answer does not show that a cause of action for the light bills paid by appellant and claimed as an offset was pleaded. It is alleged that appellees had the building wired with electric wires during the time he occupied the same, and represented to him that there were separate and distinct meters to care for the electricity used by the several tenants, and that appellant believed and relied upon these representations. Yet he does not allege that the representations were untrue. He further avers that, at the time he paid the light bills of other tenants, he did not know that fact, and would not have paid the same, had he known it, and that he immediately notified plaintiffs of the

payment, and requested them to protect him. He does not allege any agreement on the part of appellees to protect or reimburse him. Indulging the utmost liberality to this pleading, it does not disclose allegations of fact sufficient to be the basis of a recovery. Therefore the court did not err in finding against the cross-action.

No reversible error having been shown, the judgment is affirmed.

**Affirmed.**

**BALDWIN et ux. v. BALDWIN et al.**  
(No. 8076.)

(Court of Civil Appeals of Texas. Galveston.  
May 11, 1921. Rehearing Denied  
June 16, 1921.)

**1. Pleading**  $\S$  111—Court held warranted in finding that conveyance of undivided interest was to confer jurisdiction of partition suit.

In a suit to partition land in Hill county, brought in Harris county three days after the recording by plaintiffs of a deed conveying an undivided interest to a relative residing in Harris county, who was made a defendant, the court held warranted in finding, on the trial of a plea of privilege filed by the defendant in possession, that the deed was executed in a fraudulent attempt to confer jurisdiction on the district court of Harris county.

**2. Appeal and error**  $\S$  1024(3)—Question whether conveyance was made in good faith or to confer jurisdiction is question for trial court.

Under a plea of privilege in a partition suit, the question whether plaintiffs, shortly before the action was brought, executed a deed conveying an undivided interest to a relative in the county in which the suit was brought, in good faith, for the purpose of making him the owner thereof, or for the purpose only of conferring jurisdiction, was a question for the court trying the case.

**3. Appeal and error**  $\S$  1071(5)—Findings and conclusions not pertinent or material not ground for reversal.

Findings and conclusions of the trial court, not pertinent to the issue being tried under a plea of privilege, present no case for a reversal of the judgment rendered on sufficient evidence.

**4. Pleading**  $\S$  111—On plea of privilege in partition suit court held to have properly heard evidence of all circumstances relating to property.

Where plaintiffs conveyed land to L., who conveyed to T., each conveyance reserving a vendor's lien, and plaintiff subsequently conveyed an undivided interest to a relative and brought suit in the county of his residence for partition, in which T. filed a plea of privilege, alleging that the conveyance to the resident of such county was for the fraudulent purpose of conferring jurisdiction, and that the suit was not brought in good faith but to enable L. to relitigate the question previously litigated as

to whether her conveyance was intended as a mortgage, the court properly received and considered evidence of the various facts and circumstances relating to the title together with those relating to the prior litigation and the connection of the parties to the pending suit therewith, on the question of fraud.

**5. Pleading**  $\S$  111—Defendant's privilege to be determined from facts, and not from form of pleadings.

Defendant's right to be sued in the county of his domicile is to be determined from the facts of the particular case, and not from the form of plaintiff's pleadings.

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Action by Jacob C. Baldwin and wife against W. L. Baldwin and others. From a judgment sustaining a plea of privilege of the defendant J. T. Trull, plaintiffs appeal. **Affirmed.**

Baldwin & Baldwin, of Houston, for appellants.

Dupree & Crenshaw, of Hillsboro, and Garrison, Pollard, Morris & Berry, of Houston, for appellees.

LANE, J. For an understanding of the nature of the case and result of the trial we deem it advisable to make the following statement:

Mrs. A. T. Lomax, a resident of Hill county, Tex., was the owner of lot 14, block 4, in the city of Hillsboro, in said Hill county, together with all improvements thereon. On the 16th day of July, 1908, Mrs. A. T. Lomax, for a cash consideration of \$2,075, conveyed to her sister, Mrs. Hattie O. Baldwin, wife of appellant J. C. Baldwin, a one-half undivided interest in said lot 14, block 4.

On the 26th day of March, 1914, Mrs. Hattie O. Baldwin, joined by her husband, J. C. Baldwin, by their deed of that date, conveyed all their undivided interest in said lot to Mrs. A. T. Lomax for a recited consideration of \$5,000, paid and secured to be paid as follows: \$1,700 cash and 12 notes of even date with the deed executed by Mrs. Lomax, each for the sum of \$250, and one note for the sum of \$300, the 12 notes being numbered from 1 to 12, inclusive, and the other No. 13; all notes being payable to the order of Mrs. Hattie O. Baldwin as follows: One on the 1st day of May and November of each year until all shall have been paid, with interest from date at the rate of 8 per cent. per annum, payable semiannually on May 1st and November 1st of each year. It was stipulated in said deed that Mrs. Lomax might procure a loan of \$2,000 from the National Loan & Investment Company of Detroit, Mich., and that the same might be secured by a deed of trust on said lot, executed by Mrs. Lomax, and that such loan should be a first

and superior lien on said property, and that the vendor's lien notes above described should be second and inferior liens to the lien of the National Loan & Investment Company. The notes contained a provision that all of them may be declared due upon default being made in the payment of any of the notes or of any installment of interest at maturity. In said deed it was expressly stipulated that the vendor's lien was retained against the property conveyed until all the notes and interest thereon were paid.

A loan of \$2,500 from the National Loan & Investment Company was procured, and the deed of trust mentioned in the deed from Baldwin and wife to Mrs. Lomax was executed to secure the same.

Mrs. Hattie Baldwin and husband, J. C. Baldwin, executed a release to Mrs. Lomax showing that notes Nos. 1 to 6, described in the deed from them to her, had been paid. Thereafter, on the 26th day of February, 1918, Mrs. A. T. Lomax, by her deed of that date, conveyed the whole of the property in controversy to appellee J. T. Trull. The deed by which the lot was conveyed by Mrs. Lomax to Trull contains the following recitals:

"For and in consideration of the sum of \$6,000, paid and secured to be paid by J. T. Trull, as follows: \$1,700 to me cash in hand paid by the said J. T. Trull, the receipt thereof is hereby fully acknowledged, and the further consideration of the assumption of the said J. T. Trull of the following indebtedness against the hereinafter conveyed property, viz. \$2,500 payable to the United States Savings Bank of Detroit, Mich., as shown by deed of trust recorded in volume 35, at page 56, of the Hill County Mortgage Records, and the further assumption of seven notes executed by the said Annie T. Lomax and payable to the order of Mrs. J. C. Baldwin on May 1, 1917, November 1, 1917, May 1, 1918, May 1, 1919, and November 1, 1919, and May 1, 1920, six of the said notes for the sum of \$250 each and one for the sum of \$300—have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said J. T. Trull, of the county of Hill, state of Texas, all that certain lot, tract, or parcel of land lying and being situated in the city of Hillsboro, in the county of Hill and state of Texas, and described as follows, to wit: Being part of lot No. 14 in block No. 4 of the said city of Hillsboro, Tex. \* \* \* To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said J. T. Trull, his heirs and assigns forever, and I do hereby bind myself, my heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said J. T. Trull and his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof. But it is expressly agreed and stipulated that the vendor's lien is retained against the above-described property and premises and improvements, until the above-described notes and all interest thereon are fully paid according to their face and

tenor, effect and reading, when this deed shall become absolute."

On the 13th day of November, 1917, after the execution of the deed from Lomax to Trull, Trull sued Mrs. Lomax in the district court of Hill county, asserting title to the property involved in this suit, and, among other things, prayed for an injunction to restrain her from interfering in the business conducted by him in the building situated on the property and from trespassing upon said property.

On the 28th day of January, 1918, J. C. Baldwin, one of the appellants herein, a brother-in-law of Mrs. Lomax, as her attorney filed answer for her in the Hill county suit, and by way of cross-action, among other things, alleged that the deed executed by Mrs. Lomax to Trull conveying the property in question in this suit was not in fact a deed, but it was intended by all parties to operate as a mortgage only to secure Trull in the payment of certain indebtedness, and praying for a cancellation of said deed. Trull denied the allegations of this answer, and alleged that the instrument was an absolute conveyance of the property.

This Hill county case was tried twice in the district court of Hill county and upon the last trial in said court, in February, 1919, judgment was rendered in favor of J. T. Trull, adjudging that he was the owner of whatever title Mrs. Lomax had in and to the property. From that judgment an appeal was perfected and was pending in the Court of Civil Appeals at Dallas at the time of the trial of this case.

J. C. Baldwin, one of the appellants, a brother-in-law of Mrs. Lomax, represented her in the trials of the case in Hill county and upon the appeal of that cause. W. L. Baldwin is a cousin of Jacob C. Baldwin, and the appellant Mrs. Hattie Baldwin is the wife of J. C. Baldwin and the sister of Mrs. Lomax.

The appeal in the Hill county case was perfected by filing an appeal cost bond on the 4th day of March, 1920.

Appellee J. T. Trull had paid the sum due by Mrs. Lomax to the National Loan & Investment Company, and notes 7 to 12, inclusive, executed by Mrs. Lomax and delivered to Mrs. Hattie O. Baldwin in part payment for Mrs. Baldwin's one-half interest in the property in controversy, and which were assumed by him in the deed from Mrs. Lomax to him, prior to the 28th day of April, 1920. On the date last named J. T. Trull paid into the First State Bank of Hillsboro, Tex., the sum of \$312, and instructed the bank that upon delivery to it of a release by the Baldwins, acknowledging the payment of notes 7 to 13, inclusive, assumed by him, to pay off note No. 13, due May 1, 1920, and on said date the bank wrote J. C. Baldwin as follows:

"Mr. J. T. Trull has deposited \$312 to pay note No. 13 for \$300 and interest on same for six months. This being one vendor's lien note against a brick building and lot here in Hillsboro, Texas, now occupied by the Trull Millinery Company and the Sherrod Shoe Store.

"When you forward the release covering notes Nos. 7, 8, 9, 10, 11, 12 and 13, of which the above mentioned being the last note of same series on a certain lot and building mentioned above, this bank will pay you \$312."

All of said notes were payable at Hillsboro and had been sent to the bank there for payment.

Baldwin refused to accept payment of note No. 13 and execute the release demanded, contending that note No. 1 of the series of notes executed by Mrs. Lomax to Mrs. Hattie Baldwin had not been paid, but had been changed from No. 1 to No. 14. Trull refused to pay note No. 1, and thereafter on the 7th day of May, 1920, Mrs. Hattie Baldwin, joined by J. C. Baldwin, executed a deed purporting to convey to W. L. Baldwin a one-eighth part of the property involved in the suit; the recited consideration being \$10 and other valuable considerations not named. This deed was sent by J. C. Baldwin to Hillsboro for record June 11, 1920, and on the 14th day of June, 1920, this suit was instituted by Hattie O. and husband, J. C. Baldwin, against J. T. Trull and Mrs. Annie T. Lomax, of Hill county, and W. L. Baldwin, of Harris county.

The plaintiffs alleged that they and the defendants were the owners of lot 14, block 4, in the city of Hillsboro. They alleged the interest owned by each party and prayed for a partition.

Defendant J. T. Trull filed his plea of privilege to be sued in the county of his residence, and therein alleged that his place of residence was at all times in Hill county, Tex., and that at no time had he ever resided in Harris county, Tex., and that none of the exceptions to exclusive venue mentioned in articles 1830 and 2308 of the Revised Statutes existed in this cause; that all the defendants except W. L. Baldwin at all times resided in Hill county, Tex., and not in Harris county, Tex.; that the real property involved in the suit is wholly situated in Hill county, Tex. He further alleged all the facts relative to the conveyances of the land sued for, and the acts of the several parties relative thereto, as set out under our statement in the first part of this opinion, and that he was in exclusive possession of the land sued for at the time of the institution of this suit and that he had been in possession thereof long before the institution of such suit; that no consideration was paid or agreed to be paid by the defendant W. L. Baldwin for the one-eighth interest of the land so pretended to be conveyed to him by the plaintiffs, but that the plaintiffs, well knowing that they owned no interest in the property, fraudu-

lently conspired with the defendants W. L. Baldwin and Annie T. Lomax to execute such pretended and bogus transfer of one-eighth undivided interest in said property for the sole purpose of fraudulently securing a resident of Harris county whom they could name as a defendant in a suit to be thereafter brought by them for the apparent purpose of partitioning said property, but in truth and in fact brought for the purpose of enabling the defendant Annie T. Lomax to again set up and litigate her claim that the deed executed by her to him was not a deed but was intended as a mortgage; "that said pretended deed to the said W. L. Baldwin is not bona fide and was not made in good faith, but is a fictitious and simulated transfer made solely for the fraudulent purpose of conferring upon this court venue and jurisdiction to hear and determine the issue between the said defendant Annie T. Lomax and this defendant as to the sufficiency and validity of said deed executed as aforesaid by the said Annie T. Lomax to this defendant to the property described in plaintiffs' petition; that the suit brought herein by the plaintiffs is not brought in good faith, but is brought for the purpose of effectuating and consummating said fraudulent plan and device; that all of the facts in reference to the execution of the various deeds hereinabove mentioned and with reference to the proceedings had in the said suit pending in the district court of Hill county, Tex., were well known to the said defendant W. L. Baldwin at the time of the execution of said deed to him by the said Hattie O. Baldwin and Jacob C. Baldwin, and the said W. L. Baldwin joined in and conspired with the said Hattie O. Baldwin, Jacob C. Baldwin, and Annie T. Lomax in the fraudulent plan, device, and scheme to so fraudulently confer venue and jurisdiction upon this court;" that this suit is a suit the real purpose of which is to recover the title to the land described in the plaintiffs' petition, but is fraudulently brought in the form of a suit for partition of land for the fraudulent purpose of conferring jurisdiction upon the district court of Harris county over the person of this defendant.

The plaintiffs filed their contest of the plea of privilege of J. T. Trull in manner and form as required by law. They admitted that all the defendants except W. L. Baldwin resided in Hill county, as alleged by defendant Trull, and that the property in question was wholly situated in said Hill county. They alleged, however, that the allegations of fraud on their part made by the defendant Trull were false and untrue, and asserted that W. L. Baldwin was in fact an owner of an undivided interest in the property in question and was a necessary party defendant; that the suit was a suit for partition of land and not one involving the trial of title to land, as alleged by said defendant Trull, and that there-



fore the district court of Harris county had jurisdiction to try the cause in Harris county, where W. L. Baldwin resided, regardless of the plea of privilege of J. T. Trull.

Neither W. L. Baldwin nor Mrs. Annie T. Lomax filed a contest of defendant's plea of privilege.

The trial court sustained the plea of privilege of defendant Trull, and ordered that the suit be transferred to the district court of Hill county for trial. From the judgment so rendered Mrs. Hattie O. Baldwin and J. C. Baldwin have appealed.

[1] Appellants first contend that the trial court erred in sustaining the plea of privilege of defendant J. T. Trull under the facts and circumstances proven. To this contention we cannot agree. In addition to the facts already stated, it was shown that appellee Trull had paid all the notes due by Mrs. Annie T. Lomax to Mrs. Hattie O. Baldwin assumed by him in the deed from her to him, except note No. 13, and that he had deposited in a bank in Hill county, where note No. 13 was payable, the amount due on said note, and directed the bank to pay the same; that on being informed by the bank of such deposit J. C. Baldwin went to Hillsboro about the 1st day of May, 1920, and refused to accept payment of note No. 13 unless Trull would pay note No. 1, which had been changed to note No. 14. Trull refused to pay note No. 1 so changed, insisting that the release executed by J. C. Baldwin and wife before he purchased from Mrs. Lomax showed that said note had been paid and that he had not assumed its payment. J. C. Baldwin then returned to Houston, and on the 7th day of May, 1920, he and his wife executed a deed to W. L. Baldwin, of Harris county, a relative of J. C. Baldwin, purporting to convey to him an undivided interest in the property in question. This deed was sent to Hill county for record on the 11th day of June, 1920, by J. C. Baldwin and not by W. L. Baldwin, and on the 14th day of May, three days later, this suit was filed in the district court of Harris county. The land in question was situated wholly in Hill county, and was in the exclusive possession of J. T. Trull at the time this suit was filed, and had so been in his exclusive possession for a long time prior thereto.

All the facts relative to the controversy involved in the suit in Hill county, now on appeal, between appellee Trull and Mrs. Lomax, were well known to the plaintiffs at the time they executed the deed to W. L. Baldwin and when they filed the suit in Harris county.

We think that the evidence is sufficient to sustain the finding of the trial court that the act of J. C. Baldwin and wife, Hattie O. Baldwin, in executing the deed to W. L. Baldwin, constituted a fraudulent attempt on their part to confer jurisdiction upon the district court of Harris county, and that there-

fore the plea of privilege of appellee should be sustained.

[2] Whether J. O. Baldwin and wife, Hattie O. Baldwin, did in good faith execute the deed to the property in question to W. L. Baldwin for the purpose of making him the owner thereof, or whether they made it for the purpose only of conferring jurisdiction upon the district court of Harris county, so as to deprive and for the purpose of depriving appellee Trull of his right to be sued in the county of his domicile, was a question for the court trying the case. *Eaton v. Klein*, 174 S. W. 331. This question was determined by the trial court in favor of appellee Trull, and we are not prepared to hold that the evidence did not support the conclusion reached by the court. We also conclude that the findings of fact and conclusions of law of the court material to the issue involved on this appeal are supported by the evidence.

[3] Findings and conclusions of the trial court not pertinent or material to the issue being tried present no cause for a reversal of the judgment rendered upon sufficient evidence. We therefore overrule assignments 4 to 15, inclusive, complaining of the finding of facts and conclusions of law filed by the court.

[4, 5] We have also reached the conclusion that the court did not err in receiving and considering in evidence all the various facts and circumstances relating to the title to the property in controversy, together with those relating to the Hill county suit and the connection of the parties to this suit therewith. Consideration of all these matters was admissible upon the question of fraud alleged by appellee in his plea of privilege. The right of the defendant to be sued in the county of his domicile is to be determined from the facts of the particular case, and not from the form in which the plaintiffs have cast their pleadings. Great latitude is allowed in the proof of allegations of fraud.

The record presents other facts, not specifically found by us, which appellee urges as being sufficient to support the judgment of the court, but, as we deem those already found sufficient, we will not prolong this opinion by the recital of others.

What we have said disposes of all the issues presented, and it is apparent therefrom that we think the judgment should be affirmed; and it is so ordered.

Affirmed.

GRAVES, J. I concur in the result reached on the sole ground that it was the trial court's province to determine the real purpose of the suit, notwithstanding its form as one in partition; that the recent act of the Legislature (chapter 93, Acts 36th Legislature, p. 152) did not undermine that authority; and that the evidence heard was sufficient to sustain that court's conclusion.

**BARKLEY et al. v. GIBBS et al. (No. 7465.)**

(Court of Civil Appeals of Texas. Galveston.  
June 14, 1921. Rehearing Denied  
June 30, 1920.)

**1. Deeds §129(4)—Held to convey life estate with remainder to children.**

A deed conveying land to grantor's daughter and her children, to have and to hold to the daughter for her sole use during her natural life, and at her death to the issue of her body forever, gives to the daughter only a life estate, with remainder in fee to her children.

**2. Trusts §191(2)—Deed held not to authorize trustee therein appointed to sell land.**

A deed appointing the husband of a life tenant as guardian or trustee of the property conveyed, to use it and its proceeds for the benefit of the life tenant and the issue of her body, does not authorize the trustee to sell the property, the expression authorizing the use of the proceeds applying only to the rents and revenues derived therefrom.

**3. Deeds §93—Construed to effect intent of parties.**

The primary rule for construction of deeds is to ascertain the intention of the parties, and technical rules of construction must yield to this primary rule.

**4. Deeds §133(2)—Conveyance of remainder to "children" and "issue of body" conveys to children who survived life tenant.**

Where the granting clause of the deed designated the remaindermen as the "children," and the habendum clause as the "issue of the body" of the life tenant, the expressions children, and issue of the body, are not the equivalent of heirs, but are words of purchase, and not of limitation, so that the remainder passes to the children who were living at the death of the life tenant to the exclusion of those who died during her lifetime.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Issue of the Body; First and Second Series, Child—Children.]

**5. Tenancy in common §13—Possession by other grantees of portion of tract does not benefit grantee of portion in controversy.**

Where a large tract of land conveyed by a life tenant had been partitioned among the grantees, the actual possession of other portions of that tract by the grantees and their successors holding conveyances thereof does not inure to the benefit of a grantee of a portion who never took possession thereof, though the title of the remaindermen to the portion in controversy was the same as their title to the portion adversely held.

**6. Life estates §8—Inclosure of small portion of tract conveyed to another is not notice whole tract is adversely claimed to the other.**

Where a grantee from a life tenant of a portion of a tract of land inclosed with the land described in his conveyance a small portion of the land conveyed to another, and which otherwise was uninclosed, such possession was not notice to the remaindermen of the claim by the

grantee of the uninclosed portion of the tract, and does not entitle them to hold by adverse possession more than the small portion inclosed with the other tract.

**7. Adverse possession §58—Must indicate assertion of exclusive ownership by occupant.**

To make possession adverse, it must be of such character as to indicate unmistakably an assertion of claim of exclusive ownership in the occupant.

Appeal from District Court, Madison County; S. W. Dean, Judge.

Trespass to try title by R. W. Barkley and others against Sallie E. Gibbs and another, in which the defendant Susie L. Brooks and her husband were made parties defendant on their warranty. From a judgment in favor of the defendant Gibbs against all plaintiffs, the plaintiffs appeal. Reversed, and judgment rendered for plaintiffs against the defendant Gibbs, and for the defendant Gibbs against the defendants Brooks and husband.

See, also, 203 S. W. 161, 227 S. W. 1099.

R. J. Randolph, of Madisonville, and E. A. Berry, of Houston, for appellants.

Dean, Humphrey & Powell, of Huntsville, for appellees.

LANE, J. This is an action in trespass to try title brought by appellants, R. W. Barkley, R. J. Randolph, Mabel Durst Hall and husband, J. P. Hall, Laura Kittrell and husband, W. H. Kittrell, and H. Durst, Jr., against Mrs. Sallie E. Gibbs and Margaret D. Scales, to recover 216 acres of land situated partly in each of the two counties of Leon and Madison, in the state of Texas. Mrs. Susie L. Brooks and husband, S. Y. Brooks, were made parties defendant by Mrs. Gibbs on their warranty. Judgment was in favor of Mrs. Sallie E. Gibbs against all plaintiffs.

Plaintiffs' petition was in the ordinary form of petitions of trespass to try title. Defendant Margaret Scales filed a disclaimer, and judgment was entered thereon, and therefore no further mention of her will be made in this opinion.

Defendant Mrs. Sallie Gibbs answered by plea of general denial and plea of not guilty, and by special plea she averred that she held a fee-simple title to the land involved in the suit by mesne conveyances from the common source of title, to wit, P. W. Kittrell, down to herself. She specially alleged that she purchased the land from Mrs. Susie L. Brooks and husband, S. Y. Brooks, and had said parties made parties defendant, and prayed that, in the event judgment should be against her for the land, she should have judgment over against Brooks and wife for her damages. She also pleaded the statutes of limitation of 5 and 10 years in bar of plaintiff's cause of action.

Brooks and wife, as a defense to Mrs.

Gibbs' alternative suit against them, pleaded a general denial. For further answer they adopted the answer of Mrs. Gibbs as against all the plaintiffs.

It was shown by the undisputed evidence that in 1862 one P. W. Kittrell owned 1,500 acres of land lying partly in Leon county and partly in Madison county, and that on the 14th day of October of that year he conveyed the same to Mary E. P. Barkley and her children by the following instrument:

"The State of Texas, County of ———.

"This indenture, made and entered into this the 14th day of October, A. D. 1862, witnesseth:

"That Pleasant W. Kittrell, of the county of Polk and state of Texas, being desirous to give and secure certain property to my daughter, Mary E. P. Barkley, and her children, the wife and children of David M. D. Barkley, all now of Leon county in state of Texas as heretofore, and in consideration of the sum of ten dollars to me in hand paid the receipt of which is hereby acknowledged and for the natural affection which I bear my said daughter and children, and for other considerations me hereunto moving, have this day given, granted, and conveyed and by this instrument of writing do give, grant and convey unto my said daughter, Mary E. P. Barkley, and her children my following named property, to wit: All of that tract or parcel of land lying in the counties of Madison and Leon on the head branches of Caney creek it being a portion of the Jaques league and containing fifteen hundred acres. For particular description of metes and bounds of said land reference may be had to a deed for the same from Ralph Graves and his wife, Adeline Graves, to me dated 21st January, A. D. 1855, and recorded in the clerk's office of Madison county, state of Texas, on 29th day of March, A. D. 1855, in Book A, pages 393 and 394, also the following slaves, to wit: Scipio a man, Mary a young woman and her child named Jessee with such increases as she may hereafter have, also Caesar an old man and his wife Rachel and their son Harrison and his wife Martha and their children Peter, Wisdom and Rosa with their future increase. To have and to hold all the above and aforesaid property, land and slaves to my daughter Mary E. P. Barkley for her sole use, behoof and benefit during her natural life, and at the death to the issue of her body forever. And I do hereby constitute and appoint my son-in-law D. M. D. Barkley the husband of my said daughter Mary E. P. Barkley guardian or trustee of the said within mentioned property and persons, to use said property and its proceeds for the sole use and benefit of his wife Mary E. P. Barkley and the issue of her body.

"In testimony of all which I hereunto affix my hand and seal, using scrawl for seal, day and date above written."

There were born to Mary E. P. Barkley several children, namely, Anna Eliza, R. W., Margaret E., Pleasant Kittrell, Jessie, Goree, and David. There were also other children born to her who died in infancy prior to her death, whose names are not shown.

On the 21st day of July, 1864, Mary E. P. Barkley and husband, D. M. D. Barkley, by their deed of that date, conveyed the 1,500-acre tract of land above mentioned to James B. Durham and T. H. Webb, and on the 21st day of December, 1868, said 1,500-acre tract was partitioned between James B. Durham and T. H. Webb. These two last-named parties conveyed parts of their respective portions of said land to various purchasers, one among whom was M. H. Ford, to whom James B. Durham, on the 18th day of September, 1891, sold 490 acres of that part of the land set aside to him in the partition between himself and T. H. Webb; this 490-acre tract includes the 216-acre tract in controversy in this suit.

In the partition of the estate of M. H. Ford the 490-acre tract conveyed by Durham to Ford was set aside to Susie L. Brooks, née Susie L. Ford, wife of S. Y. Brooks. On the 1st day of September, 1899, Susie L. Brooks, and husband, S. Y. Brooks, by separate deeds, conveyed to M. H. Wells and J. H. Johnson each a part of the said 490-acre tract. These last-named purchasers took possession of their respective lands and occupied the same for more than 10 years prior to the time of filing this suit. On the 9th day of June, 1910, Susie L. Brooks and husband, by their warranty deed of that date, conveyed to appellee, Mrs. Sallie E. Gibbs, the 216 acres in controversy, which is a part of the 490-acre tract set aside to Susie L. Brooks in the partition of the estate of M. H. Ford, for a consideration of \$2,100.

Mary E. P. Barkley died in 1900. In or about the year 1904, one J. J. Williams, who had purchased and fenced about 500 acres of that portion of the P. W. Kittrell 1,500-acre tract set aside to T. H. Webb in the partition between him and James B. Durham, inclosed with his own land about 4 or 5 acres of the 216 acres in controversy. After learning of such inclosure Williams was requested by S. Y. Brooks to look after the entire 216 acres, and to keep others from taking timber therefrom. Williams did thereafter let his stock graze upon said 216 acres, and he also took some poles therefrom. The 4 or 5 acres of the 216 so inclosed with Williams' land was in an irregular shape, and near the corner of Williams' land and near his improvements, all of which were on his own land.

The plaintiffs are shown to be the legal owners of the land in controversy, unless the deed from P. W. Kittrell to Mary E. P. Barkley and her children to the 1,500-acre tract conveyed to Mrs. Barkley a fee in an undivided part thereof, or unless by such deed D. M. D. Barkley was empowered to sell the same to Durham and Webb, as he did, or unless they are barred by the statutes of limitation pleaded by the defendant Mrs. Gibbs. In other words, if the deed from

Kittrell to Mary E. P. Barkley has the legal effect to pass the title to the land in controversy to the children of Mary E. P. Barkley and only a life estate therein to her, and if no power is conferred therein upon D. M. D. Barkley to sell such land, then the plaintiffs are shown to be the owners thereof, and should recover, unless barred by the statute of limitations pleaded by the defendants.

The cause was submitted to a jury upon the main charge of the court and special charge No. 1 requested by defendants, as follows:

#### Charge of the Court.

"Gentlemen of the jury, I submit this case to you on special issues, but in order that you may understand these special issues, I give you the following instructions:

"By the term 'preponderance of the evidence' is meant the greater weight and degree of credible evidence.

"By the term 'peaceable possession' is meant such possession as is continuous, and not interrupted by adverse suit to recover the estate.

"By adverse possession is meant an actual and visible appropriation of the land, commenced and continued under a claim of right, inconsistent with and hostile to the claim of another.

"Possession can be maintained by the claimant or by another or others holding the same for him, and will extend to the boundaries of the entire tract claimed, although only a part may be actually reduced to possession.

"Bearing in mind the foregoing instructions, I submit to you the following special issues of fact:

"Special Issue No. 1. Do you find from a preponderance of the evidence that the defendant Mrs. Sallie E. Gibbs, and those under whom she claims, and whose estate she holds, has had peaceable and adverse possession of the land in controversy, cultivating, using, and enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered for at least 5 years after the plaintiffs' cause of action accrued and before the filing of this suit, which was on January 22, 1916? And you are instructed in this connection that plaintiffs' cause of action accrued upon the death of Mary E. Barkley, and not before, and you are instructed that the defendant Mrs. Sallie E. Gibbs, and the defendants Mrs. Susie L. Brooks and her husband, S. Y. Brooks, under the partition offered in evidence, could claim under the deed offered in evidence to M. H. Ford, the ancestor of the defendant, Susie L. Brooks.

"Special Issue No. 2. Do you find from a preponderance of the evidence that the defendant Mrs. Sallie E. Gibbs, and those under whom she claims, and whose estate she has, has had peaceable and adverse possession of the lands and premises in controversy, claiming the same under a deed or deeds for at least 10 years after plaintiffs' cause of action accrued, which I have instructed you was upon the death of Mary E. Barkley, and before the filing of this suit?"

#### Requested Charge.

"Gentlemen of the jury, At the request of plaintiffs you are instructed that the defense

of limitation is an affirmative defense, and the burden is on the defendants to prove such defense by a preponderance of the evidence, and unless they have done so in this case you will find against them in their plea of limitation."

The jury answered both questions propounded by the charge in the affirmative. The trial court thereupon rendered judgment for the defendants against plaintiffs, which judgment contains, among other things, the following recital:

"The court, after due consideration of the pleadings, the evidence, and the argument of counsel, as well as the verdict of the jury upon such special issues, finds that the law and the facts are with the defendants. It is therefore considered by the court that the plaintiffs take nothing by their suit, and that the defendants recover of and from the plaintiffs all costs incurred in this cause, and that defendants have their execution."

From the judgment so rendered all of the plaintiffs have appealed, and by their brief have presented 9 assignments of error. At a former term, this court declined to consider any of such assignments, and affirmed the judgment of the trial court. See 203 S. W. 161. On writ of error the Supreme Court reversed the judgment of this court, and remanded the cause to this court, with directions that it consider the assignments. 227 S. W. 1099. Complying with such directions we now proceed to consider the assignments. We deem it unnecessary to discuss in detail the several assignments as a disposition of the main and controlling issues will render the detailed discussion of the incidental issues raised by the remaining assignments unnecessary.

It is the contention of appellants, first, that the deed from P. W. Kittrell to Mary E. P. Barkley, hereinbefore set out, conveyed to Mary E. P. Barkley a life estate only to the land described therein, and that it conveyed the remainder or the fee to her children, and that it did not confer upon D. M. D. Barkley any power to sell the land, and therefore the children of Mary E. P. Barkley and those holding under them have and hold the legal title to the land sued for, and are entitled to recover in this suit unless they are barred by the statutes of limitation pleaded by appellees; and second, that there was no evidence justifying the submission of the question of limitation as to any part of the land in controversy except the 4 or 5 acres shown to have been inclosed by J. J. Williams for more than 5 or 10 years prior to the filing of this suit.

On the other hand, appellee, Mrs. Gibbs, contends:

First. That the deed from P. W. Kittrell to Mary E. P. Barkley and her children, construed as a whole, vests in the said Mary E. P. Barkley the fee-simple title to the 1,500 acres therein conveyed, and of which the 216

acres in controversy are a part; and, since the appellee Mrs. Sallie E. Gibbs holds said 216 acres under a regular and consecutive chain of title emanating in the deed executed by the said Mary E. P. Barkley and husband D. M. D. Barkley to James B. Durham and T. H. Webb, the judgment should have been against plaintiffs, regardless of the finding of the jury on the question of limitation.

Second. That, if the court should construe the deed from Kittrell to Mrs. Barkley as vesting in the latter a life estate only in the 1,500 acres, and the estate in remainder to the children, then, since the proof shows that several of the children died while minors, and since the said Mary E. P. Barkley and her husband, D. M. D. Barkley, inherited the interest of such of said children as died before the death of the said Mary E. P. Barkley and husband, and since the plaintiffs failed to show from how many of said children the said Mary E. P. Barkley and D. M. D. Barkley inherited, and because the defendants hold under warranty deed all of the estate of the said Mary E. P. Barkley and D. M. D. Barkley, the trial court was left without information as to the exact extent of the interest, if any, of the plaintiffs in and to the land in controversy, and therefore, upon consideration of all of the facts, could have rendered no judgment other than that for defendants, regardless of the findings of the jury on the question of limitation.

Third. That, as the deed from Pleasant W. Kittrell to Mary E. P. Barkley made and constituted D. M. D. Barkley as guardian or trustee of the property therein conveyed, and empowered him to use the same and its proceeds for the benefit of the said Mary E. P. Barkley and the issue of her body, the said D. M. D. Barkley had the right to sell said land and use the proceeds of the sale for the benefit of Mary E. P. Barkley and her children, and that he did so sell said land.

Fourth. That appellants' right to recover the land was barred by the statute of limitation of 5 and 10 years pleaded by appellee.

We think the contention of appellant should be sustained. The material and pertinent parts of the Kittrell deed declare substantially that P. W. Kittrell has given, granted, and conveyed, and by the instrument of writing does give, grant, and convey unto his daughter, Mary E. P. Barkley, and her children, the 1,500 acres of land described; this granting clause is followed by the following clause:

"To have and to hold all the above \* \* \* land \* \* \* to my daughter, Mary E. P. Barkley, for her sole use, behoof and benefit during her natural life, and at her death [italics ours] to the issue of her body forever. And I do hereby constitute and appoint my son-in-law, D. M. D. Barkley, the husband of my said daughter, Mary E. P. Barkley, guardian or trustee of said within-mentioned property, \* \* \* to use said property and its proceeds [italics

ours] for the sole use and benefit of his wife, Mary E. P. Barkley, and the issue of her body."

[1,2] We hold that the effect of this deed was to convey to Mary E. P. Barkley a life estate only in the 1,500 acres described therein, and the fee thereof to her children who survived her. We also hold that such deed conferred no power upon D. M. D. Barkley to sell said land, and that by the expression "to use said property and its proceeds for the sole use and benefit of his wife, Mary E. P. Barkley, and the issue of her body," meant only that D. M. D. Barkley should use the property and apply the rents and revenues derived therefrom for the sole use and benefit of his wife and the issue of her body, and that it was not intended thereby to authorize Barkley to sell such land.

[3] The rule for the construction of deeds is briefly stated in section 93, pp. 1087, 1088, vol. 8, R. C. L., as follows:

"The court will effectuate the lawful purpose of deeds, as it will of all other instruments, if this can be done consistently with the principles and rules of law applicable. The primary rule to be observed, therefore, is that the real intention of the parties is to be sought and carried out whenever possible, and statutes to that effect are found in many jurisdictions. All rules of construction are simply means to a given end, being those methods of reasoning which experience has taught are best calculated to lead to the intention, and generally no rule will be adopted that leads to the defeat of the intention. So, whatever may have been the earlier doctrine, it is now thoroughly settled that technical rules of construction are not favored, and must not be applied so as to defeat the intention. In modern times the more sensible rule obtains, in all cases, to ascertain and give effect to the intention of the parties as gathered from the entire instrument, together with the surrounding circumstances, unless such intention is in conflict with some unbending canon of construction or settled rule of property, or is repugnant to the terms of the grant. Furthermore, the primary or dominant intent must prevail over a secondary intent, where the two are inconsistent, wherefore, if two clauses are inconsistent they must be construed so as to give effect to the intention of the parties as collected from the whole instrument."

Applying the rule just stated, we think it clearly appears from the deed under discussion, as a whole, that it was the intention of P. W. Kittrell, who executed the same, to convey the fee to the land described therein to the issue of the body of his daughter, Mary E. P. Barkley, subject only to the life estate conveyed to said daughter, and that there is nothing in the deed which could be properly construed as conferring on D. M. D. Barkley power to sell said land.

[4] Having reached the conclusion that the fee to the 1,500 acres, by the terms of the deed of P. W. Kittrell, passed to the "issue

of the body" of Mary E. P. Barkley, and in view of the contention of appellee Mrs. Gibbs that title to an undivided part of the land passed to such of the children of Mary E. P. Barkley as died in infancy, and that Mary E. P. Barkley and D. M. D. Barkley inherited through them a portion of the 1,500 acres of land, it becomes a pertinent inquiry as to who were embraced in the terms "her children" and "issue of her body" as used in the P. W. Kittrell deed. In other words, were the children who are shown to have died in infancy, and perhaps, in so far as shown by the evidence, before P. W. Kittrell executed the deed under discussion, to be considered as embraced in the terms "her children" and "issue of her body"? Or was it the intention of P. W. Kittrell in executing the deed that the fee to the land should pass to such of the issue of the body of Mary E. P. Barkley as should survive her? That P. W. Kittrell intended that the land should become the absolute property of the issue of the body of Mary E. P. Barkley after her death can hardly be seriously questioned. We think it well settled that "children" is never used in a deed as the equivalent of "heirs." "Children" is "usually a word of purchase, and not of limitation, whether in the granting clause, premises, or habendum, unless the context in which it is used requires a contrary conclusion, which, however, is not the case where the grant is to one 'and her children.'" The word "issue" is likewise usually a word of purchase. 8 R. C. L. p. 1055, § 108, and authorities there cited.

Considering the deed, then, as a whole, we think it clearly indicates that it was the intention of P. W. Kittrell thereby to convey the fee to the land described therein to the issue of the body of Mary E. P. Barkley who survived her, subject only to her life estate. In using the phrases "the children," "the issue of her body," found in the deed, P. W. Kittrell evidently had in mind a certain class of persons, viz. such "children" or "issue of the body" of Mary E. P. Barkley as should survive her. *Hopkins v. Hopkins*, 103 Tex. 15, 122 S. W. 15, 16; 28 R. C. L. p. 264, § 238.

"Although, as has been seen, the general rule favors the death of the testator as the time for fixing the membership in a class, there are numerous decisions to the effect that, where distribution is to be made among a class upon some contingency or at some time subsequent to the testator's decease, then those, and those only, who belong to the class when such time or contingency arrives are entitled to share in the distribution. The gift of property to a class of persons, distributable at a time subsequent to the death of the testator, is construed as including all persons in being at the time appointed for the distribution who belong to the class, whether born before or after the death of the testator, except when a different intention appears from the will." 28 R. C. L. p. 264, § 238.

Having disposed of all questions relative to the effect of the P. W. Kittrell deed, we now return to the consideration of the question of limitation. As before stated, it was shown that some 12 or 15 years before the institution of this suit one J. J. Williams, who had purchased and inclosed under fence about 500 acres of that portion of the Kittrell 1,500-acre tract set aside to T. H. Webb in the partition between him and James B. Durham, moved his fence out so as to inclose with his own land about 4 or 5 acres of the 216 acres in controversy. Said 4 or 5 acres so inclosed was in an irregular shape, near the corner of the land of Williams, and near his residence and other houses situated entirely on his own land.

After the death of M. H. Ford, and after Mrs. Susie L. Brooks had become the owner of the 490 acres formerly owned by M. H. Ford, her husband, S. Y. Brooks, on learning that Williams had inclosed said 4 or 5 acres, permitted him to keep the same under his fence upon the promise of Williams to look after the remainder of the 216 acres and to see that no one took timber therefrom. Williams used the 4 or 5 acres in connection with his own premises from the time he fenced the same up to the time of filing suit by appellants, a period of more than 10 years. Williams testified that when he fenced the 4 or 5 acres he knew it did not belong to him, but he thought the owner would not object to his fencing and using the same. The remainder of the 216 acres was uninclosed.

[5] Appellee Mrs. Gibbs contends that if appellants were the owners of the 216-acre tract sued for they were by the same title, the P. W. Kittrell deed, the owners of the entire 1,500 acres conveyed by said deed, and that the actual adverse possession of Williams, Wells, Johnson, Dickey, and others, who had each purchased several portions of said 1,500-acre tract, by deed specifically describing each portion, should not be distinguished from the actual possession held by Williams for Brooks of the 216-acre tract in controversy, and that the possession and claim of these several purchasers of their respective tracts, under their several deeds, and the payment of taxes thereon, should be considered in determining whether the facts proven were sufficient to charge appellants with notice that the land was being held adversely to them, and especially the 216 acres in controversy.

To these contentions we cannot agree. While it is true that the possession and use by Williams, Wells, Johnson, and others of their respective tracts, which were particularly described in their several deeds, were sufficient to advise appellants that lands so described and possessed were being held adversely to them, we can hardly conceive that

such possession and use could tend to advise appellants that such holders and possessors were claiming or intended to claim any portion of the 1,500 acres not embraced within the boundaries named in their respective deeds. But, to the contrary, the only reasonable conclusion which could be reached from such facts would be that these parties intended to claim only such land as was described in their several deeds, and of which they had taken possession. Evidently such possession by these parties cannot be construed as a holding and possession of any lands not described in such deeds, and of which no possession was taken for themselves, and by no stretch of imagination could such holding be construed as a holding for Brooks and wife, or those claiming under them, of any part of the 216 acres in controversy.

[8, 7] Nor can we agree that the fact that other parties had purchased and taken possession of the land so purchased would be notice to appellants that Williams, by inclosing the 4 or 5 acres of the 216 acres in controversy, intended to claim for himself or others the whole of said 216 acres adversely to appellants. We do not think that the evidence was sufficient to justify the court in submitting to the jury the question of limitation as the same relates to that portion of the 216 acres not within the inclosure of Williams. While the true owner is charged with knowledge of the location of the boundaries of his land, he cannot be affected with notice that an adjoining proprietor, such as Williams was in the present case, has encroached by his fence a short distance over the line for the purpose of acquiring 216 acres of his land under the statute of limitation. To make possession adverse, it must be of such character as to unmistakably indicate an assertion of claim of exclusive ownership in the occupant. *Bracken v. Jones*, 63 Tex. 184; *Bender v. Brooks*, 103 Tex. 329, 127 S. W. 168, Ann. Cas. 1913A, 559; *Bartine v. McElroy*, 58 Tex. Civ. App. 16, 123 S. W. 1174; *Callen v. Collins*, 56 Tex. Civ. App. 620, 120 S. W. 547; *Jones v. Weaver*, 122 S. W. 619.

For the reasons pointed out we have reached the conclusion that the trial court erred in submitting the question of limitation, in so far as it relates to so much of the land in controversy as was not within the inclosure of Williams, and that judgment should have been rendered for appellant for all that part of said 216 acres not within such inclosure, and that judgment should have been also rendered in favor of Mrs. Sallie E. Gibbs against S. Y. Brooks and wife, Susie L. Brooks, upon their warranty for the sum of \$2,160, same being the sum paid by Mrs. Gibbs to Brooks and wife as purchase money for the land in controversy,

together with 6 per cent. interest per annum thereon from date of such payment until the same is repaid.

It is therefore ordered that the judgment of the trial court be and the same is hereby reversed, and judgment is here rendered for appellants for the 216 acres of land described in their petition, except, however, the 4 or 5 acres shown to have been within the inclosure of J. J. Williams.

Judgment is also here rendered in favor of Mrs. Sallie E. Gibbs upon her cross-bill against her codefendants, S. Y. Brooks and Mrs. Susie L. Brooks, upon their warranty for the sum of \$2,160, same being the sum paid by Mrs. Gibbs to said codefendants for the land in controversy, together with 6 per cent. per annum interest thereon from the 9th day of June, 1910.

Reversed and rendered.

### ARMSTRONG v. PAYNE. (No. 9033.)

(Court of Civil Appeals of Texas. Galveston. May 12, 1921.)

1. Brokers  $\S$ 52—Not entitled to commission for consummation of trade unless binding contract is made.

Where a broker's contract entitles him to commission on consummation of a trade, he is not entitled to a commission unless at least a contract for the trade is entered into by the parties which is binding on them.

2. Brokers  $\S$ 63(4)—Refusal of other party's wife to join in conveyance as required by contract with broker's client for an exchange of lands prevents consummation of trade.

A broker is not entitled to a commission for the consummation of a trade of land where the contract for the trade required the deed to the broker's client, which covered a homestead, to be executed by the grantor's wife, who was not a party to the contract, and the wife refused to sign such deed, so that the client was justified in refusing to perform his part of the contract.

3. Brokers  $\S$ 61(1)—Client's renunciation of contract to exchange lands held justified by demand of other party for a contract to protect latter against defects in title.

Where the contract for exchange of lands, for consummating which plaintiff was to receive a commission, provided that, if either party failed to overcome defects in his title, the other party could remove such defects at the expense of the other, the demand of the other party that the broker's client execute an additional contract to protect him against defects in the title gave the client the right to decline to go on with the deal without being liable for the commission.

Appeal from District Court, Wharton County; M. S. Munson, Judge.

Action by R. A. Armstrong against J. C. Payne to recover a real estate brokers' com-

mission. Judgment for defendant, and plaintiff appeals. Affirmed.

Cline & Ingram, of Wharton, and Fly & Ragsdale, of Victoria, for appellant.

Hall & Rowan and Kelley & Hawes, all of Wharton, for appellee.

GRAVES, J. Armstrong, as a real estate broker, sued Payne to recover a commission claimed to be due him from the exchange of certain lands between Payne and Talley, declaring upon this contract in writing:

"Articles of agreement between J. C. Payne and R. A. Armstrong in an exchange trade of property between J. C. Payne, of Wharton, and J. A. Talley, of Temple, Tex.

"In case of trade being consummated, J. C. Payne is to convey by deed two certain houses in the Vineyard addition of the town of Wharton, value of each placed at \$600.00, and the balance of the commission to be paid in cash.

"The commission to be two and one-half per cent. of the valuation of the property conveyed to Talley. In the event a trade is consummated, Armstrong is to pay Payne's expenses to inspect the land. If the trade is made, Payne is to pay his own expenses.

"J. C. Payne.

"R. A. Armstrong.

"Signed in duplicate, Wharton, Texas, 9-24-14."

He averred that, pursuant to this agreement with Payne, he had brought the latter and Talley together, and that they had finally consummated an exchange between them at an agreed valuation of \$66,420 of 753 acres of land in Wharton county, Tex., belonging to Payne, for 4,200 acres in Reagan county, Tex., belonging to Talley; that such exchange had been evidenced by a written contract between the parties under and by virtue of which each had gone into possession and assumed control, management, and ownership of the land so acquired by him from the other; that this consummation of the trade, under the terms of their own contract, had made Payne liable to him (Armstrong) for the agreed brokerage fee of 2½ per cent. on \$66,420, or \$1,660.50, \$1,200 of which was payable in the two houses in the Vineyard addition to the town of Wharton, the balance of \$460.50 in cash, and that Payne had refused to either convey him the two houses or pay the money.

Among a number of other defensive matters not deemed material for the purposes of this opinion, Payne answered that the trade between Talley and himself had never been consummated; that Talley had neither carried out his part of their contract nor offered to; that he had never been ready and willing to convey his Reagan county property to Payne in exchange for a deed from the latter alone to his lands in Wharton county; that the contract between them for the exchange of their lands was neither a valid and mutually binding one nor susceptible of

being specifically enforced, for all of which reasons no obligation under the express terms of his agreement with Armstrong had matured.

On the trial of the cause before a jury the evidence disclosed that, while there had been a preliminary occupation of or entry upon the Reagan county land by Payne and that in Wharton county by Talley, the deal had never in fact been consummated. The written contract expressly provided that the deeds from each to the other should be executed both by the husbands and their respective wives; that abstracts thereof should be furnished and the title to the lands approved by the attorneys for each party, with provision that the purchaser in either instance—in case the seller did not by a fixed date correct any defects in his title—might himself have that done at the seller's expense; that surveys of both properties should be made; that Talley should execute and deliver to Payne an indemnity bond to protect him against the possible loss of 200 acres of the Reagan county land on which a suit was pending.

By the undisputed evidence none of these requirements were met; no surveys were ever made; Talley did not put up the indemnity bond for the 200 acres; his attorney never approved Payne's title to the Wharton county land; Mrs. Payne not only never did move off of the land, which was her homestead and so known to be by Talley, but refused ever at any time either to sign a contract for its sale or to join her husband in a conveyance of it to Talley; and the latter positively testified more than once on the trial that he never did and never would have accepted a deed to it as a compliance with Payne's obligation to transfer it to him without her joinder. There was also no proof that Mrs. Talley ever agreed to or did join in a deed with Talley to Payne.

On the coming in of these facts, the court peremptorily instructed the jury to find for Payne, which was done, and this appeal by Armstrong complains of an adverse judgment entered upon the verdict.

[1] We think appellant misconceives the legal effect of the contract he sues upon. By its express terms he was to get no commission unless the trade was consummated, and by the undisputed evidence it never was consummated. The mere fact that Talley filed a suit against Payne to establish his legal title to the Wharton county lands and in the alternative for damages, which was later settled by compromise between them, would cut no figure here; this action being based upon an unsubstantiated claim that their exchange of properties had been duly effected.

In that class of land broker's contracts where it is stipulated that the agent is to be paid his commissions when the trade between his principal and the purchaser is con-



summated, he has not earned and is not entitled to the commissions unless the trade is consummated; there must at least have been procured such a contract for the disposition of the properties as could have been enforced by way of specific performance. *Moss v. Wren*, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847; *Britton v. Eagan*, 196 S. W. 972; *Griffith v. Bradford*, 138 S. W. 1072.

[2] Not only, as already pointed out, was there in this instance no actual consummation of the exchange, but under the facts given the contract providing for it was not one as to which specific performance could have been enforced. Its terms required the joinder of Mrs. Payne, the purchaser was unwilling to accept a deed in its absence, the property was her homestead, and she refused to so join. The transaction was therefore blocked. *Griffith v. Bradford*, supra; *Blair v. Lowrey*, 164 S. W. 14.

[3] Nor will it do here to yet contend, as appellant does, that Payne's renunciation of the agreement to trade their properties excused Talley from performance of his undertakings thereunder, for the reason that, by Mr. Talley's own statement, before Payne made any objection to going on with the deal, he, upon the advice of his attorney, demanded of Payne as a prerequisite to closing the trade that he execute to Talley an additional contract to protect him against the defects in Payne's title. This was contrary to the terms of their contract, which gave Talley the right to have these matters met, its provision being:

"But if either party hereto fails or refuses to meet and overcome any defects in his title before January 1, 1915, then the purchaser shall have a reasonable time thereafter to have the same met and overcome, for which work the seller agrees to pay all reasonable and necessary expenses."

Not having chosen to avail himself of this privilege, he rejected Payne's title and demanded of him as a condition precedent to closing the trade a new contract and obligation not originally required. Payne was therefore not without the right to decline to go on with the deal.

We conclude that the court did not err in directing the verdict and entering the judgment. All assignments will be overruled, and an affirmance ordered.

**Affirmed.**

**KELLY v. WILSON et al. (No. 8034.)**

(Court of Civil Appeals of Texas. Galveston.  
May 13, 1921. Rehearing Denied  
June 9, 1921.)

**1. Partition** §8—Description held unambiguous, when applied to circumstances.

A deed executed in pursuance of an agreement for voluntary partition, which conveyed

to plaintiff 200 acres in part of a survey set apart to the heirs of the parties' ancestor, except the portion thereof set apart to defendant and elsewhere described, shown to have been executed shortly after the tract thereby divided between the parties was decreed to the heirs who made the partition, was plain and unambiguous, both on its face and when applied to the circumstances.

**2. Evidence** §461(3) — Intention to convey other land inadmissible to contradict unambiguous deed.

Where a deed effecting a voluntary partition between the parties was unambiguous on its face and when applied to the situation, parol evidence is inadmissible to show that the oral agreement for partition was intended to convey other land, though the deed recited it was executed in pursuance of a partition agreement.

**3. Partition** §9(2)—Evidence held not to show intention to convey land other than that described.

Even if parol evidence were admissible to show the oral agreement for partition effected by a deed reciting it was given in pursuance to an agreement for partition, an oral agreement, made while a suit to determine title to the land was pending, which divided land ultimately not received by the parties to the partition agreement, held not the agreement referred to in the deed; but it will be presumed that a subsequent agreement was made after the decision of the suit, in pursuance of which the deed dividing the tract set off to the parties in that suit was executed.

**4. Appeal and error** §1177(6) — Judgment cannot be rendered, where evidence shows adverse possession of some land without showing boundaries.

On appeal from a judgment for defendants in trespass to try title, where the record showed that the plaintiff was the owner of the title to the land in controversy, but that some portion thereof had been claimed and occupied by the defendants for more than 10 years before the suit was filed without showing the boundaries of the portion so occupied, judgment cannot be rendered for the plaintiff, but the cause must be remanded, to have the boundaries of that portion determined.

**5. Adverse possession** §100(1)—Possession by record owner of portion of tract extends to all not occupied adversely.

Where the owner of the record title to land is in actual possession of a portion thereof, his possession extends to all of the tract, except those portions actually occupied adversely.

**Appeal from District Court, Madison County; J. A. Platt, Judge.**

Trespass to try title by S. H. Kelly against Ella L. Wilson and her husband. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with instructions to render judgment for all the land in controversy, except such portions as defendants may show they have occupied for the period of limitations.

Dean & Humphrey, of Huntsville, for appellant.

Lewis & Dean, of Navasota, and A. T. McKinney, Jr., of Huntsville, for appellees.

PLEASANTS, C. J. This is an action of trespass to try title, brought by appellant against appellee Ella L. Wilson and her husband, J. R. Wilson. The land in controversy is a tract of 200 acres, more or less, a part of the John Montgomery survey in Madison county.

Plaintiff's petition, in addition to the general allegation of fee-simple title, alleges title by limitation of three, five, and ten years. The land sued for is all of a tract of 817 acres, more or less, which is described in the petition by metes and bounds, except 617 acres off the east end thereof. The petition further alleges that the boundary line between the land owned by plaintiff on said 817-acre tract and that owned by defendants has never been fixed and established, and asked that such line be now fixed and established.

The defendants answered by general demurrer, special exception, and general denial, and further pleaded the statutes of limitation of three, five, and ten years. The trial in the court below without a jury resulted in a judgment in favor of the defendants.

It was agreed by all parties that Samuel Calhoun is the common source of title of plaintiff and defendants, and that the parties to the partition deed hereinafter mentioned were the heirs and all of the heirs of said Samuel Calhoun, deceased, at the time of the execution of said partition deed, except Louis Calhoun, and that the said Louis Calhoun received his share of the estate of the said Samuel Calhoun under the will of the latter, and not in the partition. It was further agreed that 10 acres of the John Montgomery headright, being the 10 acres mentioned in the partition deed as being devised in the will of the said Samuel Calhoun to the said Louis Calhoun, is in the forks of the Bedias creek and Trinity river, and that said 10 acres is not claimed by either the plaintiff or defendants in this suit.

By a deed of partition executed by the heirs of Samuel Calhoun on September —, 1888, and duly acknowledged on November 16, 1888, there was conveyed to Mrs. Kate Kelly, whose title plaintiff now holds, among other lands of said estate, a tract described as follows:

"Tract No. 14, 200 acres in Madison county, in said state, being part of the John Montgomery headright in said county, and on the north line thereof, being that part of said Montgomery survey set apart to Samuel Calhoun in the partition between the heirs of John Montgomery and the heirs of Samuel Calhoun, and including all that part of said headright so set apart to said heirs, except 617 acres herein set apart to Mrs. Ella Wilson, and designated as tract No. 18."

This deed conveys to defendant, Mrs. Ella Wilson, among others, the following described tract:

"No. 18, 617 acres in Madison county, in the state of Texas, being part of the John Montgomery headright in said county, including the eastern part of the land owned by the said Calhoun in said headright survey, except a 10-acre survey set apart to Louis Calhoun by the will of said decedent."

This deed recites that a verbal agreement had been made by and between the heirs of Samuel Calhoun in 1874, by which they had—

"partitioned and divided the said lands among themselves, and designated the respective portions of the said lands that each of them should thereafter possess and own; and whereas, said legatees, or the heirs of each of them, have had exclusive possession and control of the respective shares so set apart to them ever since said partition was so made aforesaid."

In 1850 John Montgomery conveyed to Samuel Calhoun two tracts of land in the John Montgomery survey. The first tract, which contains 1,000 acres, extends along the north boundary line of the survey east a distance of 1,918 varas to the northeast corner of the survey on the Trinity river. From the northeast corner the lines of the tract run down the Trinity river and up Bedias creek with their meanders, and then, leaving the creek, the line runs west 3,589 varas, and thence north 1,538 varas, to the place of beginning on the north line of the survey. From this description it is seen that the western portion of this tract is a parallelogram, 1,918 varas in length and 1,538 varas wide. The second tract, which contains 400 acres, is described as beginning at the southwest corner of the 1,000-acre tract; thence west 1,000 varas; thence north to the north boundary line of the survey; thence east with said line to the northwest corner of the 1,000-acre tract; thence south on the west line of said tract to the place of beginning.

In a suit brought by the heirs of John Montgomery against J. M. Wright, executor of the estate of Samuel Calhoun, in the district court of Madison county, the plaintiffs on December 7, 1871, obtained a judgment for an undivided five-twelfths of the two tracts of land of 1,000 and 400 acres, respectively, before described. After adjudging plaintiffs an undivided five-twelfths interest in the land, this judgment further orders and decrees:

"It is therefore ordered that W. M. James, G. T. Rhodes, and J. D. H. Richardson, all of this county, be appointed to survey, plot, and partition said lands by metes and bounds so as to give complainants five-twelfths of said two tracts, having reference to value, quality, and quantity, but irrespective of value enhanced by the improvements, and said Calhoun's inter-

est by consent be set off in a body on the east end of said 1,000-acre tract, so as to include his improvements, or so much of them as may be on the part allotted to him."

An appeal from this judgment was taken to the Supreme Court, and pending the appeal the record of this judgment was destroyed by fire. The judgment was affirmed by the Supreme Court, and thereafter, on August 10, 1874, on motion of plaintiffs to substitute the record, which was agreed to by the defendant executor, the original judgment was substituted and entered in the minutes of the court. The records of the district court of Madison county do not show any report by the commissioners appointed by the judgment to partition the land, and no further order appears to have been made in the case after the order substituting the original judgment.

The undisputed evidence shows that two of the commissioners named in this judgment, together with the county surveyor of Madison county, made partition of the land in accordance with said judgment, and fixed and established a division line between the land set apart to the Calhoun heirs on the east end of the 1,000-acre tract and that set apart to the Montgomery heirs. This line is well known and has been recognized as the division line between the Montgomery and Calhoun heirs ever since it was established by said commissioners.

There is evidence showing that, prior to the entry of the substituted judgment in 1874 and the establishment of the division line above referred to, there had been a verbal partition between the Calhoun heirs of the land belonging to the Calhoun estate, and by this partition Mrs. Kelly was given 200 acres in the northwest corner of the 400-acre Montgomery tract before described, and Mrs. Wilson 617 acres out of the north portion of the 1,000 and 400 acre tracts. A plat showing the location of the land as fixed by this partition was in evidence.

Defendant J. R. Wilson testified:

"The verbal partition was made before I married. I know that verbal partition was made before I married, and my wife had been in possession for a year or more of her part. Yes; that is the partition that is reflected on this map that Mr. Wright gave me some time after I married Miss Ella L. Calhoun."

Again:

"I married Miss Ella L. Calhoun on the 26th day of June, 1872, and moved on to this place in September, 1872. \* \* \* It must have been some time about a year after I married. It must have been some time in 1873 or in the spring of 1874. It was after I married that the partition deed was made. That deed was burned in the courthouse here. I have never been able to find it."

Mrs. Kelly took possession of the 200 acres set apart to her in this verbal partition,

erected a house, and placed a tenant therein. After final settlement of the suit of Montgomery heirs against the executor of the Calhoun estate, by which 817 acres off the east end of the 1,000-acre tract was set aside to the Calhoun estate and the division line above mentioned was established, Mrs. Kelly abandoned her possession of the 200 acres in the northwest corner of the 400-acre tract and removed her improvements therefrom. A few acres of this 200-acre tract was inclosed in a field owned by Mrs. Kelly on an adjoining survey, and she seems to have continued to hold possession of this small portion of the land; but the undisputed evidence shows that she never claimed any portion of the 200-acre tract after the final settlement of the Montgomery suit. The undisputed evidence further shows that Mrs. Kelly, prior to her death in 1900, claimed the 200 acres involved in this suit and paid the taxes thereon, and that it has been since continuously claimed and the taxes thereon paid by her heirs and by plaintiff herein. A portion of this land was rented by Mrs. Kelly to Capt. Herring for pasturage purposes, and he fenced it in 1898 or 1899, and continued to hold it under his rent contract and to pay yearly rent therefor until he took charge of the penitentiary in 1907.

After Capt. Herring gave up the pasture, it was rented to J. R. Rhodes, whose possession and occupancy is detailed by him as follows:

"Mr. Herring had the place just before I did. When Mr. Herring was appointed superintendent at the penitentiary, he was going to move to Huntsville, and he called me up and told me that there was a good pasture there; if I wanted it, that I could get it. He was appointed superintendent under Gov. Campbell in 1907. He told me about that pasture before he left. He moved shortly after he was appointed superintendent. Then I wrote to Mr. Kelly, and Mr. Herring wrote to Mr. Kelly. Yes; I paid for it. I was renting it from Mr. Kelly. I never heard of any one else claiming that land while I had it. This pasture went right up to that little field over there. Mr. Kelly told me he was claiming something like 200 acres in there. He spoke to me three different times about fencing the land south of that road. He said he wanted to make a trade with me to fence it. I told him I didn't have time. And then next year I rented it from him again, and he told me again that he wanted to get me to fence it; but we kept putting it off and never did make any trade. While I had that land I was using it as a pasture. I kept the fences up. It was in the agreement that I was to keep the fences and have it for so much money. None of the Wilsons ever had anything to do with that land while I had it."

Defendants have resided on the old Samuel Calhoun homestead on the east end of the 1,000-acre tract ever since their marriage in 1872. They have claimed all of

said tract east of the line fixed as the division line between the Calhoun and Montgomery heirs, and have held actual possession for more than ten years before this suit was filed to some portions of the land claimed by plaintiffs in this suit, but the exact quantity and a definite description of the portions so occupied by them is not shown by the record.

Under appropriate assignments of error the appellant assails all of the material findings of fact and conclusions of law upon which the judgment of the trial court is based. It would serve no useful purpose to set out or discuss the assignments in detail. The judgment is based primarily upon the conclusion that the partition deed between the heirs of Samuel Calhoun did not convey to Mrs. Kelly any portion of the 817 acres of land now claimed by the defendants on the east end of the 1,000-acre tract.

[1] This conclusion cannot be sustained under any recognized rule for the construction of written instruments, nor upon any reasonable inference that can be drawn from the facts shown by the undisputed evidence. The language of the deed is free from ambiguity. It conveys to Mrs. Kelly:

"200 acres in Madison county in said state, being a part of the John Montgomery headright, and on the north line thereof, being that part of said Montgomery survey set apart to Samuel Calhoun in the partition between the heirs of John Montgomery and the heirs of Samuel Calhoun, and including all that part of said headright so set apart to said heirs, except 617 acres herein set apart to Mrs. Ella Wilson."

This language is plain, and there is nothing in it to raise any doubt or uncertainty as to the location of the land intended to be conveyed. When by the aid of undisputed evidence we seek to apply this description to the land in controversy, no doubt or uncertainty arises as to the identity and location of the land intended to be conveyed. As before shown, the undisputed evidence, a portion of which is a judgment record, shows in the partition between the heirs of John Montgomery and Samuel Calhoun a tract of 817 acres off the east end of a 1,000-acre tract on the John Montgomery head right was set apart to the Calhoun heirs. This 817-acre tract lies along the north line of the Montgomery survey. Mrs. Wilson had her home on the east end of this 817-acre tract at the time this deed was executed, and Mrs. Kelly owned other land adjoining the north line of the Montgomery survey. The tract conveyed to Mrs. Wilson on the Montgomery survey referred to in the description of the tract conveyed to Mrs. Kelly is described as follows:

"617 acres in Madison county, in the state of Texas, being part of the John Montgomery headright in said county, including the eastern part of the land owned by the said S. Calhoun in said headright survey, except a 10-acre sur-

vey set apart to Louis Calhoun by the will of said decedent."

The clear and unmistakable purpose and intention of the parties, as expressed in this instrument and interpreted by the situation and circumstances shown by the undisputed evidence, was to convey to Mrs. Wilson 617 acres of the 817-acre tract to include her home on the eastern portion of the tract, and convey to Mrs. Kelly the remainder of the tract adjoining the north line of the survey and near the other land owned by her.

[2] There being no ambiguity on the face of the deed, and none arising when the description therein contained is applied to the land, it is not competent in a suit of this character to show by extrinsic evidence that other land than that described in the deed was intended to be conveyed. *Thompson v. Langdon*, 87 Tex. 254, 28 S. W. 931; *Chew v. Zweib*, 29 Tex. Civ. App. 311, 69 S. W. 207; *Hamman v. San Jacinto Rice Co.*, 229 S. W. 1008, recently decided by this court.

[3] But, regardless of this rule, there is no evidence in this case tending to show that the parties to this deed did not intend to convey the land clearly and unambiguously described in the deed. The learned trial judge based his conclusion that this deed did not convey to Mrs. Kelly the land claimed by plaintiff in this suit on the recital in the deed before set out as to the previous verbal partition and the previous possession of and control of the property by the heirs under such partition, and the evidence showing the possession and claim by Mrs. Kelly to the 200 acres in the northwest corner of the 400-acre tract. In reaching the conclusion that this 200 acres was the land intended to be conveyed by the deed, he evidently overlooked the fact that the verbal partition referred to in the deed is there stated to have been made in 1874, and the further fact that the verbal partition under which Mrs. Kelly took possession of the 200 acres on the 400-acre tract is shown by the undisputed evidence, including the testimony of defendant J. R. Wilson, to have been in 1872 or 1871, prior to the final settlement of the suit of the Montgomery heirs before referred to, and that after such settlement Mrs. Kelly abandoned possession and claim to said 200 acres.

At the time this partition deed was executed the Calhoun heirs owned no land in the 400-acre tract, and the only land owned by them on the Montgomery survey was the 817 acres on the east end of the 1,000-acre tract which had been set aside to them by the judgment in the suit just mentioned, and which was clearly referred to and identified by the partition deed. When the verbal partition was made in 1871 or 1872 by the Calhoun heirs, they only partitioned 817 acres, which was seven-twelfths of the 1,400

acres that had been adjudged to them in the suit of the Montgomery heirs; but the 817 acres then partitioned were not taken off the east end of the 1,000-acre tract as the judgment in the suit directed, and it is perfectly apparent from the undisputed evidence that after this judgment was affirmed by the Supreme Court, and the original judgment, which had been destroyed by fire, was substituted, and the 817 acres off the east end of the 1,000-acre tract had been set apart by two of the commissioners of partition, and the line dividing it from the land set aside to the Montgomery heirs fixed and established, the former verbal partition of the seven-twelfths of the 1,400 acres of land on the Montgomery survey owned by the Calhoun heirs, which partitioned portions of the land they were not entitled to under the judgment, was rescinded, and it was agreed that Mrs. Wilson and Mrs. Kelly should take their respective 617 and 200 acres out of the 817 acres designated in the judgment and set aside by the commissioners of partition to the Calhoun estate.

This change in the original agreement for partition in no way affected the other Calhoun heirs, and Mrs. Wilson and Mrs. Kelly each received the same quantity of land that had been given them by the original partition. So far as the balance of the large estate which was partitioned by this deed was concerned, the original verbal partition was apparently confirmed; but there is no room to doubt that there was a second verbal agreement as to the division of this Montgomery land, which partitioned that portion of the land awarded to the Calhoun estate by the final judgment in the suit between it and the Montgomery heirs.

These conclusions require a reversal of the judgment of the court below, and, but for the state of the record upon the issue of limitation, we would here render the judgment that should have been rendered below.

[4, 5] As before pointed out, the evidence shows that some portion or portions of the land conveyed to plaintiff's ancestor by the partition deed has been claimed and occupied by the defendants for more than ten years before this suit was filed. The plaintiff having record title to all of the land claimed by him, and being in actual possession by tenants of a portion thereof, his constructive possession extended to all of the land, except that actually occupied by the defendants. There is no evidence in the record from which we can determine the quantity of land so held by defendants or definitely describe it, and the case must be remanded for further trial on this issue.

It is therefore ordered that the judgment of the court below be reversed, and the cause remanded, with instructions to the trial court to render judgment for the plaintiff for all the land in controversy, except

such portion or portions thereof as defendants may show title to under their plea of limitation.

Reversed and remanded, with instructions.

**SAMMONS v. CULPEPPER et al.**  
(No. 8063.)

(Court of Civil Appeals of Texas. Galveston.  
June 13, 1921.)

**Landlord and tenant**  $\Rightarrow$  231(8)—Evidence held insufficient to show tenant liable for rent.

Evidence in an action for rent held not to support judgment for plaintiff, in that it failed to prove that defendant was in possession of the property at the time charged, or that there was an agreement for rent at a stipulated sum per month.

Appeal from Harris County Court; Roy F. Campbell, Judge.

Action by Mrs. J. M. Culpepper and another against J. C. Sammons. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Homer Stephenson and John M. Cobb, both of Houston, for appellant.

Hutcheson, Bryan & Dyess and Grover Rees, all of Houston, for appellees.

GRAVES, J. In this cause the appellees, who were plaintiffs below, sued the appellant for rent for the use of a certain building in the town of Goose Creek, Tex., during the first four months of the year 1919, charging that he was at the time of the suit in possession of it, that he had entered on the property under a contract of lease with plaintiffs, contracting to pay them therefor the sum of \$50 per month, and in *hæc verba* further:

"That thereafter, by agreement, the monthly rental of said property was reduced to \$35 per month; that the defendant has occupied said premises under a rental contract for the months of January, February, March, and April, 1919, and according to the terms of the contract under which he has said property is obligated to pay plaintiffs therefor the sum of \$35 per month, or the total sum of \$140."

On trial before a jury upon a special issue submitted to it by the court, judgment for \$150.86 was rendered against the defendant below, and he prosecutes this appeal. His contention here is that the evidence is insufficient to support the judgment rendered, and we think the position is well taken.

The proof utterly failed to show that appellant was in possession of the property at the time of the suit, or that he had used or been in possession of it during any part of the four months' period for which this re-

covery of rent was allowed; indeed, there is no showing that there was even any such use or occupancy during any portion of the entire year of 1919.

The appellees in argument, however, still say they at least proved a month to month contract for rent at the rate of \$35 per month, and did not have to also show actual occupancy, since there was no evidence of a termination of such tenancy by as much as one month's notice, etc.

Aside from its departure from their allegations, the further trouble with this conclusion is that it likewise was not established. Mr. Culpepper himself distinctly limited the \$35 reduction in the rent, which arrangement he testified he made or directed, to the time during which the strike at Goose Creek lasted—that is, only a brief time from November, 1917. He testified there was no such agreement extending beyond that time, although for some time after the strike was called off appellant continued to pay and he to accept \$35 per month. This falls far short of indicating that appellant was still obligated to pay an indefinite month to month contract a rental of \$35 per month as late as from January to April, inclusive, of 1919.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

#### VAN VELZER v. STRYKER. (No. 8032.)

(Court of Civil Appeals of Texas. Galveston. May 19, 1921.)

1. Estoppel ⇨93(1)—Owner of car not estopped from asserting claim against purchaser, though he stood by and saw repairs made in good faith.

In a suit to recover title and possession of an automobile purchased by defendant from one holding it under a claimant's bond, though plaintiff saw repairs made by defendant at a heavy expense and in good faith, believing the machine to belong to him, and knew defendant was laboring under such belief, and allowed him to complete such repairs before asserting his claim, plaintiff is not estopped from asserting claim to the automobile.

2. Sequestration ⇨15—Owner of automobile entitled to recover value of use while withheld by purchaser under claimant's bond.

The owner of an automobile withheld from him by a purchaser under a claimant's bond is entitled to recover the value of its use withheld from him by such purchaser.

3. Sequestration ⇨15—Recovery for car diminished by value of repairs permitted by plaintiff owner.

In suit to recover title and possession of an automobile purchased by defendant from one holding it under a claimant's bond, where it

appeared that plaintiff saw the repairs which were made by defendant at a heavy expense and in good faith, believing the machine to belong to him, and that defendant was laboring under such belief, and allowed him to complete such repairs before asserting his claim, judgment for plaintiff owner for the value of the use of the automobile will be diminished by the cost of repairs.

Error from Harris County Court; Geo. D. Sears, Judge.

Suit by A. C. Van Velzer against A. B. Stryker. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

A. C. Van Velzer, of Houston, for plaintiff in error.

Charles Murphy, of Houston, for defendant in error.

LANE, J. This suit was instituted on the 15th day of March, 1915, by appellant, A. C. Van Velzer, against appellee, A. B. Stryker, to recover the title and possession of a certain automobile of the estimated value of \$250, and for \$2 per day for the use of same from the 1st day of January, 1915, until returned to plaintiff.

This is the third trial of this cause. Upon the first trial judgment was for defendant, Stryker, and upon appeal the judgment was by this court reversed and the cause remanded. The opinion of this court on that appeal is reported in 188 S. W. 723.

Upon the second trial judgment was for the plaintiff, Van Velzer, and upon appeal that judgment was by the Beaumont Court of Civil Appeals reversed and the cause remanded, because the trial court failed to file its findings of fact and conclusions of law upon the request of the defendant. The opinion on that appeal is reported in 212 S. W. 674.

On the 19th day of November, 1919, after the judgment had been reversed by the Beaumont Court of Civil Appeals, plaintiff filed his second amended petition, whereby he sues for the automobile and for \$745, the alleged value of the use of same.

Defendant, Stryker, answered by general denial, and by specially pleading that if the automobile was the property of Van Velzer he is estopped to claim same: First, because one McKenzie, the vendor of appellant, Van Velzer, who formerly owned the automobile and who sold the same to Van Velzer, had, prior to his sale, sued the Houston Motorcar Company, who were in possession of the automobile, for the same; that in such suit he (McKenzie) recovered judgment and by virtue of such judgment had the sheriff of Harris county to take possession of the automobile; that one McKee, who set up claim to the automobile, thereupon filed his claimant's bond and oath and the automobile was delivered to him; that thereafter McKenzie

sued McKee and his bondsmen and recovered judgment for the automobile, or for its value in the event the automobile could not be recovered; that during the pendency of the last-named suit McKee sold and delivered the automobile to one Smith, who bought in good faith without notice of McKenzie's claim; that thereafter Smith sold to one A. E. Lundell, and that Lundell sold to appellee, Stryker, both of whom were without notice of the claim of McKenzie, and that, by reason of his suit and the judgment entered in his favor against McKee and his bondsmen, McKenzie had elected to stand by such judgment and was thereby estopped to further claim the automobile as against appellee, Stryker; second, because after Van Velzer learned that Stryker had the automobile, and knew that he was in good faith claiming the same, and knew that he was having the same repaired at a heavy expense, he gave Stryker no notice of his claim but suffered him to have such repairs made upon the automobile.

He prayed that Van Velzer be denied any recovery whatever, but that, in the event judgment be against him in favor of Van Velzer, he have judgment over against A. E. Lundell, from whom he purchased, for any such sum as may be adjudged against him in favor of Van Velzer.

A. E. Lundell, who was made a party defendant by appellee, Stryker, made no answer.

The undisputed evidence shows the following facts:

One E. D. McKenzie was the owner of the automobile in 1913. Said automobile was found by him in the possession of the Houston Motorcar Exchange. On the 15th day of February, 1914, McKenzie brought suit against said exchange for the automobile, and at the time caused a writ of sequestration to issue, under which the sheriff of Harris county took possession of the automobile. On the 4th day of March, 1914, the suit of McKenzie v. Houston Motorcar Exchange was called for trial, and, upon a disclaimer being entered by the exchange, judgment was entered against it in favor of McKenzie for the automobile. On the 16th day of May, 1914, one H. McKee filed a claimant's oath and bond, and the automobile was delivered to him by the sheriff on the 19th day of May, 1914. E. D. McKenzie did not join issue with the claimant, H. McKee, under the provisions of the statute which provides for the trial of the rights of property taken under a claimant's bond, but on the 29th day of May, 1914, he brought suit against H. McKee and the sureties on his claimant's bond for the title and possession of the automobile and for damages, and prayed that, if said car could not be found and returned to him, he have judgment against the principal and sureties for \$250, the alleged value of the automobile. During the pendency of that

suit, to wit, on the 16th day of July, 1914, H. McKee sold and delivered the automobile to one Smith. On the 15th day of January, 1915, the case of McKenzie v. H. McKee et al., on the bond was tried and resulted in a judgment for McKenzie against H. McKee for the title and possession of the automobile and against H. McKee as principal and F. R. Seedman, Jake Marti, T. B. Nicholas, and H. Bissonnet as sureties for \$121.50 as damages, and for \$250 if the automobile was not delivered to him (McKenzie), and for writ of possession and execution. On the 4th day of February, 1914, McKenzie sold the automobile to plaintiff, Van Velzer, who had acted as McKenzie's attorney in all of the suits.

On the 12th day of February, 1914, A. E. Lundell, acting for Smith, who bought from McKee, sold and delivered the automobile to appellee, A. B. Stryker, who bought in good faith without notice of the adverse claim of Van Velzer. Some time during the month of March, 1915, appellee, Stryker, had the automobile overhauled and repaired at a considerable cost to him. While the repairs were being made, appellant, Van Velzer, saw the automobile and observed that such repairs were being made, and made claim to the same, but waited until such repairs were completed and paid for by Stryker before he made known to him that he (Van Velzer) claimed the automobile.

Both E. D. McKenzie and appellant, Van Velzer, testified that McKenzie had sold the automobile to Van Velzer, and no one testified to the contrary.

The cause was tried before a jury upon the special issues, in answer to which they found: First, that the reasonable value of the automobile at the time appellee, Stryker, purchased it was \$100; second, that after appellant, Van Velzer, saw the automobile at the garage where it was being repaired, repairs of the value of \$25 were made thereon; third, that when Van Velzer first saw the automobile in the garage, and saw that it was being repaired, he knew that it was the one he had purchased from McKenzie, and knew that Stryker was having it repaired, and that had Van Velzer told Stryker that he (Van Velzer) claimed the automobile Stryker would not have continued to repair the same; fourth, that the value of the use and hire of the automobile from March, 1915, to date of the trial was \$37.50.

Upon the answers of the jury being returned into court both Van Velzer and Stryker filed their respective motions for judgment in their favor. Whereupon the court rendered judgment decreeing that Van Velzer take nothing by his suit and that A. B. Stryker take nothing by his action against A. E. Lundell, and that both Stryker and Lundell go hence without day. From this judgment Van Velzer has appealed.

Appellant contends, first, that the court erred in not rendering judgment in his favor

for the value of the automobile, as found by the jury, because it was shown by the undisputed and uncontradicted evidence that he was the owner thereof and entitled to recover its value.

This contention, we think, should be sustained. In his answer the defendant, Stryker, recites as facts the matters and things as found by the court, including those relating to the suit and judgment of *McKenzie v. McKee*, and then alleged as follows:

"And that thereafter, on or about the 4th day of February, 1914, McKenzie, without having the possession of said automobile, or even knowing its whereabouts, executed a bill of sale of said automobile to plaintiff, who neither had possession of said automobile, and who had been the attorney for said McKenzie in all of his suits."

These allegations unquestionably admit that the automobile, which was placed in possession of McKee by McKenzie and for which McKenzie sued McKee, was sold by McKenzie to appellant, Van Velzer. Therefore appellee should not now be heard to say that there were certain circumstances shown which would have justified the trial judge in finding that the automobile was not in fact sold by McKenzie to appellant, Van Velzer, and, besides, both McKenzie and appellant testified that the automobile was so sold, and their testimony was not contradicted by the testimony of any witness.

The admission of appellee, as well as the undisputed evidence, shows that appellant was the owner of the automobile, and it follows that he was entitled to judgment for its value as found by the jury, unless he was estopped by reason of the matters and things alleged by appellee as constituting an estoppel.

[1] We held upon a former appeal of this cause (188 S. W. 724) that the matters pleaded by appellee would not estop appellant from asserting his claim to the automobile, and we see no reason to recede from such holding.

Having held that judgment should have been rendered in favor of appellant for the value of the automobile under the admitted and undisputed facts, there remains only to be determined the question as to what judgment should be rendered upon the answers of the jury to the issues submitted to them.

[2, 3] Assuming then, as we must and as we have found, that the automobile was owned by appellant, Van Velzer, and that he was entitled to recover its value, we must further hold that he was entitled to the value of its use which was withheld from him by appellee, Stryker, which the jury found to be \$37.50. We further hold, however, that in view of the finding of the jury that appellee, Stryker, had expended \$25 in making repairs on the automobile, by reason of the fact that Van Velzer failed to inform him of his claim

to the same after he (Van Velzer) had found the same in his possession and knew that such repairs were being made, said sum of \$25 so expended by appellee, Stryker, should be deducted from the sum of \$37.50 found by the jury as the value of the use of the automobile, leaving a balance due Van Velzer of the said sum of \$37.50, of \$12.50.

It is shown by the record that after Van Velzer had found the automobile in the garage, and after the repairs mentioned above had been made thereon, he sued out a writ of sequestration, by virtue of which the sheriff took possession of the automobile, and that thereafter the automobile was delivered to appellee, Stryker, upon his replevin bond, signed by himself as principal and by Lee N. Hall, N. Stryker, and E. M. Biggers as his sureties.

In view of the facts and conclusions stated, we have reached the further conclusion that the judgment of the trial court should be reversed, and that judgment should be here rendered in favor of appellant, Van Velzer, against appellee, A. B. Stryker, and his sureties as such for the sum of \$112.50, and that if the automobile is returned to the sheriff the value thereof, as may be found and determined by said officer, if any, shall be credited upon such judgment in the manner and condition as provided by articles 7107 and 7108, Vernon's Sayles' Civil Statutes; and it is so ordered.

It is further ordered that appellee, Stryker, have judgment over against A. E. Lundell for the sum of \$100; same being the amount of the judgment rendered in favor of Van Velzer against Stryker as the value of the automobile sold by Lundell to him.

Reversed and rendered.

### C. L. SMITH OIL CO. v. RIGGS. (No. 7201.)

(Court of Civil Appeals of Texas, Galveston.  
June 14, 1916. On Rehearing, May 24,  
1921.)

1. Master and servant  $\S$ 288(1)—Assumption of risk by inexperienced and youthful fireman injured by explosion of boiler held for jury.

In an action for injuries to a fireman from the explosion of boiler, the question whether the plaintiff, who was 16 years of age and inexperienced, assumed the risk of employer's negligence in using salt water in the boiler, in failing to provide a water glass on boiler to indicate the amount of water, and in permitting the steam gauge to become defective, held for the jury.

2. Master and servant  $\S$ 217(1)—Risk of unknown danger not assumed.

A servant never assumes the risk of conditions of which he is ignorant and is not charg-



ed with knowledge of, nor of conditions of which he has knowledge, unless he may reasonably apprehend or appreciate the danger incident to such conditions.

#### On Rehearing.

3. Damages  $\S$ 132(14) — \$5,000 verdict for permanent injuries to nervous system and eyesight held not excessive.

\$5,000 verdict for injuries to fireman sustained in explosion of boiler permanently affecting his nervous system, causing him to suffer from neurasthenia, and permanently affecting his eyesight, producing a zigzag sensation after use of eyes for a short period, held not excessive.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by Jesse Riggs against the C. L. Smith Oil Company. Judgment for plaintiff, and defendant appeals. Judgment was reversed, and questions certified to the Supreme Court. On remand after answer to questions (230 S. W. 139). Affirmed.

Hunt, Myer & Teagle, of Houston, for appellant.

Carothers & Brown, of Houston, for appellee.

LANE, J. This suit was brought by Jesse Riggs, a minor, by his mother, S. J. Riggs, against the defendant, C. L. Smith Oil Company, to recover damages for personal injuries alleged to have been suffered by him by reason of the explosion of one of appellant's boilers which was being fired by Jesse Riggs at the time of such explosion. For cause of action plaintiff alleged as follows:

"That almost two months prior to the 31st day of October, 1913, the plaintiff, a minor 16 years of age and inexperienced, was employed by the defendant as a helper on one of its drilling rigs at Goose Creek, Harris county, Tex., and plaintiff continued in such employment until the 31st day of October, 1913, at which time he was injured, as will be hereafter set forth, while he was engaged in the performance of his duties to the defendant, his employer, and acting within the scope of his employment. That on the 30th day of October, 1913, defendant's driller and foreman in charge of said rig directed and ordered the plaintiff to fire the steam boiler on said rig that night in the absence of the regular fireman, and plaintiff fired said boiler from about 7 o'clock that night until about 5 o'clock the following morning, at which time said boiler exploded, seriously injuring the plaintiff, as will be hereafter set forth.

"That at the time of said explosion of said boiler and for some time prior thereto the defendant had been using salt water in said boiler, instead of fresh water, a supply of which fresh water was available. That there was no water glass on this boiler, and plaintiff had to resort to the lift-up gauge to determine the amount of water in said boiler, and, with the water that was being used, it was impossible to

distinguish the water and foam in said lift-up gauge, and it was impossible to determine with any degree of accuracy the amount of water in said boiler. That defendant had also permitted the steam gauge on said boiler to become choked up, defective, and out of repair and not in working order, and it was, on this account, impossible for a person firing said boiler to determine with any degree of accuracy the amount of steam pressure on said boiler. That in addition thereto the defendant had permitted the safety or blow-off valve on said boiler to become defective and out of order and to remain so, and on this account said safety valve had become stuck and would not work, and the excess of steam could not escape. That the defendant knew of these defects or could have known of same if it had used ordinary care to discover same, and the defendant knew that on account of said defects it was very dangerous to operate said boiler, but the plaintiff did not know of these defects and did not understand, on account of his inexperience and youth, the danger of attempting to fire said boiler in its said condition. That the use of salt water greatly increased the danger of operating said boiler, and greatly increased the tendency of said safety valve to become stuck and out of order, and greatly increased the danger of operating said boiler without an adequate water gauge and increased the difficulty of determining the amount of water in said boiler by means of the lift-up gauge, and the use of such water greatly increased the tendency of the steam gauge to get out of order and rendered it much more dangerous to operate said boiler without an adequate steam gauge. That, in addition thereto, the defendant had wholly failed to provide any system whereby those operating the drilling rig which used the steam generated by said boiler were required to notify the fireman operating said boiler before they shut off the steam from said drilling rig and thus increased the pressure on said boiler. That immediately before said boiler exploded said drilling crew shut off the steam from said rig and greatly increased the pressure on said boiler, but plaintiff did not know that said steam had been shut off, as the increased pressure was not indicated by the steam gauge, and the pressure could not be relieved by the escape valve, which was out of order. That, in addition thereto, the walls of said boiler had been weakened by the use of said salt water, and it had thus been rendered more dangerous. That all of these facts were known to the defendant, or could have been known to it if it had used ordinary care, but they were unknown to the plaintiff.

"That the operation of said boiler and the firing of same under the facts and circumstances above set forth was a dangerous occupation, as the defendant knew or should have known, and the plaintiff was a totally inexperienced boy and unaware of said dangers and how to avoid them, as defendant also knew, but defendant, its agents, servants, and employes, failed entirely to warn plaintiff of said dangers and how to avoid them.

"That the defendant, its agents, servants, and employes, were negligent and careless in the following respects, to wit: (a) In using salt

water in said boiler instead of fresh water; (b) in failing to provide said boiler with a water glass to indicate the amount of water in said boiler; (c) in permitting said steam gauge to become choked up, out of repair, defective, and not in working order; (d) in permitting the safety or blow-off valve on said boiler to become and remain defective, stuck, and out of working order; (e) in failing to provide an adequate system for warning the fireman when the steam was to be cut from the drilling rig and the pressure on the boiler increased; (f) in permitting the walls of the said boiler to become weakened by the action of said salt water; and (g) in failing to warn the plaintiff of the dangers of said work and of handling said boiler in its said condition, and of how to avoid such dangers. That the said acts of negligence on the part of the defendant, its agents, servants, and employes, and each of said acts and omissions, were the direct and proximate cause of the plaintiff's injuries as hereinafter set forth.

"That by reason of said explosion the plaintiff was thrown about 10 feet and was burned and scalded all over his face and arms and over his back, particularly his left kidney, and plaintiff's legs were badly burned and scalded. That plaintiff's left ankle and ankle joint were badly burned, and said ankle was permanently injured. That as a result thereof plaintiff has very poor use of said ankle and will continue to have poor use thereof at all times hereafter. That plaintiff's kidneys were injured by said burns, and plaintiff will probably have kidney trouble therefrom at all times hereafter. That the calf of plaintiff's right leg was severely bruised and permanently injured; that plaintiff was also struck in the head by some object thrown by said explosion, and his head was thereby injured; that plaintiff's whole nervous system has been shocked and permanently injured, and as a result of his said injuries the plaintiff is now suffering and will continue at all times hereafter to suffer from neurasthenia. That plaintiff was confined to his bed for 18 days and suffered and will continue to suffer great mental and physical pain and anguish, and that plaintiff's ability to earn a livelihood has been permanently impaired. That by reason of the foregoing facts the plaintiff has been damaged in the sum of \$10,000."

The defendant by its answer admitted that at the time plaintiff, Jesse Riggs, was injured he was a boy of only 16 years of age and inexperienced in firing boilers; that he had been employed by appellant about 2 months before the injury as a helper on one of its drilling rigs; that at the time of his injury he was employed to fire, and was in fact firing, one of appellant's boilers at night; that on the night of the injury defendant's foreman in charge of its drilling rig directed and ordered the plaintiff, Jesse Riggs, to fire said boiler, and that while he was firing said boiler it exploded. Defendant denied that its boiler which exploded was defective, or that salt water was used therein as alleged by plaintiff; but it says that, if such was true, it did not know that such defects existed, or that it could have known thereof by the exercise of ordinary

care on its part. It further pleaded contributory negligence and assumed risk on the part of plaintiff.

By supplemental petition plaintiff denied all the defenses pleaded by the defendant.

The case was tried before a jury upon special issues, and in answer thereto it found: First, that defendant used salt water in its boiler and that such act was negligence; second, that the use of salt water was one of the direct and proximate causes of the explosion; third, that defendant was negligent in not having a water glass on the boiler to indicate the amount of water in the boiler, and in permitting the steam gauge on the boiler to become choked up, out of repair, defective, and out of working order at the time of the explosion, and in permitting the safety or blow-off valve to become defective, stuck, and out of working order at the time of said explosion, and that all of these defects contributed to and were concurring causes which resulted in the explosion of said boiler; fifth, that the operation and firing of said boiler under the facts and circumstances shown by the evidence was a dangerous occupation, and that plaintiff, Jesse Riggs, was not warned of such danger by defendant, its agents or employes, and how to avoid the same, and that such failure on the part of defendant or its agents to warn plaintiff directly contributed to his injury; sixth, that Jesse Riggs did not have sufficient intelligence and capacity to comprehend and appreciate the danger of said boiler exploding on account of the use of salt water, or on account of the defects in said boiler, at the time he was put to work firing the same; seventh, that the risk of said boiler exploding, under the facts and circumstances of the case, was not a risk and danger ordinarily incident to the occupation of a fireman, and that plaintiff did not assume the risk of injury from said boiler exploding; eighth, that plaintiff knew of the absence of the water glass and other defects of said boiler at the time he fired the same, but did not know and appreciate the danger of operating the same under such conditions, and that such danger was not obvious to a person of plaintiff's age and discretion; ninth, that plaintiff should recover the sum of \$5,000 for his injuries.

Upon such findings of the jury judgment was rendered for plaintiff against defendant for \$5,000.

Appellant's first assignment of error is as follows:

"The court erred in permitting the witness Dr. Ross to testify that the plaintiff's main trouble was going to be with his eyes, and in testifying that plaintiff was unable to read steadily, and after reading a little bit it would become blurred, and that there would be a zigzag sensation, and in testifying that there was a nerve weakening in eyes; defendant objecting to all such testimony because the same

was irrelevant and immaterial, and because there was no allegations in any of the pleadings to put the defendant on notice that the plaintiff would claim, or was claiming, any injury to his eyes."

Appellant's contention is that, where damages actually sustained do not necessarily result from the injuries alleged, and are consequently not implied by law, the plaintiff must allege the particular damage which he sustained, for notice thereof to the defendant, otherwise the plaintiff will not be permitted to give evidence of it on the trial, or to recover for injuries not alleged; that, while it may be sufficient to specify the main facts, yet if it is attempted, as in this case, to particularize the injuries arising from the principal one, all the injuries for which recovery is sought should be alleged, to enable proof to be made thereof; and that it was error for the court to permit proof of the injuries to plaintiff's eyes as no such injury was alleged.

Appellee contends that his allegation that "plaintiff's whole nervous system has been shocked and permanently injured, and as a result of his said injuries the plaintiff is now suffering and will continue at all times thereafter to suffer from neurasthenia," in the absence of special exception, is sufficient to admit evidence of the injury to his eyes.

The authorities support the contention of appellant, and are against the contention of appellee. *Campbell v. Cook*, 86 Tex. at page 632, 26 S. W. 486, 40 Am. St. Rep. 878; *Southern Pac. Co. v. Martin*, 98 Tex. 322, 83 S. W. 675; *Ry. Co. v. Sinton*, 109 S. W. 942; *Wells Fargo & Co. Express Co. v. Boyle*, 39 Tex. Civ. App. 365, 87 S. W. 164; *Texas State Fair v. Marti*, 30 Tex. Civ. App. 132, 69 S. W. 432.

Plaintiff particularized his injuries, stating that he was scalded, burned over his left kidney, left ankle, and ankle joint; that he would probably have kidney trouble from the burns; that the calf of his left leg was bruised and permanently injured; that he was struck on the head by some object; that his whole nervous system had been shocked and permanently injured; and that as a result the plaintiff was suffering and would continue to suffer, from neurasthenia.

There was no allegation that his eyes or eyesight was impaired, nor was there any allegation that impairment of vision or injury to the eyes is the usual necessary result of neurasthenia.

Dr. F. R. Ross, witness for plaintiff, was permitted to testify, over defendant's objection, as follows:

"I think the boy's main trouble is going to be with his eyes. There was an inability on his part, when I examined him, to read steadily; he tired easily. At the beginning he could read very readily, but then after reading a little bit it would become blurred and he would have a *sigzag* sensation, all due to exhaustion,

and not to any organic disease of the eye itself, but just simply to that nerve weakness and fatigue. That also caused him to have headaches, and then when it comes to the mental part of it, he was unable to apply himself as readily, I mean to any test or to his work, or reading or writing, or anything that he set himself to do; he could not do so readily as he did prior to these injuries that he had received."

The defendant objected to all of this testimony for the reason that there was no allegation in the pleadings which set up injury to the eyes, and nothing to put defendant on notice that such injuries would be proven or damages claimed therefor.

In the case of *Wells Fargo & Co. Express v. Boyle*, 39 Tex. Civ. App. 365, 87 S. W. 164, it is held that an allegation of the petition that plaintiff was injured in the head, spine, and nerves was insufficient to warrant the admission of evidence of injury to his eyes and eyesight.

In *Texas State Fair v. Marti*, supra, the court said:

"On the trial plaintiff was permitted to prove that Mrs. Marti was injured internally, and that her groins and ovaries were affected. This evidence was objected to on the ground that no such injuries were alleged in the petition. The objection was overruled, and exceptions duly reserved. We find that the testimony was improperly admitted."

The allegations of the petition concerning the alleged injuries of Mrs. Marti read thus:

"That her head, back, side, arms, and stomach were seriously injured, and her nervous system greatly shocked. \* \* \* It is, of course, well settled that no injuries can be proved except those alleged, and because this rule was not observed on the trial hereof the judgment must be reversed."

The authorities cited and many others support the contention of appellant that the evidence complained of was not admissible. We therefore sustain said assignment No. 1.

The jury found that plaintiff, Jesse Riggs, a boy of 16 years of age, did not have the intelligence, capacity, and discretion to comprehend and appreciate the danger incident to firing a boiler in the condition the one in question was shown to have been and in which salt water was used. Appellant assigns such finding as his second assignment of error.

[1] We think the evidence was amply sufficient to support such finding. Appellant admits the allegations of section 2 of appellee's petition, wherein it is alleged that appellee, Jesse Riggs, was a boy of 16 years of age and inexperienced in the firing and operating a boiler at the time of the injury. The undisputed evidence shows that said boiler was defective as alleged by plaintiff, and that salt water was used therein, and that the use of salt water in such boiler as the one in question was dangerous; that no one

warned Jesse Riggs of such danger, or how to guard against danger by reason of such defects in said boiler. Jesse Riggs testified:

"I did not know the necessity for a water glass. \* \* \* I knew they were using salt water, \* \* \* but I had not heard any one say anything about the danger of using salt water. I had never worked on a boiler where the top valve was out of order. \* \* \* I did not know anything about the dangers of using salt water in a boiler before I was injured. \* \* \* I had never before fired a boiler that did not have a water glass on it. I didn't think about all that; in fact I never had enough experience to realize the danger there was in a boiler."

This evidence stands undisputed.

[2] A servant never assumes the risk of conditions of which he is ignorant and is not charged with knowledge of, and not then unless he may reasonably apprehend or appreciate the danger incident to such condition. The fact that the servant knew, or ought to have known, that there was some danger does not excuse the master if the danger was greater than the servant, in the exercise of due care, had reason to anticipate. *Wood's Master and Servant*, § 387, p. 776; *Orange Lumber Co. v. Ellis*, 105 Tex. 363, 150 S. W. 582; *Stalworth v. Gulf Ref. Co.*, 175 S. W. 767. The second assignment is overruled.

What has been said with reference to appellant's second assignment will also apply to its third and fourth assignments, and for the same reason given for overruling assignment No. 2 we overrule assignments Nos. 3 and 4.

Assignment No. 5 insists that the sum of \$5,000 damage as found by the jury was excessive, etc. In view of the fact that the judgment rendered must be reversed for the reasons given under the first assignment, it is not necessary to decide the question here presented. For the error committed by the court in admitting the testimony of Dr. Ross, complained of by the first assignment, the judgment of the trial court is reversed, and the cause remanded.

Reversed and remanded.

#### On Rehearing.

At a former term of this court we concluded that, as the plaintiff had alleged several specific injuries to his person by reason of the accident complained of and had not alleged any injury to his eyes, it was error for the trial court to permit the plaintiff's attending physician to testify that his principal injury was to his eyes, and having reached such conclusion, and because of the admission of such testimony, we reversed the judgment of the trial court and remanded the cause for retrial. Pending a motion for

rehearing by appellee, we certified to the Supreme Court (230 S. W. 139) the question as to whether or not the testimony complained of was admissible under the general allegation:

"That plaintiff's whole nervous system has been shocked and permanently injured, and as a result of his said injuries the plaintiff is now suffering and will continue at all times hereafter to suffer from neurasthenia."

The Supreme Court in answer to such question answered that such testimony was admissible, stating:

"Under the medical testimony set out in the certificate, plaintiff was suffering and would continue to suffer from traumatic neurasthenia, which was a derangement of the nervous system, and the condition of plaintiff's eye was both a symptom and a result of traumatic neurasthenia"—citing *H. & T. C. Ry. Co. v. Hanks*, 58 Tex. Civ. App. 298, 124 S. W. 138; *Ft. Worth & R. G. Ry. Co. v. White*, 51 S. W. 856.

It is apparent that the answer of the Supreme Court is 'contrary to the conclusion reached by us in our former opinion and requires the granting of the motion for rehearing and an affirmance of the judgment of the trial court, unless we can hold under the evidence that the judgment rendered was excessive, as insisted by appellant.

[3] We have carefully examined the evidence relating to this question, and are not prepared to say that the amount awarded as damages was excessive. We therefore affirm the judgment.

#### PHILLIPS v. PERUE et al. (No. 7741.)

(Court of Civil Appeals of Texas. Galveston. May 27, 1921.)

I. Appeal and error  $\S$  877(2) — Intervener held not entitled to raise question not affecting him.

In action by creditor of foreign insurance company to subject deposit made with the State Treasurer under Rev. St. 1911, art. 4930, to payment of the debt, the Superintendent of Insurance of the state in which the company was organized, acting as liquidator of the company, after intervening in such action as claimant of the securities deposited, could not, on appeal from judgment directing distribution of proceeds of sale of securities to plaintiff and other creditors who had intervened in the action, and denying the claim of such Superintendent of Insurance, question the sufficiency of the notice required by the trial court for the intervention of proper claimants or the sufficiency of the proof in reference to a number of the claims for which recoveries were allowed, in the absence of a showing that their claims had not exhausted the deposit, since the deposit was for the primary benefit of the Texas creditors, and such Superintendent of Insurance of

other state, in the absence of such showing, had no interest to be affected.

**2. Appeal and error ⇨ 179(1)—Question urged on appeal held not sufficiently raised in trial court.**

In action against insolvent foreign insurance company by a creditor to subject deposit of securities made with State Treasurer under Rev. St. 1911, art. 4930, to payment of the debt, in which a receiver was appointed and other creditors were directed to file claims, questions as to whether sufficient notice was required by the court for the intervention of proper claimants and as to the sufficiency of proof in reference to a number of allowed claims were not available on appeal where there was no pleading or proof that any persons entitled to participate in the fund were not before the court, or complaint by such persons themselves.

Appeal from District Court, Walker County; E. A. Berry, Judge.

Action by Sarah Perue and others against the Casualty Company of America, in which a receiver was appointed, and Jesse S. Phillips, Superintendent of Insurance of the State of New York, as liquidator of the Casualty Company of America, and others intervened. Judgment for plaintiff and some of the interveners against the defendant and the receiver, and directing that the named intervener take nothing, and named intervener appeals. On remand after answer of the Supreme Court to questions certified to it (229 S. W. 849). Affirmed.

Dean, Humphrey & Powell, of Huntsville, and Chas. S. Whitman, Clarence C. Fowler, and Albert Peese, all of New York City, for appellant.

Geo. T. Burgess and J. J. Eckford, both of Dallas, C. M. Cureton, Atty. Gen., O. W. Taylor, Asst. Atty. Gen., A. T. McKinney, of Huntsville, and Hill & Hill, of Houston, for appellees.

GRAVES, J. Casualty Company of America, a corporation organized under the Insurance Law of the state of New York (Consol. Laws, c. 28), to do a fidelity, guaranty, and insurance business, qualified in 1914 to do business in the state of Texas and made a deposit of \$50,000 in securities with the Treasurer of the state of Texas, under article 4930, Revised Statutes of Texas 1911.

While its permit to do business in Texas did not expire until February 28, 1917, it withdrew from the state on December 5, 1916, surrendering its right to do business in Texas, but leaving the deposit with the State Treasurer as before.

On May 4, 1917, by virtue of section 63 of the Insurance Law of the state of New York and of an order pursuant thereto entered in the Supreme Court of New York county, Jesse S. Phillips, Superintendent of Insur-

ance of the state of New York, became vested, as liquidator, with title to all the company's property.

On June 16, 1917, Sarah Perue commenced this action against the Casualty Company in the district court of Walker county, Tex., for the sum of \$1,800, the action being based on an award by the Industrial Accident Board of Texas, which award was based in turn on a compensation policy issued by the Casualty Company to W. R. Griffin. She sought by this suit to subject the \$50,000 so on deposit with the Treasurer of Texas to the payment of her debt, alleged that the company was insolvent, that a receiver had already been appointed in New York to take charge of its assets there, and asked the court to appoint a receiver of the fund, pending final adjudication of the cause. This action was apparently taken pursuant to article 2128, Revised Statutes of Texas.

On the same day the suit was filed therein the district court of Walker county, on considering the petition, appointed W. O. Jones receiver of the company, directing him, upon filing the prescribed bond, to take possession of all its assets situated, in the state of Texas and hold them subject to the court's further orders. Jones at once qualified and entered upon his duties.

Thereafter various parties intervened in the cause, asserting judgments and claims against the Casualty Company, and seeking payment out of the funds in the Treasurer's hands. At the September term, 1917, the court entered upon its minutes an order directing all parties having claims against the company to intervene in the suit by March 1, 1918. This was in effect extended by a further order of April 18, 1918, giving all parties leave to intervene and file additional pleadings. On this last-mentioned date, and after all the other litigants had come in, J. M. Edwards, the Treasurer of the state of Texas, intervened in the cause, wherein he alleged that he was custodian of the bonds deposited with him by the Casualty Company of America in order for that company to do a fidelity and surety business in the state of Texas. He further recited that the Casualty Company, on the 5th day of December, 1916, withdrew from business in the state of Texas, that, although it surrendered its certificate authorizing it to do business in the state of Texas, it did not withdraw the securities under article 4932, Revised Statutes, and that it did not give the required bond, nor reinsure its business, nor take any other action by which it was entitled to withdraw the securities deposited with him. He also alleged that the statutes of Texas provided no way by which he might execute the trust imposed upon him by article 4930, and tendered the securities held by him into court for such disposition as the court should find

proper under the law and facts of the case. On the same day, the 18th day of April, 1918, this intervention of the Treasurer was considered by the court, and judgment rendered that it was necessary for the receiver to have possession of the securities; that there was no law by which the State Treasurer might collect the sums due under the securities in his possession, and no law by which he was authorized to distribute the funds in his possession applicable to the present state of affairs of the defendant Casualty Company of America, and there was no method by which those entitled to such funds might obtain same, except through the instrumentality of that court; that as a consequence the Treasurer should turn the securities into the registry of the court for delivery to the receiver, and he himself be relieved of further custody of them and of the trust imposed upon him by the statutes with reference thereto. The Treasurer so delivered the fund or securities, and thereafter, though a formal party, took no further active part in the litigation.

Among those above alluded to as having come into the cause were Lena Balesteri, J. H. Langbehn, and B. G. Morris, all residents of Texas, who held surety obligations of the Casualty Company, contracted in Texas, and which had previously been reduced by the courts of Texas to judgments against it. Some 39 other creditors had also come in, setting up claims arising out of bonds and policies issued by the company, which were alleged to be of such a nature as to entitle them to have the same, or a properly proportionate share thereof in event the fund did not fully meet all claims, paid out of the \$50,000 deposit.

It is not deemed essential that further details as to the origin and character of any of these creditors' claims be here gone into.

Jesse S. Phillips, who, in so far as the insurance laws of New York and the proceedings had thereunder in the Supreme Court of that state could do so as against the rights claimed herein under the Texas statutes, had before the filing of this suit in Texas been vested with title to all the company's assets wherever situated, including the \$50,000 deposit in Texas, and authorized to administer them as is usual with receivers of insolvent corporations, also intervened, claiming the deposit by virtue of such title and authority acquired in New York, and asking that it be turned over to him for distribution in the domiciliary liquidation and settlement of the company's affairs then being carried on in New York.

The case was tried without a jury, and on April 18, 1918, the court below rendered judgment against the Casualty Company of America and W. C. Jones, as receiver thereof, in favor of Sarah Perue and the 42 intervening creditors for the several amounts adjudged to have been proven up by them,

directing its receiver to take charge of the deposited securities, which had been turned over to him by the Treasurer under the court's prior order, convert them into cash, and distribute the proceeds in the order specified to the plaintiff and the intervening claimants, who were divided into certain classes, after paying fees of the receiver and his attorneys. Any balance was to be held by the receiver subject to further orders of the court, and Jesse S. Phillips, superintendent, liquidator, etc., was to take nothing. From this judgment Jesse S. Phillips in the capacity stated above has appealed.

It will be noted that while the trial court did not in this judgment purport to order distribution of this fund under the provisions of article 4935, Revised Statutes of Texas 1911, providing in certain contingencies for payment by the Treasurer direct, it in effect treated and administered the deposit as a trust fund for the benefit of Texas creditors by its direction to the Treasurer to turn the same over to the court's receiver for disbursement through that agency.

Upon the facts thus stated, this court at a former term certified to our Supreme Court the following questions:

"(1) Was the \$50,000 deposit, under the provisions of article 4930, Revised Statutes, c. 13, a special or trust fund, upon which the Texas creditors of the Casualty Company of America had a claim or lien prior and superior to any right, title, or interest therein held by Jesse S. Phillips, liquidator, etc., of the company under the laws of New York?"

"(2) Did the court below have authority to appoint a receiver in Texas to become custodian of the fund in place of the Treasurer of the state, and, if so, was it vested with the further power to order the disbursement thereof through that officer in the manner it did rather than through the Treasurer?"

By opinion delivered April 6, 1921, and filed in this court May 17, 1921 (229 S. W. 849), the Supreme Court answered both these questions in the affirmative, thereby holding that the deposit was a trust fund to which the Texas creditors of the company had a claim superior to any right of appellant, Phillips, and that the court below not only had authority to appoint a receiver for it, but, as directed in the judgment there entered, to order the disbursement of the amount through that agency rather than through the State Treasurer.

We think that holding determines adversely to him the merits of the appeal presented here by appellant, and that the trial court's judgment against him must accordingly be affirmed.

[1, 2] In addition to the issues which were thus submitted to the Supreme Court, he has attempted to raise in this court questions as to whether or not sufficient notice was required by the trial court for the intervention of proper claimants and as to

the sufficiency of the proof in reference to a number of the claims for which recoveries were there allowed, but we do not think he has shown himself to be in position to complain about these matters. In the first place, the deposit being for the primary benefit of the Texas creditors, and the facts here not showing that their claims had not exhausted it, he could have no interest affected. In the second place, he nowhere pleaded nor proved that any persons entitled to participate in the fund were not before the court, nor are any such persons themselves complaining; indeed, there is nothing in the record to indicate that any such persons in fact existed.

No reversible error being pointed out, all assignments are overruled, and the judgment is affirmed.

Affirmed.

**CAROTHERS et al. v. MILLS et al.**  
(No. 6200.)

(Court of Civil Appeals of Texas. Austin.  
June 8, 1921.)

1. Mines and minerals  $\S$ 55(8)—Term "mineral rights" need not be as a matter of law construed to include oil and gas, especially as it relates to a deed executed in 1899.

While oil and gas are minerals, the term "mineral rights" need not be construed to include oil and gas as a matter of law, especially with relation to a reservation clause in a deed executed in 1899, when exploration for oil and gas was not so common as at present.

2. Mines and minerals  $\S$ 48—Scientific meaning of "mineral" defined.

In its broadest and scientific meaning a mineral is any inorganic species having a definite chemical composition.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mineral.]

3. Mines and minerals  $\S$ 55(5)—When question whether term "mineral rights" used in a deed reserving such rights in popular view of meaning may be inquired into.

If the popular and usual view of the meaning of the term "mineral rights" used in a reservation of such rights in a deed was different from its scientific signification when the deed was executed, and it is alleged and proved that the parties regarded it in the former sense, inquiry may be made as to this intention, which should control, rather than any precise legal meaning.

4. Mines and minerals  $\S$ 55(8)—Intention to include oil and gas in a reservation of mineral rights in a deed held for the jury.

Evidence held to present a question for the jury as to whether parties to a deed executed in 1899 intended to include oil and gas in a reservation of "all mineral rights."

5. Mines and minerals  $\S$ 55(8)—Plaintiffs, claiming that mineral rights reserved in deed did not include oil and gas, held bound to show both parties so understood, or that grantors at least so intended.

In a suit wherein plaintiffs claimed oil and gas was not included in a reservation of mineral rights in a deed on which defendants claim right thereto, it devolved on plaintiffs to show that both parties to the deed mutually understood that the phrase "all mineral rights" in such reservation should not include oil and gas, or that grantors at least so intended, and it will not be sufficient to show that grantees alone had no intention that the oil and gas should be reserved.

6. Vendor and purchaser  $\S$ 239(1)—Purchaser without notice of intention to reserve oil and gas held not affected.

Where a deed reserved "all mineral rights," a purchaser from the grantee would not be affected by the intention of the original parties as to whether or not the reservation should include oil and gas, if he in good faith purchased without notice thereof.

Appeal from District Court, Mills County;  
F. M. Spann, Judge.

Suit by S. M. Carothers and others against J. J. Mills and others. Judgment for the defendants, motion to set aside verdict and judgment and for new trial overruled, and the plaintiffs appeal. Reversed and remanded.

J. C. Darroch, of Goldthwaite, and W. W. Hair, of Temple, for appellants.

Wilkinson & McGaugh, of Brownwood, for appellees.

BRADY, J. The following fair statement of the nature and result of the suit is taken from appellants' brief:

"Plaintiffs filed this suit April 15, 1919, against J. J. Mills and wife and H. W. Knickerbocker. The case was tried on May 17, 1919, before a jury. After the conclusion of the evidence the court instructed the jury peremptorily to return a verdict for the defendants, and on said instructed verdict the court rendered judgment on May 17, 1919, in favor of the defendants.

"On May 17, 1919, plaintiffs filed a motion for new trial, to set aside the verdict and judgment, which motion was overruled, and plaintiffs in open court excepted and gave notice of appeal to this court, and in due time filed their appeal bond, which was duly approved.

"The plaintiffs' petition alleged: That on October 30, 1899, the defendants J. J. Mills and wife conveyed by deed to Mrs. S. H. Carothers, wife of S. M. Carothers, one of the plaintiffs, the land in controversy, about 1,500 acres in Mills county, Tex., and that all the plaintiffs were the sole heirs of S. H. Carothers, deceased, and owners of the land. That said deed had written therein, the following clause: 'It being understood and agreed by and between the parties hereto that the said J. J. Mills,

grantor herein, reserves all mineral rights on said land, and the right and privilege to work same at any time he desires. He may also sell or transfer any part of said mineral rights.' That by virtue of said reservation the defendants J. J. Mills and wife are asserting and claiming ownership of all oil and gas in said land.

"The petition further alleged that J. J. Mills and wife, on or about the 21st day of May, 1918, did convey to defendant Knickerbocker, by instrument in writing purporting to be an oil and gas lease on the land therein described and mentioned, for a term of five years, the lease to the said Knickerbocker being 1,000 acres off the north side of the land in controversy. Petition further alleged that the substance of the terms of the lease were for oil and gas, laying pipe lines, etc., in the consideration of the sum of \$1,000 and one-eighth of the oil produced and saved on said leased premises, and the sum of \$1,000 per year thereafter to be paid by said Knickerbocker, at his option to said Mills in order to keep the lease alive. Petition further alleged: 'That the defendant Knickerbocker by virtue of said instrument is now claiming all the rights, privileges, and estate in and upon said land in and to the oil and gas in place in and under the same which are therein attempted to be conveyed to him by said Mills and wife, and is so claiming the same as against these plaintiffs.' And the petition of plaintiffs further alleged:

"Plaintiffs show to the court that they are the surviving heirs of said Mrs. S. H. Carothers, and the owners of said first above described tract of land, together with all the oil and gas now in place in and under the same, or which may hereafter be discovered in and under the same, during the ownership thereof by plaintiffs, or at any time hereafter; that the above reservation in deed from said Mills and wife to said Mrs. S. H. Carothers is wholly insufficient to pass to and vest in the said defendant Mills and wife any title to, claim, interest, or estate in such oil and gas, or in and upon said land for the purpose of prospecting for the same.

"That at the time of the execution of said deed from defendant Mills and wife to said Mrs. S. H. Carothers, containing said reservations, the existence, either actual or probable, of petroleum oil and natural gas in the portion of the state of Texas in which said land is located was wholly unknown and unthought of; that at said time there had been little, if any, oil and gas produced in the state of Texas, and none whatever in the county in which said land is located, or in any county adjoining the same, or in fact within a radius of several hundred miles from said land, and said products were not being produced at the time aforesaid in but few localities, if any, in the state of Texas, and in but small quantities; that if it shall appear to the court that petroleum oil and natural gas do come within the general designation of mineral, the plaintiffs say that the same were at said time not generally known to be such, or believed to be such, and that it was not within the contemplation of the said Mills and wife and the said Mrs. S. H. Carothers and her said husband, S. M. Carothers, at the time of the executing and taking of such conveyance, that the same should reserve to

the grantors Mills and wife the oil and gas in and under said land, or the right to prospect the said land for oil and gas, and it was not the intention of the parties to said conveyance that the title to oil and gas should be reserved to the grantors by virtue of such reservations, or the right to prospect for the same; that it was only in contemplation of said parties and their intention that there should be reserved to grantors, by virtue of said reservation clause, the right to prospect said land for such minerals as gold and silver and copper.

"Plaintiffs show that the claim of ownership on the part of the defendants Mills and wife as against these plaintiffs is wholly without foundation in law or in fact, and that said defendants do not own the oil and gas in and under said land, or any part thereof; and that their purported lease to the defendant Knickerbocker is a nullity, and conveyed nothing to him; that said claims of the defendants, and the recorded lease from the defendant Mills to defendant Knickerbocker, are a cloud upon the title of these plaintiffs.

"Plaintiffs further show that in the event it shall appear to the court that for any reason the said lease to the defendant Knickerbocker is a valid lease as against plaintiffs, then plaintiffs say that they, and not the defendants Mills, are entitled to the rentals and royalties in said instrument required to be paid by the defendant Knickerbocker, upon the terms and conditions therein set forth, and that they are entitled to judgment against the defendants Mills and wife for the sum of \$1,000 paid by said Knickerbocker to said defendants as the down payment on said lease.

"Petition closes with a prayer, among other things, that plaintiffs have and recover the said defendants' title to the oil and gas in or under said tract of land as described, that is, 1,500 acres, for cancellation of the aforesaid lease of Mills and wife to Knickerbocker, and that plaintiffs be decreed to be the owners of the oil and gas in, under or on said land, etc.; and, further, that if said lease be held to be valid lease, plaintiffs recover title to the oil and gas subject to the lease, and for all rights and royalties hereafter to be paid by said Knickerbocker and heretofore paid by him, and for general and special relief, etc.

"Defendant Mills and wife answered by general denial. Defendant Knickerbocker answered by general denial and also alleged in connection with his lease for oil and gas from Mills and wife that he had purchased the same for valuable consideration, in good faith, without notice of the claims of plaintiffs, and that he was a bona fide purchaser thereof for value and without notice."

#### Opinion.

[1] It is the contention of appellants that the cause should have been submitted to the jury, because the pleadings and evidence raised the issue that it was not the intention of the parties to reserve to the grantors any oil and gas in the land; and especially the issue as to what the parties mutually understood, agreed, and intended the meaning of the words "mineral rights" should be,



viewed in the light of the surrounding facts and circumstances. It is also claimed that an issue of fact was made by the pleadings and the evidence as to the mutual intention of the parties that the words "mineral rights," as used in this reservation, were intended to include only gold, silver, and copper. Appellees insist that the language of the reservation is clear and unambiguous, and that any evidence showing an intention of the parties contrary to the express language, "all mineral rights," was immaterial and inadmissible; and that therefore there was no issue for the jury.

We will examine these conflicting claims in the light of authorities deemed applicable, and of the principles which are thought by us to be controlling.

In *Archer on the Law of Oil and Gas*, c. 48, p. 834, this rule is announced:

"Whether petroleum or natural gas is conveyed by a deed, wherein all minerals underlying the tract are either reserved or conveyed, is a question of intention. Such grant or reservation does not convey or reserve petroleum, oil or natural gas, unless the deed on its face shows an intention to do so, or unless such intention is proven by competent evidence."

Among the cases cited are *Schuylkill Nav. Co. v. Moore*, 2 Whart. (Pa.) 477, in which it was said:

"The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it."

In *McKinney's Heirs v. Central Ky. Gas. Co.*, 134 Ky. 239, 120 S. W. 314, 20 Ann. Cas. 934, a decision by the Court of Appeals of Kentucky, this language was used:

"It will be observed that gas is not specifically mentioned in either of the deeds; but in all of them the word 'minerals' is used, which counsel for the parties concede, when given its broadest meaning, includes natural gas. But the question to be determined is: What was the intention of the parties to the deeds at the time they were made? Did the grantors understand at that time that oil and gas were minerals and would pass with the other minerals named in the conveyances, and did they intend to convey the gas? In other words, did the minds of the parties to the conveyances meet upon the questions? Did the one understand that he was conveying, and the other that he was purchasing, the gas thereunder? If not, the gas did not pass with the conveyances. The solution of this question depends upon the language used in the conveyances and the facts and circumstances surrounding the parties at the time they made them."

While in some of the earlier decisions, especially those of the courts of Pennsylvania, it was held that the term "minerals" did not include oil and gas, the later decisions uniformly hold to the contrary; even the

more recent Pennsylvania cases so decided. Our Supreme Court has held that oil and gas are minerals, and this must be regarded as now settled in this state. However, it does not follow that the term must be so construed, as a matter of law, despite the intention of the parties, especially with relation to a clause in a deed, made when the conveyance in controversy was executed, which was in the year 1899. It may be at this late day, when the exploration for and development of oil and gas is so common, and when courts are so uniformly holding these substances to be minerals, that the ordinary acceptance of the term "minerals" must be held to include oil and gas. Possibly it should be so held, although the parties may have intended otherwise, but, as stated, we do not think this is necessarily so under the facts and circumstances pleaded and sought to be proven in this case. We think the issue fairly arises in this case whether the phrase "all mineral rights" was intended by the parties to include oil and gas.

[2-4] In its broadest and scientific meaning, a mineral is any inorganic species having a definite chemical composition. However, in the light of the facts pleaded here, was it so regarded by the mass of mankind, and was it the ordinary acceptance of the term at the time the deed in controversy was executed? If the popular and usual view of its meaning was different from its scientific significance, and it should be alleged and proven that the parties regarded it in the former sense, it would seem to be the just and fair rule to permit inquiry into the intention of the parties, and that it should control, rather than any precise legal meaning. In the record it is shown that oil and gas were practically unknown in the section where the parties lived, and where the land was situated, at the date of the deed. There was also evidence that not only the grantees did not intend that the reservation should include oil and gas, but there is evidence tending to show, and sufficient to raise the issue, that the grantors did not so intend. There is evidence even tending to show that the grantors intended only to reserve gold, silver, and copper. It is not necessary to detail the evidence, but in the light of the facts shown in the record, and under the principle announced in the authorities heretofore cited, we have concluded that the case should have gone to the jury, and that the trial court erred in peremptorily instructing a verdict.

While not directly in point on the facts, we consider the reasoning in the able opinion of Mr. Chief Justice Phillips, in *Greene v. Robison*, 109 Tex. 367, 210 S. W. 498, applicable here. In that case, as well as in the earlier case of *Schendell v. Rogan*, 94 Tex. 585, 63 S. W. 1001, it was decided that

a reservation to the state of all minerals or mineral lands did not operate on lands not known to be mineral, nor upon minerals not known to exist. In *Greene v. Robison*, after quoting from *Schendell v. Rogan*, Mr. Chief Justice Phillips suggested this significant question:

"If such a reservation did not operate on lands not known to be mineral, how can a reservation of minerals themselves operate on minerals not known to exist?"

It is true that in those cases the court was considering the meaning of certain acts of the Legislature, and the decisions doubtless turned largely on what was conceived to be the public policy of the state. However, it is also certain that the Supreme Court gave some effect to the consideration that it appeared that the lands in question were not known to contain minerals at the time they were classified and sold. The analogy to the instant case, in principle at least, is thought by us to make the reasoning applicable here. We see no difference in principle between the rules of construction in ascertaining the legislative intention or the effect of contracts with the state and those applying to ascertain the intention of the parties to a private contract. If the parties may break through the letter of the statute, in the one case, they can break through the letter of a deed, in the other, in order to arrive at the all-controlling question—the intention.

We realize that the authorities are not in harmony on this point, and that our conclusion is apparently in conflict with the holding of the Court of Civil Appeals for the Second District, in the case of *Luse et al. v. Boatman*, 217 S. W. 1096, in which a writ of error was refused by the Supreme Court. We think the conflict is not real, however, and that it does not necessarily follow that the Supreme Court approved the decision although the judgment of the court below, for those holding under the grantee, was reversed and rendered. It was there held that a reservation of "all minerals" included oil and gas. But the evidence as to intention of the parties was very meager. It was, perhaps, insufficient to raise any issue of fact as to whether the parties actually intended that the phrase should not include oil and gas. At all events, being satisfied that it is a question for the jury here, and not being convinced that the Supreme Court has held to the contrary, we do not accept the decision in *Luse v. Boatman* as being decisive of the case in favor of the grantors here.

[5, 6] In reversing and remanding the case, we think it proper to say that it devolves upon the plaintiffs to show that the parties mutually understood that the phrase "all mineral rights" should not include oil and gas, or that the grantors at least so intended.

It will not be sufficient in this action to show that the grantees alone had no intention that the oil and gas should be reserved. Furthermore, the rights of the appellee Knickerbocker would not be affected by the intention of the original parties, if he, in good faith, purchased without notice thereof.

Judgment is reversed, and the cause remanded.

Reversed and remanded.

#### ACME TIRE & VULCANIZING CO. et al. v. NATIONAL CASH REGISTER CO. (No. 8061.)

(Court of Civil Appeals of Texas. Galveston.  
June 14, 1921.)

1. Sales  $\S$  261(5)—Representations as to mechanical performance are representations of fact.

Representations by a salesman that a cash register would add, subtract, and segregate items cannot be regarded as mere trade talk, but are representations, which, if false, invalidate a contract for the purchase of a machine induced by such misrepresentations.

2. Evidence  $\S$  434(8)—Proof of fraud in procurement of written contract does not violate parol evidence rule.

Proof of fraudulent misrepresentations in the procurement of a written contract is not an infringement upon the rule prohibiting parol evidence to vary the terms of a written instrument.

3. Evidence  $\S$  434(11)—Oral agreement for 30-day test is admissible in corroboration of fraud in procurement of written contract.

Even if an oral agreement that the buyer of a cash register should have the privilege of a trial test for 30 days was inadmissible to vary the terms of a written contract of sale, it was admissible in corroboration of buyer's claim that the written contract was procured by fraudulent misrepresentations.

Appeal from Harris County Court; John W. Lewis, Judge.

Action by the National Cash Register Company against the Acme Tire & Vulcanizing Company and others. Judgment for the plaintiff, and defendants appeal. Reversed and remanded.

J. L. Meany, of Houston, for appellants. Campbell, Myer & Freeman and W. Ray Scruggs, all of Houston, for appellee.

PLEASANTS, C. J. This suit was brought by the appellee against the Acme Tire & Vulcanizing Company as a partnership, and against the individual members of said firm, to recover upon a promissory note for the sum of \$420 executed by the defendants in favor of plaintiff on the 1st day of May,

1919, and payable in monthly installments of \$30 each, and to foreclose a mortgage lien given by defendants to secure the payment of said note upon a cash register machine described in the petition.

The defendants' answer admits the execution and delivery of the note and mortgage as alleged by plaintiff, and that it was executed in part payment of the purchase price of the cash register machine described in said mortgage, and which defendants agreed to purchase from plaintiff as alleged in the petition. It is then averred in said answer:

"That the plaintiff did, through its agent and vice principal, W. A. Ryan, fraudulently represent and warrant to the defendants, with knowledge of the falsity of such representation and warranties, that the said described cash register would add, subtract, and segregate their items of sale and purchase without the aid of a bookkeeper, and that it would in every respect do in the line of their business the work of a bookkeeper, and save them the expense of hiring one; that defendants believed and relied on these representations and guaranties, and that they were to them the moving consideration for the signing and delivery of the said contract and note, and that they would not have either signed or delivered either instrument if the said representations and guaranties had not been made to them by the said Ryan before and at the time of their signing and delivering them.

"That the plaintiff did, through its said agent, Ryan, fraudulently represent to them, prior to and at the signing and delivering of the said contract and note, that they would have 30 days to test the usefulness to them of the said cash register, and that neither instrument would become effectively operative until this 30-day test period would have elapsed, and that because of these representations and their reliance in them they assigned and delivered the said contract and note, which they would not have done if the plaintiff, through its said agent, had not so contracted with them.

"That the written words of the contract pleaded in plaintiff's petition does not contain all of the agreements made and entered into by the plaintiff and themselves at the alleged sale and conditional purchase of the said cash register, and this they allege, because it was, prior to and at the time of the signing and delivery of the said contract and note, between themselves and the plaintiff fully understood and agreed that they would have 30 days to test the usefulness to them of the said cash register, and that the contract and note they so signed and delivered should, by the terms of this agreement, be canceled and held for naught if the cash register should within that time fail to be satisfactory to them.

"That the said Ryan did, as a further inducement to them, prior to and at the signing and delivery of the said contract and note, fraudulently represent that it was the custom of the plaintiff to give purchasers of its cash registers a 30-day test period, and that it was also the custom of the plaintiff, but only as a matter of form, to get on any such sale a small cash payment and a contract and note, but that such cash paid would be promptly repaid, and the contract and note canceled at the return of any

such machine within this 30-day test period, and they now allege that they believed these statements to be true, and relied on them, and that they would not, if they had not believed and relied on them, have signed and delivered the said contract and note.

"That the defendants had never had a cash register, and that they were therefore wholly unfamiliar with the mechanical ability of the operations of the cash register they were buying, and that they believed the plaintiff's agent, Ryan, to be thoroughly conversant with the workings and mechanical ability of all of the operatives of this and every cash register, and that, because of so believing in his skill and in the fraudulent statements made by him about the mechanical ability of the cash register, they signed and delivered the said contract and note.

"That the defendants would not in any event have considered the purchase of the cash register if the said Ryan had not represented to them that it would, because of the mechanical ability of its construction, add, subtract, and segregate without the aid of a bookkeeper, and save them the expense of hiring one, and the defendants here now allege that the plaintiff's said agent knew that it was these fraudulent statements, representations, and guaranties he was so making that moved them to sign and deliver the herein pleaded contract and note.

"That the plaintiff's agent, Ryan, said to them prior to and at the conclusion of the contract and at the signing of itself and the note that they would within 30 days learn that his statements about the cash register would prove to be true, and that they would, if it should not show itself within that time to have the very mechanical ability of his representations, or if it should not in all things prove adapted to their business, have the right to return it, and that the contract and note they were signing would be, in that event, canceled and held for naught, and believing all of these statements, and relying upon them, they signed and delivered the said contract and note.

"That the defendants gave the said cash register a fair trial within the said stipulated test time of 30 days, and that they, within that time, learned that it would not add, subtract, and segregate without the aid of a bookkeeper, and that it would not save them the expense of hiring one; that all of the statements herein pleaded to have been made about its mechanical ability by the plaintiff's agent, Ryan, were fraudulently untrue, and that it was not, as by him fraudulently represented, mechanically adapted to their business, and was in fact not the machine which they contracted to purchase, but an entirely different machine.

"That they notified the plaintiff, orally, on the 20th day of May, 1919, of the facts pleaded in this last preceding paragraph, and again on the 29th day of May, 1919, by letter, a copy of which is hereto attached and marked Exhibit A:

"Houston, Tex., May 29, 1919.

"National Cash Register Company, Houston, Texas, Mr. W. A. Ryan—Dear Sir: On or about the 1st day of May we purchased a cash register from you, with the understanding that, if same did not produce results you claimed in 30 days, we would not accept same.

"We find this register is not adapted to our business.

"We wish the removal of this register and the termination of our agreement as soon as possible.

"Acme Tire & Vulcanizing Company.

"[Signed] C. A. Beck.

"Filed September 13, 1920. Albert Townsend, Clerk Co. Court at Law of Harris Co., Tex., by H. H. Branard, Deputy."

—and that they did in these two notices, and since then, and do now, tender and offer the plaintiff the return of the said cash register, and they further allege that they did at the giving of these notices, and since the giving of them, notify the plaintiff that they wished to terminate and have terminated their contract with it, and they also allege that the plaintiff has, and though demand has been made, refused, and does still refuse, to repay the \$30, or any part thereof, paid by them to it at the signing and delivery of the said contract and note.

"The consideration for which the said note was given having therefore wholly failed, and the contract set forth in plaintiff's petition having been made on account of the frauds pleaded in this answer, all of which the defendants are ready to verify, the defendants, now becoming actors, plead the foregoing averments for cross-action and complaint, as though here repeated at length, and, complaining of the plaintiff, pray that the said contract and note be set aside, rescinded, canceled, and held for naught; that they, in law and in equity, have judgment in all things; that the plaintiff take nothing by his suit; and that they have judgment, as their liquidated damages, for the \$30 paid to the plaintiff, as herein alleged, and for their costs."

Plaintiffs excepted to this answer and to each of its paragraphs set out above, on the ground that the defendants thereby attempted by parol testimony to vary the terms of the written contract.

These exceptions were sustained by the court, and upon the trial all evidence offered by defendants to establish the averments of the answer was excluded, and the jury instructed to return a verdict for the plaintiff.

These rulings of the trial court are assailed by appellants under appropriate assignments of error, and we think the assignments should be sustained.

[1] The averments of the answer, in effect, are that defendants were induced to execute the contract upon which plaintiff sues by the false representations of plaintiff's agent as to the mechanical construction and capacity of the cash register machine. The representation that the machine could add, subtract, and segregate, as averred in the answer cannot be regarded as mere trade talk, but was a false statement of the existence of a material fact, and when made to one who was ignorant of the true facts, and who, relying upon such representation, was induced to make the contract for the purchase of the machine, was such fraud in the procurement of the contract as to render it unenforceable by the party guilty of the fraud.

[2] Proof of such fraud in the procurement of the contract is not an infringement upon the rule that forbids the introduction of parol evidence to vary the terms of a written instrument. *American Law Book Co. v. Fulwiler*, 219 S. W. 883; *Bridger v. Goldsmith*, 143 N. Y. 428, 38 N. E. 458; *Trust Co. v. Beck*, 187 S. W. 753; *Mortgage Co. v. Coe*, 166 S. W. 419; *Hinkley v. Oil Co.*, 132 Iowa, 396, 107 N. W. 629, 119 Am. St. Rep. 564; *Pratt v. Darling*, 125 Wis. 93, 103 N. W. 229.

[3] The averment that the defendants were to have 30 days in which to test the machine, standing alone, might be held an averment varying the terms of the written contract, but when taken in connection with the other averments as to the representation in regard to the capacity of the machine, proof of such agreement might be made in corroboration of the averments of fraud and false representation.

It follows from these conclusions that the judgment of the trial court should be reversed, and the cause remanded, and it has been so ordered.

Reversed and remanded,

#### SOUTHERN PAC. CO. v. MISTROT-CALLAHAN CO. (No. 6282.)

(Court of Civil Appeals of Texas, Austin.  
April 27, 1921. Rehearing Denied  
July 2, 1921.)

Appeal from McLennan County Court; Jas. P. Alexander, Judge.

Action by the Mistrot-Callahan Company against the Southern Pacific Company and another. Judgment for plaintiff, and defendant Southern Pacific Company appeals. Affirmed.

O. L. Stribling, of Waco, and Baker, Botts, Parker & Garwood, of Houston, for appellant.  
W. B. Carrington and W. L. Eason, both of Waco, for appellee.

KEY, C. J. Appellee sued appellant and the Missouri, Kansas & Texas Railway Company for damages, and recovered a judgment against appellant for \$250.67, from which judgment this appeal is prosecuted.

This is the second appeal, and upon the last trial the county court followed and applied the law of the case as announced by this court on the former appeal. See *Mistrot-Callahan Co. v. M., K. & T. Ry. Co.*, 209 S. W. 775.

The questions presented by the appeal are not of such importance as to require extended or specific discussion in this opinion, and therefore we content ourselves with saying that, in our opinion, the court's charge, together with special instructions given at appellant's request, fully and fairly submitted the case to the jury, and the evidence supports the finding of the jury in favor of the plaintiff.

No error has been shown, and the judgment is affirmed.

Affirmed.

**ROMAN v. KING. (No. 22055.)**

(Supreme Court of Missouri. Division No. 1.  
June 8, 1921. Motion for Rehearing  
Denied July 23, 1921.)

**1. Landlord and tenant §164(1) — Duty of landlord to maintain stairways.**

Where a landlord demises a portion of a house to which access is had by way of halls, stairways, or other approaches to be used in common with the owner or other tenants, it is the owner's duty to keep such undemised facilities, or to use reasonable care to keep them, in safe condition for the use of the tenant.

**2. Negligence §32(1) — Duty to invitee defined.**

One who invites another to come upon his premises is bound in law to see that such premises are in such condition that the invitation may be safely accepted.

**3. Landlord and tenant §164(1)—Free entrance and exit implied in lease of residence.**

Where property leased was constructed for the purpose of a residence, and was so used, such use implies free entrance and exit for business and social purposes.

**4. Landlord and tenant §164(7) — Tenant's knowledge of defective steps does not bar right to recover for injuries resulting therefrom.**

A tenant's equal knowledge with defendant of the defective condition of steps used in common with other tenants does not bar her right to recover for injuries resulting therefrom.

**5. Landlord and tenant §164(7) — Continued use of defective passageway not conclusive evidence of lack of tenant's care.**

Mere continued use of a common passageway after knowledge of its dangerous condition is not in itself conclusive evidence of a lack of due care on the part of a tenant, since such knowledge does not require the tenant to desist in using the same in a careful manner, nor render careful use thereof contributory negligence.

**6. Landlord and tenant §164(1) — Right of tenant to use front steps.**

Although a tenant occupying an upper flat had access through a rear door to her back yard, the law will not compel her, without good reason, to abandon her front door and steps used in common with other tenants.

**7. Landlord and tenant §169(5)—Evidence in tenant's action for injuries held inadmissible.**

In an action by a tenant for injuries sustained in using defective front steps, a check given by the landlord in settlement for carpenter work done on the back porch, and a note signed by plaintiff stating, "All work is done all right," held inadmissible.

**8. Landlord and tenant §169(6) — Evidence held not to show unsafe condition of steps.**

In a tenant's action for injuries sustained by reason of defective front steps in May, 1914, the fact that such steps were not, in September, 1913, considered strong enough to bear

the weight of a piano, was no evidence that they were unsafe for the plaintiff to walk upon at that time, or at any later date.

**9. Trial §194(16)—Instruction assuming negligence held to invade province of jury.**

In a tenant's action for injuries resulting from defective steps, an instruction assuming that if the tenant meddled with the step she committed an act of negligence, although she replaced it in the same position, held improper as being equivalent to a peremptory instruction to find for defendant.

**10. Landlord and tenant §168(1) — Injured tenant held not negligent.**

If a landlord negligently permitted steps to become unsafe, causing a tenant's injury, the fact that the tenant may have attempted to repair the step, or picked it up or laid it down without changing its condition, did not lessen the landlord's responsibility.

**11. Landlord and tenant §162—Tenant's right to use of steps stated.**

A tenant from month to month, paying her rent in advance, was entitled to use the front steps, which were also used by other tenants, not only for personal access to her own premises, but for the access of others having business or social relations with her, which might make it necessary or desirable to her, and all such persons were entitled to reasonable care on the part of the landlord with respect to conditions of safety.

**12. Landlord and tenant §168(1) — Tenant need not vacate because of defective steps.**

If, upon due notice or with knowledge of the dangerous condition of steps, the landlord still fails to make the necessary repairs, the tenant is not bound to vacate the premises and resort to her suit in damages for relief, but may, in the exercise of such care as is indicated by the danger, continue to use the premises, if practicable to do so with reasonable safety.

Appeal from St. Louis Circuit Court; M. Hartmann, Judge.

Suit by Katherine D. Roman against John C. King. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

See, also, 202 S. W. 590.

W. B. & Ford W. Thompson, of St. Louis, for appellant.

Kinealy & Kinealy, of St. Louis, for respondent.

BROWN, C. Suit for damages sustained by falling on the steps of a two-story flat building, known as Nos. 3209 and 3209-A North Newstead avenue, in the city of St. Louis, owned and leased as residences by defendant. The plaintiff was tenant of the upper flat. A porch extended across the entire front on Newstead avenue, which was reached from the street by a granitoid walk to the steps about the middle of the porch. These consisted of a lower step of granitoid, with four wooden steps leading from it to

the porch floor. Each flat was reached by a front door leading into the house from this porch, which was not divided by rail or otherwise, but was common to both flats. There was also a back door, reached by stairs. The plaintiff occupied the upper flat as tenant from month to month of the defendant; the lower flat being occupied by a tenant holding by like tenure.

After stating these facts the petition proceeds:

"That upon the 18th day of May, 1914, while plaintiff, in the exercise of ordinary care upon her part, was passing over and down said flight of wooden steps in going from the front door of said upper flat to the ground, and using said steps for the purpose of egress therefrom, in the usual and customary manner, without fault upon her part, one of the wooden steps of the flight of wooden steps above mentioned became entirely loose and unfastened from the wooden carriage upon which said step was resting and slipped from under plaintiff's foot, and thereby plaintiff was thrown on a stone step at the bottom of said flight of wooden steps and fell in such manner that she sustained serious and permanent injuries to her body and nervous system."

After stating the nature of plaintiff's injuries, which were serious, the petition proceeds as follows:

"Plaintiff states that said flight of steps upon which she was injured were at the time of said injury in the possession of and under the control of the defendant, and constituted a common stairway for the common use of defendant's tenants occupying the upper and lower flats of defendant's said two-story flat building, and that by reason thereof it was the legal duty of defendant to keep the same in a reasonably safe condition for the ordinary and necessary use of plaintiff as a tenant of the upper flat of said building. Plaintiff states that in violation of said duty said defendant negligently permitted said step to be and remain out of repair and in an unsafe and dangerous condition at the time of and for a long period of time prior to the date of said injury, in this, to wit, that one of the boards constituting the step or tread of said common stairway on one side thereof was loose and unfastened by reason of the wooden carriage upon which said step rested, having become so rotten and decayed that said board or step could not be nailed or fastened thereto, as it would not hold a nail driven into it on said side, and said board or step in its said loose and unfastened condition had become and was unsafe for persons lawfully using the same, and that defendant knew, or in the exercise of ordinary care could have known, that said step was out of repair and unsafe and in a dangerous condition."

Damages are alleged and asked in the sum of \$25,000. The answer, after a general denial, pleads contributory negligence as follows:

"Further answering, defendant says that any injuries which plaintiff may have sustained upon the occasion referred to in the petition were due to her own negligence directly contributing

thereto, in that shortly prior to the time she fell she negligently moved said step from the position it had theretofore occupied, and in that she negligently placed the board step in the place and position in which it was at the time she fell, and in that she negligently went upon said step, knowing the condition in which same was at the time."

Issue was joined by replication.

The four wooden steps leading up to the front porch were supported upon carriers of wood, and for a long time one of them had been loose at one end so that it could be moved out several inches in front of the riser beneath it. The tenants of the respective flats washed the steps alternately. The loose step had first been observed in that condition in December previous to the accident, which occurred May 18, 1914, and the plaintiff had, on several occasions, driven nails into the loose end, but the wooden carrier was so rotten that these would not take hold of it. Plaintiff, about two weeks before the accident, directed defendant's attention to its condition and told him she would move out unless he fixed it, which he promised, but failed to do until after the accident occurred. Mr. King, the defendant, denied this, and says, in substance, that if a tenant should so address him he would tell him to move out.

On the day of the accident the plaintiff was descending the steps with a pan full of chicken feed held in front of her; the loose step slipped out and she fell down the steps, striking on her head and back, suffering thereby the injuries complained of. She knew the step was loose because she had attempted to nail it down. She says she knew it was bad, but did not know how bad. She had climbed up and down them several times the same day. She said that whenever she noticed it was loose she put a nail in it, but never thought of getting hurt herself. In answer to a question upon her cross-examination as to what she had done with it that morning before she was hurt, she said:

"Why, I pulled it out a little bit like that, showed it to Mrs. Hogan and her daughter, and pushed it back in place and placed it back the way I always did."

The condition of the step was described by a policeman, who saw it just after the injury, as follows: "The step itself was all right, but the carrier was rotten." He said he had walked on it as he went up without noticing its condition; that this step was the second from the bottom. The evidence that the carrier which supported it was rotten seems to be unquestioned. When it was repaired about an hour after the accident defendant was present. The carrier was thrown into the scrap heap and disappeared. The defendant testified that in 1913 he employed one Settlemore, a carpenter, to fix

the back porch used in connection with plaintiff's flat; that by check dated November 5, 1913, he paid this carpenter \$118.89 and received from him a note signed by plaintiff as follows: "All work is done all right." Although the defendant, being on the stand at the time, gave no evidence tending to show that this work had anything to do with the front porch steps, the court, against the objection of the plaintiff, permitted the check and note to be placed in evidence before the jury. The testimony of plaintiff was that he employed this carpenter to fix the back porch; that he knew of no other work that he did; and that he came to him for his pay with this note. The plaintiff duly excepted to the ruling of the court in admitting these papers.

After the evidence was in, the defendant asked that the jury be instructed to return a verdict for the defendant, which was refused. The court then gave for plaintiff the following instruction:

"(1) The jury are instructed that, if you find and believe from all the evidence that defendant was the owner of the premises known as Nos. 3209 and 3209-A North Newstead avenue, in the city of St. Louis, and that on said premises there was a double flat building, and that the upper flat, known as 3209-A was occupied by plaintiff and her husband and family, as the tenant of defendant, and that the lower flat, known as 3209 North Newstead avenue, was occupied by another family, and that the front entrance to said upper flat opened upon a porch, and that from said porch to the ground there was but one set of steps, and that said one set of steps was used by the occupants of each of said flats (upper and lower) in common as a common ingress and egress from the respective flats, then it was the duty of defendant, as the owner and landlord, to use reasonable care and diligence to keep and maintain said set of steps in a reasonably safe and fit condition for such use by the plaintiff; therefore, if you further find that on the day plaintiff was injured the said steps were not in a reasonably safe and fit condition, and that defendant either knew their condition, or by the exercise of ordinary care might have known their condition, and that defendant either knew said condition, or might by the exercise of ordinary care have known it, for such length of time before plaintiff was injured as to have given him a reasonable opportunity and time to have repaired it before plaintiff was injured, and you further find and believe that, notwithstanding said fact defendant failed to put said steps in a reasonably safe condition, and that as a direct result of defendant's said failure plaintiff, while making use of said steps and while descending said steps, without fault upon her part, as mentioned in other instructions, suffered an injury, then your verdict should be for plaintiff, and by the words 'reasonable care and diligence,' as used in this instruction, is meant such a degree of care and diligence as may reasonably be expected to be made use of by a man of ordinary intelligence, prudence, and caution under like circumstances and conditions."

Against the objection of plaintiff, it gave for defendant the following instructions, to which action the plaintiff duly excepted:

"(3) The court instructs the jury that in no event can you find in favor of the plaintiff unless you believe from the evidence that the defendant failed to exercise ordinary care to keep the step in question in a reasonably safe condition and repair, and that the plaintiff exercised ordinary care for her own safety at the time she fell.

"(4) The court instructs the jury that if you believe from the evidence that on the morning that plaintiff claims to have received her injuries she intentionally moved the tread of the step in question with her hands, either entirely or partially from the position it occupied on the risers supporting it, and that plaintiff then undertook to place said tread back in its proper position, but did so in such manner that when she shortly thereafter passed down said steps and went up on said tread it became displaced and caused her to fall, then plaintiff is not entitled to recover, and your verdict must be for the defendant.

"(5) The court instructs the jury that if you believe from the evidence that on the occasion when plaintiff received the fall testified to by her she knew the condition of the step which she went upon, and that in going upon same on that occasion she failed to exercise the care which an ordinary prudent person would have exercised under the same circumstances, and that by reason thereof received the fall of which she complains, she is not entitled to recover, and your verdict must be for the defendant.

"(6) The court instructs the jury that if you believe from the evidence that shortly before plaintiff received the fall of which she complains she lifted up the tread board of the step described by her, and then negligently laid same down on its support, so that it was likely to cause her to fall if she stepped upon same, and that she thereafter, while said board was in the same position in which she had placed it, if you so find, stepped upon said board, and that same moved and caused her to fall, then your verdict should be in favor of the defendant.

"(7) The court instructs the jury that if you believe from the evidence that when plaintiff went upon the step in question she knew its condition, and knew of the danger, if any, of her falling if she went upon same, and that she determined to take the chance of going upon the step, then she is not entitled to recover, and your verdict should be for the defendant."

The jury under the instructions returned a verdict for defendant, upon which the judgment appealed from was entered, and this appeal was taken.

1. We are called upon in this case to determine the liability of the owner of a house containing two separate tenements, known as flats, leased by him to separate tenants having no contractual relation whatever with each other, with respect to the premises, for his failure to keep the common approach to the house in a safe condition, by reason of which one of them was injured. Before proceeding to the facts presented by the

record of the trial below, we will briefly notice the principles relating to such liability. These have, as might be expected, received frequent notice from the courts of both this country and England.

The doctrine of the English courts may be illustrated by the cases of *Miller v. Hancock* [1893] 2 Q. B. D. 177, and *Hargroves v. Hartopp* [1905] 1 K. B. D. 472. In the first of these cases the defendant was the owner of premises leased in flats to tenants. The plaintiff was collector for a railway company, who in that capacity called upon the tenant of one of these flats and in coming down the staircase, through a defect in the stair, fell and broke his leg. *Bowen, L. J.*, said:

"The tenants could only use their flats by using the staircase. The defendant, therefore, when he let the flats, impliedly granted to the tenants an easement over the staircase, which he retained in his own occupation, for the purpose of the enjoyment of the flats so let. Under those circumstances, what is the law as to the repairs of the staircase?"

He then proceeded to hold that under these circumstances the landlord had given the tenant a right to use the staircase and undertaken to keep it reasonably safe for the use of the tenants and also of those persons who would necessarily go up and down the stairs in ordinary course of business with them. He concluded that the creation of the relation of landlord and tenant in such a case would be an absurdity if not founded upon such an implied duty. His conclusion was founded upon the reasoning of Lord Mansfield in *Taylor v. Whitehead*, 2 Douglas, 745. In *Hargroves v. Hartopp*, this case was followed by Lord Alverstone, C. J., who, in commenting upon the opinion of *Bowen, L. J.*, in the *Miller Case*, said that he understood it to mean that the duty to repair was coextensive with that created by express covenant; that is to say, that it was an absolute duty to keep the premises in safe condition at all events, and not merely a duty to take reasonable care to do so. He expresses some doubt as to the absolute nature of the duty, but declined to decide the point, placing his decision upon the ground of the failure of the landlord to exercise reasonable care. This is the general doctrine of the courts in this country. *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Home Realty Co. v. Carius*, 189 Ky. 228, 224 S. W. 751; *King & Metzger v. Cassell*, 150 Ky. 537, 150 S. W. 682, 42 L. R. A. (N. S.) 774; *Kansas Investment Co. v. Carter*, 160 Mass. 421, 36 N. E. 63; *Bissell v. Lloyd*, 100 Ill. 214; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628.

[1] This doctrine was definitely adopted by this court in *McGinley v. Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 384, which

was followed in *Turner v. Ragan*, 229 S. W. 809, decided at the last term of this court and not yet [officially] reported at this writing. It is supported by reasoning which seems to us unanswerable, and may be stated in its direct application to this case as follows. Whenever the owner of a house demises a portion of it to which access is had by way of halls, stairways, or other approaches to be used in common with the owner or tenants of other portions of the same premises, the owner, by such transaction, retains as to the tenant the possession and control of the undemised facilities, and it is his duty to keep them, or to use reasonable care to keep them, in safe condition for the use of the tenant in the enjoyment of his own possession. Without the application of this rule in his favor the tenancy is a farce, and the tenant from month to month, as in this case, may be evicted without notice by the simple refusal of his landlord to maintain the only means of access. The principle is well illustrated by the evidence in this case, in which the owner testified that, if his tenant had threatened to leave unless such repairs should be made as to enable her to enter her apartments with safety, he would simply have told her to go. It is impossible that the application of the rules of the common law should create such a condition.

[2] It is a principle too well established to be now thoughtlessly abandoned that one who invites another to come upon his premises is bound in law to see that those premises are in such condition that the invitation may be safely accepted. In this case the lease was an invitation to the plaintiff to enter the flat by the way already apparently provided. In return the owner exacted a monthly rental. She could only enter by crossing his own premises by the use of the steps that gave way under her feet, and she was entitled to have them maintained so that she could do so in safety. Her rights under the lease constituted the measure of his duty in that respect.

[3] The property was constructed for the purpose of a residence, and was so used. This use implies free entrance and exit for business and social purposes, and the most of the cases to which we have already referred hold that all persons so entering and leaving do so upon the implied invitation of the owner, and are equally entitled to the same protection as the tenant himself.

[4, 5] There is one branch of the same question to which we should advert before proceeding to the facts of this case. We have already noticed the effect of failure to maintain the facilities for safe entrance upon and exit from the premises as a method of wrongful eviction, as was so plainly suggested by defendant in his testimony. This has made necessary another rule which has become thoroughly established in our juris-



prudence, and is expressed by the Kentucky Court of Appeals in *Home Realty Co. v. Carlius*, supra, as follows:

"It is urged that plaintiff's equal knowledge with defendant of the condition of the steps bars her right to recover herein. We cannot agree with this contention. These steps constituted practically the only means of access to the two apartments, and were used by both tenants, facts necessarily known to the landlord. Because of their inaccessibility and condition the other entrances were seldom used. \* \* \* Mere continued use of a common passageway, after knowledge of its dangerous condition, is not of itself conclusive evidence of a lack of due care on the part of the tenant, since such knowledge does not require the tenant to desist from using same in a careful manner, nor render the careful use of same contributory negligence. *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295.

[6] We think the proposition expressed in these and other cases is a sound one. We do not think the law should encourage the wrongdoer in interposing his own wrong as a defense against one who has suffered from its effects. It is true that in this case the plaintiff had access through a rear door to her back yard, and we will presume that this way would somewhere safely to a street. It may also be that under some circumstances it might have been plaintiff's duty to protect her landlord from loss by subjecting herself to the same roundabout process, but she also had the right to consider, to some extent at least, her own convenience secured to her by her lease, even to the extent of encountering a danger which might possibly react upon the landlord who violates it. The law will not compel her, without good reason, to abandon her front door, the full and free use of which was included in her monthly rental.

[7] 2. Soon after the plaintiff moved into the house the defendant employed one Settlementmore, whom he describes as "a kind of carpenter," to fix the back porch. On November 5th Settlementmore came to him with a note signed by plaintiff, reading as follows: "All work is done all right." He thereupon gave Settlementmore his check for \$116.89 for his work on the back porch. Although the defendant in person produced these two papers in court and identified them, he made no suggestion that they referred to anything but the work on the back porch, which amounted to that sum, yet the court, against the insistent objection of the plaintiff, permitted both papers to go to the jury. This action is one of the errors assigned and insisted on in this court.

At the time these papers were introduced, the plaintiff had testified:

"That on Monday, the 10th of September, 1913, when her things were being moved in by the moving man, she called up the defendant over the phone and notified him that the moving

man was afraid to move her heavy things in over the front steps, and that the defendant told her to go ahead; that he would fix everything up;" that the man "took her piano, etc., up the back stairs on account of the condition of the front steps."

She also said that in December following she found out that one of the front steps was loose. This was the step on which she fell.

This is the only evidence we can find in the record connecting these two papers with the subject of this suit, or which might be urged as an excuse for their admission in evidence. Defendant stated that he employed Settlementmore to put up the porch, that the amount of the check was for that service, and that Settlementmore brought him the note of his own volition to obtain his pay for that work.

[8] The admission of these two papers in evidence amounts to a judicial direction to the jury that they tend, either of themselves or in connection with some other evidence in the case, to prove that the plaintiff, on or about the 5th day of November, 1913, expressed her satisfaction with the condition of these front steps, and that the carriers to which their ends were nailed were not rotten and dangerous at the time of the accident 6½ months later. The fact that these steps were not, in September, 1913, considered strong enough to bear the weight of a piano is no evidence that they were unsafe for the plaintiff to walk upon at that time or at any later date.

Plaintiff's explanation of this note is that she gave it to a negro paper hanger to show that he had, satisfactorily to her, completed a little job of papering in her flat.

The thing of which plaintiff now complains is that the carriers upon which these steps rested and to which they were nailed were rotten and would not hold the nails which should keep them in place, so that one end of the step gave way beneath her feet and caused her fall. This was probably true, for the defendant was on the spot with a carpenter within an hour after the injury, and repaired the damage, using the same old step in the new structure, but throwing the carriers into the scrap heap and putting in new ones.

For the reasons we have stated, we are constrained to hold that the court was in error in permitting the note and check to go to the jury as evidence pertinent to the issue before them. There is nothing in the record connecting them in any manner with that issue, while the testimony of defendant himself shows affirmatively that there was no such connection. That it was, when considered in connection with the action of the court in admitting it, highly prejudicial to the plaintiff, is evident.

3. The plaintiff testified that she had known since some time in December, 1913,

that this step was loose, and had complained to defendant about it; that he had promised to fix it and that she had tried to fix it herself, driving nails in it; that on the morning of and before the accident she had found it loose at one end, and had called the attention of Mrs. Hogan and her daughter, the mother-in-law and sister-in-law of defendant, who lived next door, to the fact by pulling out the loose end six or seven inches and then putting it back in place. Mrs. Hogan and her daughter testified that she had not only done this but had picked up the step and then put it back in position again.

[9] Defendant's plea of contributory negligence being limited to plaintiff's negligence in removing the step from the position it had theretofore occupied and negligently placing it in the position in which it was at the time she fell, and afterward negligently going upon it, knowing the condition in which it was at the time, he asked and the court gave his instruction No. 4, copied in our statement, in which the jury were told that if they believed from the evidence that on the morning of the accident plaintiff—

"intentionally moved the tread of the step in question with her hands, either entirely or partially from the position it occupied on the risers supporting it, and that plaintiff then undertook to place said tread in its proper position, but did so in such manner that when she shortly thereafter passed down said steps and went upon said tread it became displaced and caused her to fall, then plaintiff is not entitled to recover."

This was equivalent to a peremptory instruction to find for defendant. It requires no argument to demonstrate that this was error. It does not submit to the jury the question of negligence in meddling with the step, but assumes that if, as she testified, she moved the loose end out six or seven inches and then put it back in the position it had occupied before, or, as the Hogans testified, picked it up and showed it to them and then put it back where it was before, she committed an act of negligence and fixed her own responsibility for the injury, notwithstanding that she placed it in the same position that she found it. In other words, if she meddled with it at all, even in the interest of her own safety, the owner was released from all liability for negligence in creating a situation so dangerous that safety required its correction. This principle would lead to the conclusion that no person could recover for an injury received in an attempt to remove the trap set for him. He must first step into it.

[10] In this case there is no evidence whatever that in meddling with the step the plaintiff contributed to any extent to the injury. She, testifying for herself, and both the Hogans, witnesses for the defendant upon that question, testified, in substance, that

when plaintiff moved or picked up the step she put it back as it was before. There is no evidence that it was within her power to mend it. The steps were undemised and in the possession of the owner, subject to the use of both his tenants for the purposes of egress and ingress, and this use he was bound to exercise all reasonable care to make safe, for which his compensation was included in his rental. If he negligently permitted it to become unsafe, and that condition was the cause of the injury, the fact that she may have attempted to repair it, or picked it up or laid it down without changing its condition, did not lessen the responsibility of the one charged with the duty of keeping it in a safe condition for her use.

[11] 4. As it will be necessary to reverse and remand the cause for the errors already noticed, it may be of service, in connection with further proceedings in the trial court, to briefly state the rule of contributory negligence as applicable to this particular class of cases. The plaintiff was, at the time of her injuries, as tenant of the premises from month to month, entitled to use all these steps, not only for personal access to her own premises, but for the access of others having business or social relations with her, which might make it necessary or desirable to her. All such persons passing in such capacity to and from her flat were, by the fact of her tenancy, entitled to reasonable care on the part of the owner of the premises with respect to such conditions of safety. She had paid her rent in advance and her title to these facilities was complete. The free and constant use of these steps was necessary to the enjoyment of her own residence, and the law does not require her to cease that enjoyment the moment the owner chooses to permit it to become dangerous. While the approach is in the possession of the owner, the easement is a part of her own premises, and the tenant may still continue to use it in the exercise of reasonable care to be determined in view of the extent and nature of the danger created by the owner's neglect or refusal to perform his duty, and her own right of enjoyment. *Home Realty Co. v. Carius, supra*; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295.

[12] If upon due notice or with knowledge of such dangerous condition he still fails to make the necessary repairs, she is not bound to vacate the premises and resort to her suit in damages for relief, but may, in the exercise of such care as is indicated by the danger, continue to use, the premises, if practicable to do so with reasonable safety. The landlord may not set a deadfall before the front door of his tenant, and claim exemption from damages for the consequent injury on the sole ground that he had succeeded in making it dangerous to enter or

leave by that route. In such a case the jury may weigh the need of the tenant in the same balance into which the cupidity of the owner has already been cast. It is unnecessary to express any opinion on the propriety of the remaining instructions.

The judgment of the circuit court for the city of St. Louis is reversed, and the cause remanded for further proceedings in accordance with the principles herein stated.

RAGLAND and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

All the judges concur.

**COMMONWEALTH FINANCE CORPORATION v. MISSOURI MOTOR BUS CO. (No. 22366.)**

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921.)

**1. Receivers §22 — Petition held to show cause for appointment.**

A petition, alleging that the motor busses of defendant corporation were purchased with plaintiff's funds intrusted to it for the purchase notes and chattel mortgages and by him misappropriated, and that the corporation had since mortgaged its busses to its codefendant, and was refusing to account to plaintiff for the money so misappropriated, states facts sufficient to authorize the appointment of a temporary receiver to take possession of the defendant corporation's property pending the determination of the suit.

**2. Appeal and error §955—Refusal to revoke receivership reversible only for abuse of discretion.**

On an appeal from an order refusing to revoke the appointment of a temporary receiver, the order will not be reversed, unless it appears to be the result of a palpable abuse of the trial court's discretion.

**3. Receivers §58—Conflicting evidence held not to show abuse of discretion in refusal to revoke appointment.**

Conflicting evidence as to whether the property of defendant corporation was purchased by misappropriated funds belonging to plaintiff, or whether the funds of plaintiff were used in the purchase of chattel mortgages, as authorized by it, which could not be enforced because it was a foreign corporation not authorized to do business, held not to show an abuse of the trial court's discretion in refusing to revoke the appointment of a temporary receiver, whose duties were only to preserve the property pending the final determination of the disputed issues.

Appeal from St. Louis Circuit Court;  
Charles B. Davis, Judge.

Suit by the Commonwealth Finance Corporation against the Missouri Motor Bus Company, a corporation, and another. From an order refusing to revoke an interlocutory order appointing a temporary receiver, the named defendant appeals. Affirmed.

E. H. Wayman, of St. Louis, for appellant Missouri Motor Bus Co.

Nagel & Kirby and E. P. Griffin, all of St. Louis, for respondent.

RAGLAND, C. This is an appeal from an order of the circuit court of the city of St. Louis refusing to revoke an interlocutory order appointing a temporary receiver.

The petition which was filed June 8, 1920, alleged, in substance, that the plaintiff was a corporation engaged in the city of New York and elsewhere in the purchase of chattel mortgages and other liens on automobiles, trucks, and motorcycles; that one Frazier had theretofore been appointed its agent and authorized to act for it in the city of St. Louis and territory tributary thereto, in the investment of its funds in such securities in conformity with methods prescribed by it; that said Frazier, while purporting to act as its agent, but wholly without the scope of his authority as such, and without the knowledge or consent of plaintiff, had invested more than \$100,000 of its funds in promoting, organizing, and incorporating the defendant, Missouri Motor Bus Company, and in purchasing for it a large number of motor busses which it was operating on the streets of the city of St. Louis; that all the property in the possession or under the control of said defendant had been acquired with plaintiff's money so unlawfully furnished it; that said defendant, acting in collusion with said Frazier, was refusing plaintiff an accounting thereof; that plaintiff was entitled to have an accounting and to have the property so unlawfully purchased with its money impressed with a lien; and that said defendant was insolvent and was operating at a daily loss. It was also alleged that the defendant, Missouri Motor Bus Company, had fraudulently given its codefendant, Tower Grove Bank, a chattel mortgage on all of said property, purporting to secure a note of \$30,000. The prayer was for an accounting of all moneys received by defendant, Missouri Motor Bus Company, through Frazier, that a lien be decreed in plaintiff's favor on all the property acquired with its funds, and for a receiver pending the litigation, etc.

In response to an order to show cause why a temporary receiver should not be appointed, the defendant, Missouri Motor Bus Company, hereinafter referred to simply as the defendant, filed a return, in which it denied that Frazier had used any of plaintiff's funds in promoting, organizing, and incorporating

said defendant, or had furnished any such funds for it to buy motor vehicles, except upon chattel mortgages and in conformity with plaintiff's methods of transacting business. It further averred that the notes and mortgages so taken by plaintiff through its said agent were void because they were usurious, and because plaintiff was a foreign corporation, and at the time of taking them was not licensed to do business in this state.

A hearing was had on the allegations of the petition, the return of the defendant to the order to show cause, and affidavits and depositions filed by the respective parties. The hearing resulted in an order appointing a receiver. A motion to revoke the order was overruled, and this appeal followed.

[1, 2] A reading of the petition makes it obvious that if the truth of its allegations is established plaintiff is entitled to the relief it seeks, and that such relief would in all probability be ineffective or entirely thwarted without the appointment of a receiver. Under such circumstances the circuit court, in the exercise of its general chancery jurisdiction, as well as under the statute (section 2018, R. S. 1909), was authorized to appoint a receiver if it deemed it necessary. And on an appeal from its order refusing to revoke such appointment we are not at liberty to set the order aside or reverse it unless it appears to be the result of a palpable abuse of the discretion committed to that court. *Abramsky v. Abramsky*, 261 Mo. 117, 168 S. W. 1178; *Stark v. Grimes*, 88 Mo. App. 409.

[3] While this is technically an appeal from an order refusing to revoke an order appointing a receiver, in conformity with the statute allowing appeals from such interlocutory orders, the propriety of the appointment in the first instance is the matter really involved, as the motion to revoke was filed and overruled immediately following the order making the appointment. In reviewing the action of the trial court, therefore, we should look to the same matters that were presented to it for consideration on the application for a receiver, namely the petition, the return to the order to show cause, and the evidence submitted by the parties in the form of affidavits and depositions in support of their respective contentions. As the merits of the cause are not before us, but merely the propriety of appointing a receiver, no useful purpose would be subserved by a statement and critical examination of the evidence at length. On the part of the plaintiff it fairly supported the allegations of the petition, except that there was no direct evidence that any of plaintiff's funds were used in promoting or incorporating defendant. To be more specific, the evidence in part tended strongly to show that Frazier and one Martin, a dealer in trucks used in the construction of motor busses, were the active promoters who procured the incorporation of de-

fendant; that while defendant's articles of incorporation alleged that its capital stock was \$600,000, and that one-half thereof had been paid up, no part of it had in fact been paid; that it had no operating capital; that all its physical property had been bought by Frazier—most of it from Martin—and paid for entirely with plaintiff's money; that thereafter Martin in the name of defendant had mortgaged all of its property to the Tower Grove Bank for \$50,000 and appropriated the money; and that, when plaintiff started an investigation of defendant's affairs and Frazier's dealings with and for it, Martin disappeared, and with him defendant's corporation records, if it ever had any.

Defendant's evidence, on the contrary, tended to show that, while Frazier as plaintiff's agent had financed all of its purchases of motor busses and trucks, he had done so in strict conformity with the authority conferred upon him by his principal; that on each of such purchases the defendant had paid one-fourth or one-third of the purchase price out of its own funds, and by prearrangement had given the seller a note and mortgage, according to the terms and on forms prescribed by plaintiff's agent, who thereupon took an assignment of same and paid for defendant the remainder of the purchase money; that there had been 19 such transactions, but that defendant was able to produce but two of the notes and three of the mortgages because an agent of plaintiff's had purloined the remainder of the securities from Frazier's office. In this connection it might be observed that if Frazier had ever caused any such mortgages to be filed or recorded defendant would not experience the difficulty of which it complains in making this proof.

The foregoing is a brief summary of the evidence offered by both sides. On that touching the abstraction of notes and mortgages from Frazier's files, defendant argues that plaintiff found itself in the predicament of having invested more than \$100,000 in securities that were worthless and unenforceable, and that it found it necessary to make away with them in order to have a pretext for following its money into defendant's property on equitable principles, and thereby avoid the consequences of having failed to comply with our laws, which prescribe the conditions upon which a foreign corporation may transact business in this state. But it is apparent that the truth of these charges, as well as their value as a defense to plaintiff's action, if established, can be determined only upon a trial of the cause on the merits. And the same is true with respect to the matters affirmed by plaintiff and denied by defendant. The sole purpose of the appointment of a receiver is to control and preserve property pending litigation, that the relief awarded, if any, may be

effective. If no receiver were appointed in the instant case until after a trial on the merits, there would then be no occasion or necessity for such an appointment, nor would there, in all probability, be anything for a decree to operate upon, if plaintiff obtained one. We are unable to discover from the record before us wherein the circuit court in any respect abused a sound judicial discretion in refusing to revoke its order appointing a receiver. Its action in that respect and the order made in connection therewith are therefore affirmed.

SMALL and BROWN, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

All the Judges concur.

**CITY OF BRUNSWICK ex rel. BARKWELL et al. v. BENECKE. (No. 22094.)**

(Supreme Court of Missouri, Division No. 2.  
June 23, 1921. Motion for Rehearing  
Denied July 19, 1921.)

**1. Courts** §488(1)—Supreme Court to consider transferred case as if obtained by ordinary process.

Where a case is transferred to the Supreme Court by one of the Courts of Appeal for the reason that a judge believes the decision of that court in conflict with the decision of another Court of Appeal, it is the duty of the Supreme Court to hear and determine the cause as in case of jurisdiction obtained by ordinary appellate process; in other words, the question of conflict drops out of the case, under Const. Amend. 1884, § 6.

**2. Time** §6—Two issues of weekly paper a 14 days' publication of notice of improvement resolution.

Under Rev. St. 1909, § 9411, authorizing improvement of streets in cities, and requiring notice of resolution to be published for two consecutive weeks, publication of such resolution in two issues of a weekly paper was sufficient, as notice when published in a weekly paper does not cease to impart notice the day after the paper leaves the press, but continues until the issuance of the next current number.

**3. Municipal corporations** §293(2) — Resolution as to street improvement properly included establishing of grade.

A resolution of a city reciting that "the surface of the roadway when said work is completed shall be at the established grade thereof, all according to plans, profiles, and specifications therefor filed by the proper officer with the city clerk of said city. The fills and cuts necessary to bring to the established grade that part of the roadway of said Broadway street proposed to be graded and paved are shown on said profile," complied with the requirement of Rev. St. 1909, § 9411, as to in-

cluding and describing in the resolution the work of bringing such street to the established grade.

**4. Municipal corporations** §362(1)—Notice to begin work may be waived by contractor by commencing work.

Where ordinance for street improvement under Rev. St. 1909, § 9411, provided that the improvement should be commenced within one week from the delivery to the contractor of written notice, and be fully completed within 60 days thereafter, the contractor, though entitled to the notice to begin work, could waive such notice by commencing work.

**5. Municipal corporations** §568(2)—Intention to waive notice to commence improvement shown by acts and conduct.

Intention of a contractor to waive notice to begin work on a street improvement under Rev. St. 1909, § 9411, may be shown by acts and conduct of the parties from which an intention to waive might be reasonably inferred, express declarations being unnecessary.

**6. Municipal corporations** §446—Tax bill issued for street improvement held void.

Where ordinance for street improvement under Rev. St. 1909, § 9411, provided that the work should be completed within 60 days, and it was not completed until the expiration of 135 days, a tax bill issued for the work was void, though contractor waived notice to begin work, no extension of time was asked or given, and ordinance contained a penalty proviso.

Appeal from Circuit Court, Chariton County; Fred Lamb, Judge.

Action by the City of Brunswick, on the relation of George W. Barkwell and others, against Otto K. Benecke. Judgment for plaintiffs, and defendant appealed to the Court of Appeals, which transferred the case to the Supreme Court. Reversed.

F. C. Sasse, of Brunswick, and O. P. Ray, of Keytesville, for appellant.

E. C. Anderson and Russell E. Holloway, both of Columbia, and Willard P. Cave, of Moberly, for respondents.

HIGBEE, P. J. [1] This case was transferred to this court by the Kansas City Court of Appeals, for the reason that one of the judges believed the decision of that court was in conflict with the decision of the Springfield Court of Appeals in Webb v. Strobach, 143 Mo. App. 459, 470, 127 S. W. 680. Under the Constitution it is our duty to hear and determine the cause as in case of jurisdiction obtained by ordinary appellate process; in other words, the question of conflict drops out of the case. Section 6 of Amendment of 1884 to the Constitution; Epstein v. Railroad, 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N. S.) 394, Ann. Cas. 1915A, 423.

The action is to enforce the lien of a spe-

cial tax bill issued by the city of Brunswick, a city of the fourth class, for grading and paving a part of a public street, against the property of the appellant abutting on said street and liable to taxation therefor. On May 3, 1915, the board of aldermen of the city adopted a resolution under the provisions of section 9411, R. S. 1909, declaring it necessary to bring to the established grade a designated portion of Broadway street by fills or excavations, as may be necessary, and to pave the same with vertical fiber paving blocks and asphalt filler, all upon a concrete base, 4 inches thick, according to specifications therefor filed by the proper officer with the city clerk of said city. It directed that the resolution be published for two consecutive insertions in the Brunswicker, a weekly newspaper published in said city. The resolution was published on May 7 and 14 in said newspaper.

On May 25, an ordinance was adopted requiring the designated portion of said street to be brought to the established grade and paved with 3-inch vertical vitrified paving blocks upon a 4-inch Portland cement concrete base, with an asphalt filler, and a 1½-inch sand cushion, and said improvement shall be commenced within one week from the delivery by the board of aldermen to the contractor of written notice to commence, and shall be fully completed within 60 days after the date of such notice, provided that for good cause shown the board of said city may extend the time for completing said improvement upon the application of the contractor made as soon as the necessity therefor appears, and before the expiration of the time herein fixed for the completion of the same.

The relator, Barkwell, was the successful bidder, and on June 22 entered into a written contract with the city to do the work. It provided that no additional time for the completion of the work should be allowed except for reasons that should appear sufficient to the board; working days lost on account of injunction, court proceedings, bad weather, strikes, etc., shall not be held to be working days, and shall be added to the number of days specified within which the work shall be completed. In consideration of the completion of the contract in accordance with the specifications, the contractor shall receive \$1.74 per square yard.

No notice was given the contractor to begin the work, but he did so on June 28, and completed it November 10. No extension of time was asked or given. The tax bill was issued November 19. The cause was tried to the court, and judgment rendered for the relator, Barkwell, from which the defendant appealed to the Kansas City Court of Appeals.

[2] 1. Section 9411, R. S. 1909, authorizing the improvement of streets in cities of the fourth class, reads:

"When the board of aldermen shall deem it necessary to pave \* \* \* any street \* \* \* the board of aldermen shall, by resolution, declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the board of aldermen shall have power to cause such improvements to be made, and contract therefor."

The appellant contends that three insertions are necessary to constitute a publication of the resolution for 2 consecutive weeks within the meaning of this section of the statute, and that resident owners of property liable to taxation for the contemplated improvements were entitled to file their protest within 10 days from the date of the last insertion, which would have been June 1. It is clear the publication required is for full 2 weeks or 14 days.

In Haywood v. Russell, 44 Mo. 252, 254, Judge Bliss said:

"The objection to the time of publication is not well taken. The statute requires that notice should be published for four weeks, and that the last insertion should be at least four weeks before the commencement of the term. If the first publication is for one week, surely the other three are for one week each, and it is only necessary that 'the last insertion'—not the last week—should be four weeks before the term. The notice objected to was published in a weekly paper, in four consecutive numbers, which makes four weeks. The objection assumes that the commencement of the publication should be eight weeks before the term, which is not required, nor is it required that the four weeks should end four weeks before the term. It is sufficient if it be for four weeks, and if the last insertion, which is the commencement of the fourth week, be four weeks before the commencement of the term." Wagner and Currier, JJ., concurred.

In Cruzen v. Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549, the defendant contended that a judgment for delinquent taxes was void because the notice of publication to the defendant was not published for 4 consecutive weeks. It appeared in the issues of the newspaper designated on March 7, 14, 21, and 28, 1889. In the opinion of Judge Barclay, concurred in by all the members of Division 1, it is said:

"Defendants argue that publication four times, at these intervals, is not publication for 'four weeks', and cite the argument of the Court of Appeals in State ex rel. Tucker (1888) 32 Mo. App. 620, claiming that the latter demonstrates that the ruling on this subject in Haywood v. Russell (1889) 44 Mo. 252 (where such a publication was held good), is unsound, and should not be followed.

"Whatever we might think of the ruling in the forty-fourth report as an original proposi-

tion, it has been acquiesced in so fully, and been treated as a settled point of practice in making publications in all sorts of proceedings, for so many years, that we decline to re-examine it. We consider that the rule it declares has become a rule of property, on the faith of which great numbers of titles, founded on judicial sales, depend."

*Ratliff v. Magee*, 165 Mo. 461, 65 S. W. 713, is in point. Syllabus 1 reads:

"The statute required that the notice for the final settlement of an estate should be 'published for 4 weeks' prior to the term. Held, that this statute required a notice to be published for 4 weeks or 28 days prior to the beginning of the term, but did not require that 4 weeks should intervene between the date of the last publication of the newspaper and the first day of the term; and hence a notice published in a newspaper on March 24, March 31, April 7, and April 14, prior to the beginning of the term on May 8, met the requirements of the statute and was sufficient."

The opinion was by Judge Valliant, in which all the members of the court en banc concurred on the point in question.

In *Fleming v. Tatum*, 232 Mo. 678, 135 S. W. 61, the order of publication in a tax suit was published on June 8, 15, 22, and 29. It was held in an opinion by Judge Valliant, to be a publication for 4 successive weeks.

A notice in an action against nonresidents to reform and foreclose a deed of trust was published in a daily newspaper (except Mondays) in the consecutive issues from Sunday, June 29, to July 26. The opinion, by Roy C., in Division 2, in which all concurred, held that the notice was published for 4 consecutive weeks (citing and reviewing *Haywood v. Russell* and *Cruzen v. Stephens*, supra; *Young v. Downey*, 150 Mo. 317, 51 S. W. 751; *Howard v. Brown*, 197 Mo. 36, 95 S. W. 191). *Brown v. Howard*, 264 Mo. 501, 175 S. W. 54. It will be seen that, by excluding the date of the first issue, June 29, the publication extended over a period of only 27 days.

In *State v. Tucker*, 32 Mo. App. 620, the notice for a local option election, held October 11, 1887, was published in a weekly newspaper on September 17, 24, October 1 and 8. From the first insertion to the date of the election was a period of 24 days. Obviously, the notice was not published 4 weeks, as required by statute.

In *Young v. Downey*, supra, it was held, approving *State v. Tucker*, that a notice published on September 8, 15, 22, and 29, when the term began October 2, was not a publication for 4 weeks, but only 24 days. Judge Burgess quotes the rule (150 Mo. loc. cit. 327, 51 S. W. 753) from 1 Elliott's General Practice, 450, as follows:

"Where the notice is required to be published once each week for a certain number of weeks, the full number of days necessary to constitute the requisite number of weeks must, according to the weight of authority, elapse between the

date of the first publication and the return day. So, it has been held that a statutory provision requiring publication for 'three successive weeks' means that twenty-one days must elapse between the first publication and the return day, and not simply three insertions in a weekly newspaper covering only fifteen days."

Judge Burgess, however, drew a distinction between that case and *Haywood v. Russell*, and, in effect, repudiated the *Cruzen Case*. But this court, in *Brown v. Howard*, 264 Mo. loc. cit. 504, 175 S. W. 54, expressed its approval of the *Haywood* and *Cruzen Cases*. There can be no question that on the facts the *Tucker* and *Young Cases* were soundly ruled.

In *Norton v. Reed*, 253 Mo. 236, 161 S. W. 842, the question arose over the sale of real estate by the probate court to pay debts of the decedent. The affidavit of the publisher showed that notice of the application for the order of sale was published in a weekly newspaper on April 21, 27, May 4, and May 11. The first day of the term was May 14, and the order of sale was made on the following day. The first insertion was only 24 days previous to the first day of the term. The court, however, entered an order reciting that the order of publication has been published for more than four weeks prior to the first day of the term. It was held that the recital referred to the publication as shown by the record, and (following *Young v. Downey*, supra) that the notice had been published 24 days, and not for four weeks, and that the order of sale and the deed made thereunder were void.

The Court of Appeals based its ruling on *Munday v. Leeper*, 120 Mo. 417, 25 S. W. 381, in which it was held that insertions in a weekly newspaper on August 12, 19, and 26 of notice of the granting of letters of administration was a publication for two weeks only. In *Ratliff v. Magee*, supra, 165 Mo. loc. cit. 467, 65 S. W. 715, Judge Valliant distinguishes *Munday v. Leeper* and others from *Haywood v. Russell*, supra. He said:

"These decisions are not in discord, and they are cited to show the importance of observing the difference in the context and purpose of the statute under discussion from those of other statutes in which like terms are used."

The learned Court of Appeals also relies on *State v. Dobbins*, 116 Mo. App. 29, 92 S. W. 136, wherein the court held, in effect, that if the notice is published in a weekly paper there should be five insertions, and that a publication in four consecutive weekly issues of the paper would not meet the requirements of the statute.

In *State v. Brown*, 130 Mo. App. 214, 109 S. W. 99, Bland, P. J. (Goode and Norton, JJ., concurring), said:

"The *Dobbins Case* seems to assume that the notice ceases to be published the day after the paper leaves the press; that it does not continue to be published from one issue of the pa-

per to the next succeeding one. If this were true, a notice published in a weekly newspaper 4 times would only give 4 days' notice, and, to comply with the requirements of the statute, it would be necessary to publish the notice for 28 days in a daily paper, or for 28 weeks in a weekly newspaper. The notice, as such, when published in a weekly, does not cease to impart notice the day after the paper leaves the press, but continues, within the meaning of the statute, to be published until the issuance of the next current number of the paper, or for 7 days. The last insertion should be held to continue for the same length of time to impart notice of the election."

We approve this enunciation, and think the rule applicable to the question under consideration, and in harmony with all other rulings of this court. *Munday v. Leeper* is out of harmony with prior and subsequent decisions. To give it our sanction would needlessly breed confusion and overrule well-considered cases that have become a rule of property, on the faith of which many titles, founded on judicial sales, depend. The resolution was published for two consecutive weeks.

[3] 2. The resolution recites that—

"The surface of the roadway when said work is completed shall be at the established grade thereof, all according to plans, profiles, and specifications therefor filed by the proper officer with the city clerk of said city. The fills and cuts necessary to bring to the established grade that part of the roadway of said Broadway street proposed to be graded and paved are shown on said profile."

This complies with the requirement of section 9411, R. S. 1909, as to including and describing in the resolution the work of bringing such street to the established grade. *Phoenix Brick & C. Co. v. Gentry County*, 257 Mo. 392, 396, 166 S. W. 1034; *Blair v. Glenn*, 187 Mo. App. 392, 395, 172 S. W. 1195.

[4, 5] 3. The ordinance provided that said improvement should be commenced within one week from the delivery to the contractor of written notice, and be fully completed within 60 days thereafter, with a proviso for extension of time for good cause shown. The contractor began the work on June 28 and completed it on November 10, a period of 135 days.

When we consider the circumstances, it is evident that the giving of the notice provided in the ordinance was waived. While the contractor was entitled to notice to begin the work, there is no reason why that formality could not be waived. The intention need not necessarily be proved by express declarations, but may be shown by the acts and conduct of the parties from which an intention to waive may be reasonably inferred. 40 Cyc. 263.

[6] It is agreed that no extension of time was asked or given. There was a provision in the contract that days lost on account of injunction, bad weather, strikes, etc., should

not be held to be working days, but this term of the contract is not invoked, nor need be, because the ordinance authorized an extension for good cause. For aught that appears, the work was needlessly delayed, to the great annoyance of the public. As time was of the essence of the contract and material, the tax bill issued for the work, and here sued on, must be held void. The penalty proviso does not relieve against the requirement to complete the work within the time prescribed. *Neill v. Gates*, 152 Mo. 585, 592, 54 S. W. 460; *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 569, 83 S. W. 1062; *Gilsonite Const. Co. v. Coal Co.*, 205 Mo. 49, 79, 103 S. W. 93; 28 Cyc. 1137.

"In *French v. Wallace*, 13 Wall. 506, it is said: 'When the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed or the acts are invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise.' Accordingly, we are of the opinion that the proviso in the ordinance, requiring the completion of the improvement within a prescribed time, was mandatory, and that a compliance with it was a condition precedent to the right of the contractor to any lawful demand against the abutting landowner." *Rose v. Trestail*, 62 Mo. App. 352, 358.

In *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 568, 569, 83 S. W. 1062, it was held that the ordinance must control, and that the failure to complete the work within the time prescribed by the ordinance rendered the tax bills void. In that case the ordinance provided that a penalty of \$10 per day after the time fixed by the ordinance should be deducted. In *Gilsonite Const. Co. v. Coal Co.*, 205 Mo. 49, 79, 103 S. W. 93, 102, it was said:

"That it is not within the power of the municipal corporation to extend the time by ordinance for the completion of the work after the time for completing it has expired"—citing *Neill v. Gates*, 152 Mo. loc. cit. 592, 54 S. W. 460, and *Hund v. Rackliffe*, 192 Mo. loc. cit. 324, 325, 91 S. W. 500.

In the case last cited, the ordinance provided that the work should be begun within 10 days after the approval of the ordinance, and completed within 40 days. The ordinance was approved June 12.

"They actually began work before that date, but the fact that they did so, does not reduce pro tanto the time for the completion of the work. The 40 days for the completion of the work began to run at the expiration of the 10 days allowed for the commencement of the work, and not from the time the work was actually commenced within the ten days." 192 Mo. 322, 91 S. W. 503.



Counsel argue that since the work was to be commenced within one week from the giving of written notice, and such notice was not given, ergo plaintiff did not fail to complete the work within the time prescribed by the ordinance. We think there is no analogy between the cases, and that there is no merit in the contention.

The judgment is reversed.

All concur.

# BERNSEE v. ROBINSON et al. (No. 22023.)

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921.)

1. Deeds  $\S$ 70(1)—Defrauded vendor properly tendered conveyance of right land, and demanded reconveyance of that which she had not intended to convey.

Where plaintiff agreed to sell and convey to defendant all of certain land fronting on an avenue, except 33 feet on which a flat stood, but through the fraudulent representations and devices of defendant she was caused unwittingly to convey the ground with the flat, instead of the vacant 33 feet south of it, plaintiff properly, on discovery of defendant's fraud, tendered him conveyance of the vacant 33 feet, and demanded reconveyance of the parcel occupied by the flat.

2. Trusts  $\S$ 95—Fraudulent purchaser may be declared to hold as trustee ex maleficio.

Defendant, the purchaser of land, who deceived the vendor into conveying land other than she intended to convey, having refused, on her demand to reconvey, coupled with an offer to convey to him the land to which he was entitled, may, in the vendor's suit to set aside her deed, and to have a trust declared, be adjudged to hold legal title for the vendor, as trustee ex maleficio, and be compelled to transfer such title and account for the rents and profits and the proceeds of the mortgage be placed on the premises.

Appeal from St. Louis Circuit Court;  
Rhodes E. Cave, Judge.

Suit by Augusta Bernsee against Oscar W. Robinson and another. Decree dismissing the bill, and from an order granting plaintiff's motion for a new trial, defendants appeal. Order granting new trial affirmed, and cause remanded for a new trial.

Foster H. Brown and Alphonso Howe, both of St. Louis, for appellants.

Taylor, Mayer & Shifrin, of St. Louis, for respondent.

RAGLAND, C. This is a suit in equity to set aside a deed conveying real estate, to have a trust declared with respect to such real estate, and for an accounting of the rents and profits. The facts giving rise to the controversy, as contended for by plaintiff, may be summarized as follows:

In May, 1914, plaintiff and her daughter, Caroline Bernsee, were the owners of a tract of land in the city of St. Louis lying immediately south of Mitchell avenue, and having a frontage on Forest avenue of 473 feet. Its depth eastwardly from Forest avenue was approximately 150 feet. The north 150 feet of the tract was owned by Caroline, and the remainder by plaintiff. On plaintiff's part, and near the south end, there was a two-story brick flat, known as 1944 and 1944A Forest avenue.

On the date heretofore mentioned the defendant Oscar W. Robinson (hereinafter referred to as the defendant), called on plaintiff and her daughter, and asked if they desired to sell the real estate just described. Plaintiff told him they would sell it as a whole but not in parcels. After some discussion he told them that he thought he could find a purchaser, and went away. In August following he told them that he had found a prospective buyer who would pay \$8,500 for the entire property; he advised them that the amount offered was the fair and reasonable value of the property, and urged them to accept it; and they consented to do so. A little later, September 9, 1914, he told them that he was unable to make sale of the whole tract to one individual, but that he had a purchaser for the flat at \$3,200, and another for the remainder of the tract at \$5,321. He thereupon paid plaintiff and her daughter \$50 as part of the purchase money—\$25 to be applied on each sale—and had them sign two papers purporting to be receipts for earnest money, but which were in fact option contracts. Under one, defendant was given the option of buying the flat, 1944 and 1944A Forest avenue, and the 33 feet of ground fronting on Forest avenue on which it stood, for \$3,200. Under the other, he was given the option of buying for \$5,321, a parcel of ground which was therein described by metes and bounds—it was the north 440 feet of the tract. According to the terms of the contracts the options expired September 24, 1914.

On September 18th defendant announced that the purchaser of the unimproved part of the property was then ready to close the transaction, and that he would be in a position to complete the sale of the 33-foot strip on which the flat was located within a few days. He accordingly had plaintiff and her daughter execute a deed to himself, which he had had prepared, and which he represented to them conveyed all of the property except the flat. He thereafter allowed his purported option on the flat to expire without buying it. Notwithstanding, he was all the while very optimistic about being able to effect a speedy sale of it, according to the representations he made from time to time to plaintiff. The fact was, however, that the flat had been conveyed to him

by the deed from plaintiff and her daughter. The flat was on the south 30 feet of the 440 feet conveyed by the deed, and the remaining 33 feet immediately south of this, and not conveyed, was vacant. Plaintiff knew the precise location of the flat, and, if she had read the deed carefully, would have known that the flat was included in the conveyance; but she had implicit confidence in the defendant, whom she supposed to be acting for her as her agent, and, without critically examining the deed herself, she accepted his representations that it conveyed only the vacant land.

Plaintiff remained wholly ignorant of the fact that the parcel of ground occupied by the flat was included in her conveyance to defendant until in November, 1915, when the information was volunteered to her by the scrivener who prepared the deed at defendant's instance. She thereupon went to defendant and demanded a correction of what she then supposed to have been a mistake on his part; he told her he would consult his attorney, and see what could be done; he also told her that he still thought he could sell the property, and that in the meantime she could continue to collect the rents. She did continue to receive the rents until April, 1916, at which time the defendant intervened, and caused the tenants to attorn to him. Plaintiff then consulted a lawyer, and he for her offered to convey to defendant the strip of 33 feet off of the south end of the tract of land first described, and demanded of him a reconveyance of the 30-foot strip occupied by the flat. Defendant refused to reconvey.

On the very day that plaintiff and her daughter conveyed to defendant the parcel of ground fronting 440 feet on Forest avenue, he obtained a mortgage loan thereon for \$5,500, and out of the proceeds of this loan he paid the whole of the purchase money of \$5,321. Thereafter he conveyed to one Fislser, on March 2, 1915, the north 60 feet, and on July 10, 1915, the next 340 feet immediately south. Both conveyances were made subject to the \$5,500 mortgage. On April 25, 1916, after a reconveyance of the flat had been demanded of defendant, he sold and conveyed a strip 10 feet in width lying between the ground that he had theretofore conveyed to Fislser and the 30-foot strip occupied by the flat; and on the same day, in consideration of a payment by him of \$500, he procured a release of the last-named strip from the \$5,500 mortgage, and remortgaged it for \$2,000.

The petition, after setting out the alleged facts in great detail, charges that the acts and representations of the defendant leading up to the conveyance to him of the parcel of ground occupied by the flat were fraudulent, and that such fraud operated to deprive plaintiff of her property. It seeks to have the deed from plaintiff to defendant, in so far as it relates to the land last mentioned,

set aside, and to compel the defendant to account to plaintiff as a trustee for the proceeds of the \$2,000 mortgage he put on the premises, and for the rents and profits since he has been in possession.

The defendant, in his pleading and on the witness stand, admitted that there was no intention on the part of plaintiff to convey to him the parcel of land in controversy. He asserted, however, that both he and plaintiff were mistaken as to the location of the flat; that both thought it was on the 33-foot strip immediately south of the 440 feet conveyed by the deed. He further testified that he did not discover the mistake until some 60 or 90 days after he had had a survey made—in August, 1915; that when he did discover the mistake he said nothing about it because he was too busy; and that he had never taken any steps to correct the error because no demand had been made upon him.

The answer, after setting out the alleged misapprehension under which both parties were laboring at the time the conveyance was made, avers that plaintiff, after knowledge of the mistake had come to her, never offered to rescind, and that, by acquiescing in the conveyance as made, and by failing and neglecting to offer to restore the status quo, she is estopped from asserting any right or claim to the premises in controversy.

The circuit court found the issues for the defendants, and dismissed plaintiff's bill. In due time she filed a motion for a new trial. It was sustained, on the ground that the court erred as a matter of law in dismissing the bill. Defendants appeal from the order granting a new trial.

[1, 2] Plaintiff charged in her petition, and attempted to show by her evidence, that, in consideration of the sum of \$5,321, she agreed to sell and convey all of the 473 feet of ground fronting on Forest avenue, except 33 feet on which the flat stood, and that through the fraudulent representations and devices of the defendant she was caused unwittingly to convey the ground with the flat instead of the vacant 33 feet south of it. The defendant, on the other hand, contends by his pleading and evidence that the plaintiff conveyed to him the identical 440 feet that she had agreed to sell for \$5,321, but that both he and she thought the flat was on the 33 feet immediately south of it. The difference between the two theories of fact and the legal consequences attendant upon each respectively is obvious. If the facts are as plaintiff contends, she very properly, upon discovery of the fraud, tendered defendant a conveyance of the vacant 33 feet of ground, and demanded a reconveyance of the parcel occupied by the flat. And he, having refused to reconvey, may, in a proceeding of this character, be adjudged to hold the legal title for her as trustee *ex maleficio*, and be compelled to transfer such title and ac-

count for the rents and profits and the proceeds of the mortgage he placed on the premises. If, on the contrary, the facts are as claimed by defendant, owing to the changed situation of the parties to the transaction and the intervening rights of third persons, it would be difficult, if not impossible, for the court to grant plaintiff any but the most meager relief without encroaching upon the superior equities of others. Whether, if the facts are as defendant asserts, the plaintiff is wholly without remedy, we need not consider, because she has based her right to relief on an entirely different ground.

The trial court seems to have misconceived the scope and character of plaintiff's bill. The terms "fraud" and "fraudulently" repeatedly occurring therein were evidently considered by it as having been inserted for rhetorical effect only. During the entire trial the court assumed that, under the pleadings, there was no substantial controversy as to the facts, and by its rulings, and frequent admonitions to counsel not to waste the time of the court in proving facts admitted by the pleadings, plaintiff was prevented from fully developing her case on the evidence. A subsequent realization of this fact, and of its former misapprehension as to the issues, undoubtedly caused the court to sustain the motion for a new trial, and on the ground that it had erred as a matter of law. Its order granting a new trial is affirmed, and the cause is remanded for a new trial.

BROWN and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

All the Judges concur.

#### McKENNA et al. v. LYNCH. (No. 22050.)

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921.)

1. Appeal and error §1064(1)—Death §104(1)—Instructing as to presumption of due care when there is evidence of contributory negligence is error and prejudicial.

In death action instructing that deceased is presumed to be in exercise of due care when there is substantial evidence of contributory negligence is error and such error is prejudicial.

2. Municipal corporations §705(10)—Pedestrian in highway may assume operator of automobile will exercise care in keeping lookout.

A pedestrian, equally with the operator of an automobile, has the right to be on and use the traveled part of a highway instead of the sidewalk, and it is not, as a matter of law, the duty of a pedestrian, while walking along the

traveled part of a highway, to turn about constantly and repeatedly to observe the approach of vehicles from the rear, but he may assume that the operator of an automobile will exercise ordinary care in keeping a lookout for him, etc., in view of Rev. St. 1919, § 7593.

3. Municipal corporations §705(10)—Pedestrian bound to exercise ordinary care for own protection against automobiles.

While a pedestrian in the highway has the right to assume that the operators of automobiles will be on the lookout for him, he is also required to be on the lookout for them, and bound to use ordinary care for his own protection, according to the circumstances in which he finds himself.

4. Death §104(1)—Evidence of contributory negligence held sufficient to render erroneous an instruction as to presumption of due care.

In an action against an automobile driver for death of a pedestrian, in the highway, when struck by his car at night, whether deceased pedestrian was guilty of negligence contributing to bringing about his injury and death held for the jury under the evidence so that an instruction on presumption of due care was erroneous.

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Suit by Florence McKenna and others, by Annie Green, their guardian, against Joseph A. Lynch. From judgment for plaintiffs, defendant appeals. Judgment reversed, and cause remanded.

Bryan, Williams & Cave, of St. Louis, for appellant.

John C. Robertson and Phil. H. Sheridan, both of St. Louis, for respondents.

RAGLAND, C. This is a suit by the guardian of the minor children of Michael McKenna, deceased, to recover of the defendant damages, to said minor children for the death of the said Michael in February, 1918, resulting from being struck by an automobile driven by defendant at the time westwardly along Laclede avenue in the city of St. Louis between Vandeventer and Sarah. The deceased at the time of his death was 48 years old, and was a molder, earning approximately \$1,000 per year. He left surviving him four minor children, a girl 14, and three boys, aged 13, 12, and 9 respectively.

The plaintiff's petition contains charges of negligence sufficiently broad to cover the instructions given to the jury. The answer raised the issue of contributory negligence.

There was evidence tending to show that at the time of the accident it was dark, there being some dispute as to the nearness of a street lamp to the exact scene of the accident; that the point of the accident was in the middle of the block, and at a point other than a regular pedestrian's crossing; that defendant was driving west at a speed in excess of the rate provided by ordinance, which or-

dinance was pleaded and proven by the plaintiff; that the defendant was accompanied by one J. E. Bowen, and this witness and the defendant both testified that as they drove west from Vandeventer avenue and approached the scene of the accident the headlights were burning, and that they were both looking straight ahead all of the time.

The defendant testified that on account of the condition of the weather he could only see directly ahead of him and a little to each side of the machine; that he could see the street ahead of him within the radius of his headlights, and that within that radius he could see approximately 100 feet; that he came west, driving at about 12 miles an hour; that he was looking ahead all the time; that when he first saw McKenna the latter was about 10 or 12 feet directly ahead of the machine, in front of the left wheel; that he saw him suddenly, and did not know where he came from or what he was doing, though he appeared to be walking in the same direction in which he (defendant) was going; that he had been looking straight ahead before he saw McKenna, and when he saw him he threw off his power and applied his brakes and threw out his clutch and tried to turn his car; that they came to a sudden stop, his car having skidded to an angle of about 45 degrees with the curb, and headed northwest; that the front end of the machine skidded around; that the machine did not pass over him; that after the machine was stopped McKenna was lying about 15 feet from the left rear wheel; that under the conditions as they existed at the time of the accident he could stop his Ford in about 15 feet; and that on this particular occasion he traveled about 15 feet after he tried to stop his car, although on cross-examination he admitted that his car moved a distance of approximately 45 feet after he first saw McKenna.

The testimony of defendant was corroborated by that of Bowen in all essential particulars. No other witness saw the deceased prior to the accident.

Defendant sounded no horn or other warning, and there was evidence tending to show that the defendant's automobile could, under the facts and circumstances shown in the evidence, have been stopped after the defendant saw the deceased, if the defendant had been driving at the rate of speed provided in the ordinance, or at a lesser rate of speed.

On the other hand, there was evidence tending to show that the automobile of the defendant could not, under the circumstances shown in the evidence, have been stopped after the defendant saw the deceased, even though the defendant had, at the time, been going at the ordinance rate of speed, or even at a lesser rate than that fixed by the ordinance.

The verdict and judgment were for plaintiffs. Defendant appeals.

The assignments of error are all predicated

on the action of the court in giving and refusing instructions. Among others, the following instruction was given at plaintiff's instance:

"You are further instructed that the burden of proving contributory negligence on the part of the deceased, Michael McKenna, is upon the defendant, the presumption is that the deceased was in the exercise of ordinary care for his own safety at the time of his death, and this presumption continues until overthrown by a preponderance or greater weight of the evidence."

[1] If there was any substantial evidence whatever of contributory negligence on the part of deceased, that is, evidence to take the case to the jury on that question, it was error to give this instruction. The impropriety, ordinarily, of instructing juries with respect to presumptions of fact as they relate to questions submitted for their determination after hearing evidence has been so frequently elaborated upon in numerous decisions of this court that no additional light would be thrown upon the subject by a further discussion. *State v. Ellison*, 268 Mo. 239, 187 S. W. 23; *Rodan v. Transit Co.*, 207 Mo. 392, 105 S. W. 1061; *Morton v. Heldhorn*, 135 Mo. 608, 37 S. W. 504; *Ham v. Barret*, 28 Mo. 388; *Myers v. Kansas City*, 108 Mo. 480, 18 S. W. 914. As was said by Blair J., in *State v. Ellison*, supra, 268 Mo. loc. cit. 257, 187 S. W. 26:

"To say \* \* \* in an instruction to a jury, in the case of a rebuttable presumption, and when evidence has been introduced upon the question, that 'the law presumes' so and so, and that such presumption 'must be overcome' or 'overthrown' by evidence, is sometimes useless, sometimes prejudicial, and always illogical."

To so instruct the jury under the circumstances of the instant case, if error at all, was prejudicial. *Morton v. Heldhorn*, supra.

[2] The question then is: Was there evidence on which defendant could go to the jury on his plea of contributory negligence? It must be conceded that a pedestrian, equally with the operator of an automobile, has the right to be upon and use the traveled part of the highway instead of the sidewalk; that it is not as a matter of law the duty of a pedestrian while walking along the traveled part of a highway to turn about constantly and repeatedly to observe the approach of possible vehicles from the rear (*Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94); that, on the contrary, he may assume that the operator of an automobile will exercise ordinary care in keeping a lookout; that under ordinary conditions he will be discovered by such operator; and that the latter will, as he approaches, slow down and give an audible signal with his horn (section 7593, R. S. 1919). In view of these correlative rights and duties of a pedestrian and the driver of an automobile, must it be said, as a conclusion of law

on the facts disclosed by the record in this case, that deceased at the time he was struck was in the exercise of ordinary care for his own safety?

{3, 4} Deceased was walking along on the traveled portion of a street at a place not customarily used by pedestrians; it was dark; during the brief interval in which he was observed just prior to the collision, he walked straight ahead without turning his face to the right or to the left; had he earlier taken the precaution to look to the rear he could have seen the approaching car long before it reached him; the advancing rays of the headlights must have shot past him while it was yet 100 feet away; and had he listened at all for the approach of cars he must have heard it in time to have stepped aside and avoided being struck. It is a reasonable inference that he was conscious of the approach of an automobile, or else he was so indifferent to such happening that his senses took no note of the fact. And it may be further inferred that he gave no thought to the approach of such a vehicle, or, if he was conscious of its coming, took no steps to get out of its way, because he assumed that the driver would exercise the proper degree of care, and by so doing would see and avoid striking him. Had it been broad daylight and the vision of the operator of the car clear and unobstructed, deceased would no doubt have been fully justified in acting upon such assumption. But under the conditions as they existed, it was entirely possible that the driver, even if exercising ordinary care, would not have seen him until it was too late to have avoided striking him. While a pedestrian has the right to assume that drivers of automobiles will be on the lookout for him, he is also required to be on the lookout for them, and in all cases is bound to exercise ordinary care for his own protection, according to the circumstances of the situation in which he finds himself. *O'Dowd v. Newnham*, 18 Ga. App. 220, 80 S. E. 36.

Whether deceased exercised such care, or whether he was guilty of negligence, which contributed to bring about his own injury and death, was on the facts shown by the evidence clearly for the jury to determine. It follows that the giving of the instruction in question was error.

Other instructions given for plaintiffs are criticized, but their defects, which are essentially technical, may be avoided on another trial.

For the error noted the judgment will be reversed, and the cause remanded.

SMALL and BROWN, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the Court.

All the Judges concur.

# CHAPMAN v. KANSAS CITY RYS. CO. (No. 22625.)

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921.)

1. Carriers  $\S$ 321(23)—Modification of requested instruction as to duty to stop before regular stopping place proper in view of evidence of agreement.

Plaintiff, in an action for injury in alighting just after boarding a street car on being informed that it was going to the barn, having testified to a positive agreement with the conductor that the conductor would stop and he would get off there, defendant's requested instruction was properly modified by insertion of the quoted words, so as to read as follows: Even if plaintiff did get on the car and his bundle was kicked therefrom, "in the absence of any agreement to stop, if you so find," this did not require the crew to stop the car to permit plaintiff to alight till it had reached the next regular stopping place.

2. Damages  $\S$ 158(1)—Certain personal injuries held covered by petition, allowing consideration of evidence in support.

Certain personal injuries held covered by specific pleading of the petition, so that it was proper for the jury to consider evidence in support thereof.

3. Evidence  $\S$ 540—Long time conductor qualified to testify to custom of motorman to await signal.

One who has for years been a conductor with a street railway company, and says that he knows the customs and practices on its lines, is qualified to testify to the custom of the motorman not to accelerate speed after slowing down to discharge and receive passengers, till receiving a go ahead signal from the conductor.

4. Carriers  $\S$ 315(1)—Under pleading of custom to await go ahead signal, character of signal may be shown.

Under averment of pleading that it was the custom of the motorman not to accelerate speed till receiving a go ahead signal from the conductor, the character of the signal as two bells may be shown.

5. Carriers  $\S$ 303(5)—That custom of street car motorman as to accelerating speed on signal from conductor was contrary to rules held immaterial as to liability to passenger thrown from car.

Relative to liability of a street railway company to a passenger injured by being thrown from a car, as he was about to alight, when the motorman, after slowing down accelerated speed on a go ahead signal from the conductor, it is immaterial that the custom of the motorman to accelerate speed in such case was contrary to the company's rules.

6. Carriers  $\S$ 316(3)—Street railroad presumed to know customary practice of employees continued for substantial time.

A street railroad company is presumed to have knowledge of the customary practice of

the motormen to accelerate speed of cars only on go ahead signals from conductors, if such practices have continued for a substantial time.

**7. Damages**  $\S$ 166(1)—Transcript of divorce suit of plaintiff suing for personal injury held inadmissible.

Defendant in a suit for personal injury, wherein plaintiff claimed that his sexual organs were injured and that he was impotent, held not entitled to introduce the transcript of proceedings in which plaintiff after the injury obtained a divorce from his second wife married after the accident, on petition alleging fraud and cruelty, the issues in that case not involving a matter involved in the injury case.

**8. New trial**  $\S$ 102(1)—Not granted for newly discovered facts in absence of diligence.

New trial will not be granted on the ground of newly discovered facts where by diligence all the alleged newly discovered evidence could have been had at the trial.

**9. Appeal and error**  $\S$ 1005(4)—Refusal of new trial on ground of verdict being against evidence not disturbed.

Refusal of motion for new trial is not reviewable on the ground of verdict being against weight of evidence to such an extent that the court abused its discretion in overruling it, if there was substantial evidence on the side of the verdict.

**10. Damages**  $\S$ 132(4)—\$17,000 for two hernias, one incurable, reduced to \$10,000.

Verdict of \$17,000 for personal injury causing two hernias, one incurable, held excessive to the extent of \$7,000.

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

Action by Eugene B. Chapman against the Kansas City Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed, on condition of remittitur.

Charles N. Sadler, of Kansas City, for appellant.

T. J. Madden, of Kansas City, for respondent.

GRAVES, J. This is the second appeal in this case. It is here upon substantially the same facts. These facts Goode, J., carefully summarized upon the previous hearing. *Chapman v. Kansas City Rys. Co.*, 217 S. W. 290. We refer to that opinion for the facts, but counsel for respondent say that we erred in that statement of facts when we said that the plaintiff followed the slowly moving car to the middle of Thirty-Fourth street, before he boarded it. Both parties refer to the old abstract of the record evidence, and much of the present evidence was read from that record. We shall not go to the old abstract. It suffices to say that the plaintiff in the present record says that he was at the usual stopping place for passengers to leave and to enter cars, and that as a

passenger alighted from the slowly moving car, he got on the car. This, with the statement of facts by Goode, J., will suffice for a statement of the present case. This opinion must be read in connection with our previous opinion. It will be noted that we reversed the previous judgment for an error in an instruction. The present record shows that the plaintiff followed the suggestions of this court in the matter of this instruction. Such other details as may be necessary for disposing of the present appeal had best be outlined in the opinion.

I. We have been favored with a brief of 184 pages by the appellant. Of this some 32 pages are devoted to a statement of facts, and a digest of the evidence. Seventy-nine pages are devoted to the question that appellant's demurrer to the evidence should have been sustained. It is not claimed that the evidence tending to show liability, so far as the plaintiff's case is concerned, is materially different from that of the previous hearing in this court. The pleadings are the same. When here before we said:

"We dismiss the error assigned because of the court's refusal to direct a verdict for defendant, with the remark that the evidence sufficed to carry all the issues to the jury."

We see no reason to change that ruling. The principal instruction for the plaintiff is again assailed. We reversed the judgment on the previous hearing for errors in this instruction, but it has been reformed in accordance with the views that we then expressed. As appears in the present record it accords with our ruling, and that question drops out of the case. This disposes of the first 2 assignments of errors. In the brief counsel make 8 assignments, in their formal assignment of errors. The remaining 6 were not discussed when the previous hearing here was had, and hence are questions now for review.

II. The third assignment of error goes to the refusal and modification of the defendant's instructions. Defendant only requested 20 instructions, and of these the court gave 15, modified 1, and gave it as modified, and refused 4, and as to the modification of instruction 9, and the refusal of 17, 18, and 19 and 20, this assignment of error is lodged. Instruction No. 9, as modified, reads:

"The court instructs the jury that, even if plaintiff did get upon the car and his bundle was kicked or thrown therefrom, 'in the absence of any agreement to stop, if you so find,' this did not require the train crew to stop the car for the purpose of permitting him to alight until it had reached the next regular stopping place, and if they failed or refused to stop the car, under such circumstances they were not guilty of any negligence, and you cannot find a verdict for plaintiff for that reason."

[1] The clause which the court added is placed in quotations. In view of what we said at the previous hearing, this amendment was proper. 217 S. W. loc. cit. 293. The instructions refused are short, and we copy them, thus:

"D. 17. The court instructs the jury that all evidence of injury to sexual organs of plaintiff is withdrawn from your consideration, and you will not consider same in arriving at your verdict."

"D. 18. The court instructs the jury that all evidence of bulging or protrusion of upper part of abdomen and stomach is withdrawn from your consideration, and you will not consider same in arriving at your verdict."

"D. 19. The court instructs the jury that all evidence of impotency is withdrawn from your consideration, and you will not consider same in arriving at your verdict."

"D. 20. The court instructs the jury that all evidence of high temperature and high pulse rate is withdrawn from your consideration, and you will not consider same in arriving at your verdict herein."

"(Refused.)"

[2] The propriety of these instructions depends upon the scope of the pleadings. Instructions should not go beyond the pleadings, although the evidence may take a broad scope. The case on trial and for determination is that made by the pleadings; so that these instructions must be weighed in the light of the pleadings. The injuries alleged are thus stated in the petition:

"His skull, head, including face, jaws, mouth, and teeth, neck, back, and spine were wrenched, bruised, and injured, and in said fall he received an injury to and displacement, impairment, and disease of his abdomen and pelvis, as well as the sexual, abdominal, and pelvic organs, and all parts surrounding and adjacent thereto; the walls of the abdomen and pelvis were broken and ruptured, and hernia has resulted therefrom, which will require surgical treatment in the future; he received other internal pelvic and abdominal injuries, but the exact nature and extent of the same he is unable to describe, other than that he experiences great discomfort, fever, aches, and pain; his right hand and the fingers thereof were injured, sprained, and broken, and the use of said hand has been greatly impaired; his left knee was bruised and injured; he was injured in his brain and mind and spinal cord and nerves, and his nervous system was shocked, injured, and diseased as a result thereof, and he still suffers mental worry and disturbed rest; his kidneys were injured, and he still suffers discomfort, pain, and disease resulting from same. Plaintiff was bruised and injured in and on all parts of his body, organs, and limbs, and from all of said injuries, which are permanent and progressive in their nature and character, he has been made sick, sore, and disabled, caused to suffer great bodily pain and mental anguish, he is unable to stand erect, his general health has been impaired; he has been rendered sexually impotent, and his entire body weakened and diseased. At present and since

said injuries plaintiff has suffered from a high pulse, increased temperature, headaches, stomach sickness, and general physical disability, and plaintiff has been unable to follow any gainful occupation, has lost time from his work and business in the way of salary and earnings, has expended money for medical and surgical attention, and, owing to the nature, character and extent of said injuries, plaintiff will continue to suffer in the future and be permanently crippled and disabled, and prevented from following any occupation, and will be compelled to expend and incur obligations for medicines and medical and surgical attendance and treatment in endeavoring to effect a cure of said injuries."

These charges of injuries covered the body and most of the organs thereof, as the snow of winter covers a fallen tree. The evidence sought to be withdrawn by these instructions was in direct support of some injury specifically pleaded. We admire fighting lawyers, but, in view of the pleadings in this case, we should not have been called upon to pass upon the propriety of these instructions, in view of the pleadings as to injuries suffered. The trial court was right in refusing each and all of them. He had to but glance at the petition.

III. The fourth assignment of error goes to the admission of improper evidence, and we are cited to 44 pages of the record, as well as parts of the brief, for the facts. Taking the first complaint made in the brief, it is said that there was error in permitting William C. Davisson to testify to the custom of giving signals where the car did not actually stop for the passengers to alight from and the passengers to board a slowly moving car. Davisson had served for many years as a conductor on this railway system, and at the time of the accident was running over the line upon which plaintiff was injured. The petition thus specifically pleads a custom or usual course of conduct by defendant:

"It was usual and customary at the time hereinafter mentioned for defendants and their servants to slow down their cars to discharge and receive passengers and to receive and discharge them while cars were in motion, and in such instances it was usual and customary for the motorman to accelerate or resume his ordinary speed upon receiving a go ahead signal from the conductor, and not to do so until he received such signal."

[3-6] By Davisson this course of conduct and custom was shown, i. e., that the defendant would discharge passengers from a slowly moving car, and receive passengers upon such slowly moving car, at the point of this accident, as well as at other points. The complaint does not go to this portion of the testimony, but to that portion of the testimony wherein he said that they gave two bells when the conductor wanted the slowly moving car to accelerate its speed. The objections are (1) that Davisson was not

qualified to speak, (2) that the evidence fails to show the company's knowledge of it, (3) that the custom was contrary to the rules of the company, and (4) that such custom was not pleaded. Davison had worked for defendant for over 12 years. He was in position to know the customs and practices of defendant, and says that he knew them in this regard. The pleadings which we have set out say that it was not only customary for them to receive upon and discharge from the car passengers when the said car was moving slowly, but that it was customary for the motorman to accelerate the speed upon a go ahead signal from the conductor. The petition was broad enough to cover the facts testified to by this witness. That the character of the go ahead signal (as to the number of bells) could be shown under the averments of this petition is clear. The point made is hypercritical in the very extreme. Customary practices are often in contravention of rules, and if such practices continue for a substantial time the defendant is presumed to have knowledge thereof, through its supervision of the business.

For some 8 pages there is a further running attack upon other bits of testimony, but in substantial merit these attacks have far less to require our attention than the matter discussed in the beginning of this paragraph. There is no merit in any of them.

[7] IV. In the fifth assignment of error, it is said the trial court erred in refusing to admit competent testimony, and we are cited to some 10 pages of the record and the latter portion of the brief for particulars. Two of these matters are too frivolous to merit consideration. They relate to alleged restrictions upon the cross-examination of plaintiff and the witness Kinney. The third we will consider.

It appears that plaintiff had been married for the second time, and that this second marriage occurred after the accident. The fact that he was married after the accident, and that he had secured a divorce from his wife, was admitted by the plaintiff. He said that he lived with her for six months after their marriage, November 20, 1917. Without objection plaintiff was permitted to testify that he was unable to have sexual intercourse with this wife. He was then asked "How long after you were married before trouble arose between you?" Objection was made to this question, and it was withdrawn. Prior to this, counsel for plaintiff had tried to draw out the trouble between husband and wife, but he was thwarted by counsel for defendant and the court. In this situation of affairs counsel offered a duly authenticated transcript of the divorce proceedings, which the court refused to admit, and of this the complaint is made. The grounds stated for divorce in this petition read:

"That said marriage relation was entered into by plaintiff under a gross misapprehension of the previous character of defendant and by reason of the defendant's fraud upon and deception of the plaintiff, and defendant has been guilty of extreme cruelty towards plaintiff."

The suit was in Douglas county, Neb., and the decree for Mr. Chapman was entered on July 9, 1918, after the marriage on November 20, 1917. Although personally served, the wife did not appear. The judgment sustains the grounds stated in the petition. How such could have been competent on the issues in this case we are at a loss to see. The matter of impotency is suggested, but impotency is not a ground upon which a husband usually gets a divorce from the wife. That is generally a matter for the wife to raise, and not for the impotent husband. But the issues in that case did not cover impotency, or any other matter involved here, and the trial court was right in excluding it. There is no merit in any of the contentions as to the exclusion of evidence.

V. The sixth assignment of error reads:

"The court erred in refusing to sustain the motion for new trial filed by appellant, because plaintiff was guilty of fraud and deceit in the trial of this case."

In pressing this point counsel pick out segregated portions of plaintiff's testimony upon the trial, and upon the previous trial, and draw their conclusions of fraud and deceit. They also ask us to compare segregated portions of his testimony with affidavits filed in support of the motion for new trial, and a record in a divorce suit brought by the first wife against the plaintiff which was likewise offered on the motion for new trial. The petition grounded the right of divorce upon a failure to support and desertion. This was in 1904. There were affidavits against the motion for new trial, and a careful examination of all brings us to a conclusion that the action of the trial court was right in overruling the motion on the ground of fraud and deceit. As to the discrepancies between the statements of plaintiff either on this or at previous hearings, they were either before the jury, or should have been before it in the exercise of due diligence.

[8] As to the alleged newly discovered facts, appearing by affidavits obtained and filed after the trial, it suffices to say that they were contradicted by affidavits, contra. Further, this case had its origin in 1913. Plaintiff himself carried the notice of his accident to the office of appellant a few days thereafter. Appellant has had the benefit of several prior trials, with plaintiff as a witness. By diligence it could have found out and had all the evidence alleged to be newly discovered. The point will be ruled against appellant.

[9] VI. The seventh assignment of error reads:



"The court erred in refusing to sustain the motion for a new trial because the verdict in this case is against the weight of the evidence to such an extent that the court abused its discretion in overruling same."

Why this assignment is urged in the face of our rulings we do not understand. In the first place we have adhered to the rule that the weight of the evidence is the peculiar province of the trial court. We further hold that, if there is substantial evidence to support the verdict of the jury, this court will affirm the judgment, although the trial court should have set aside the verdict, because against the weight of the evidence; this on the theory that in law cases we only examine the evidence for the purpose of determining whether or not there is substantial evidence on the side of the verdict. This court will not consider the evidence to determine its weight, nor to determine the propriety of the ruling of the lower court on the mere weight of the evidence. In the matter of determining the mere weight of the evidence, there is no discretion of the trial court which is reviewable here in law cases. Wrong action upon the part of the jury is not covered by the foregoing assignment of error, and hence the question of passion or prejudice upon the part of the jury is not before us. This we mention because of some language used in the brief.

[10] VII. The only serious question in this case is the amount of the verdict. The plaintiff was 58 years old at the time of the accident in 1913. One trial resulted in a mistrial. On the second trial we reversed the judgment of \$10,000, because of a faulty instruction. This time (the third trial), by a verdict of 10 of the 12 jurors, we have a judgment for \$17,000. The leading physician for plaintiff testified that he was suffering from two hernias, and inability to have an erection of the penis. The first hernia he describes is one between the two rectus or abdominal muscles, and just below the navel. These muscles are attached to the lower ribs, from the lower part of the breast bone at the one end and to the pubic bone below. Between the two muscles, as they run down the median line of the stomach and bowels, is an interstitial tissue, and this was ruptured, so that the inner organs bulged out considerably. This physician thought that he discovered an old tear in the right rectus muscle, which he attributed to external violence. He also found on the right side, and lower down, an inguinal hernia. This doctor also said that one muscle which attached the penis to the pubic bone had been severed. There were three doctors for the plaintiff and three for defendant. But one of the six was able to find this trouble in and about the penis. The original petition in this cause was introduced in evidence, and there was no allegation therein about this third trou-

ble; no allegation therein about impotency or a physical condition which would produce such trouble; no allegation that the sexual organs were in any way injured. Four years after the accident we find the plaintiff getting married for the second time. There is a question as to whether or not the first hernia described could have been produced by the fall plaintiff received had these rectus muscles not been weakened beforehand in some manner, and by some means. As to the inguinal hernia, all agree that its cure is a matter of a simple operation. We feel that there is no substance in the matter of alleged impotency. Plaintiff was examined for the alleged trouble in and about the penis, and, as said, only one out of the six physicians could or did discover any trouble. One of them said, being more emphatic than the others, that the claim was the merest rot. All concede the hernia in the abdomen, between the rectus muscles, and that it is permanent and incurable, and is only controlled by a bandage worn for that purpose. In view of all the facts we feel that this judgment is some \$7,000 too high, and that the cause should be reversed and remanded unless a remittitur be entered for that sum. If, therefore, the plaintiff will remit the sum of \$7,000, as and of the date of the judgment below, the judgment, thus reduced to \$10,000, will be affirmed, as and of the date of the judgment entered below; otherwise the judgment will be reversed and cause remanded.

All concur.

#### BURRUS v. HENDRICKS. (No. 22184.)

(Supreme Court of Missouri, Division No. 1  
July 11, 1921.)

1. Appeal and error  $\S$  581(1)—Abstract or record fatally defective, unless all matters of record proper shown.

Prior to the adoption of the amendment of December 31, 1920, to Rule 13 of the Supreme Court (228 S. W. viii), unless all matters of record proper were shown in the abstract of the record proper, or there was a statement, as authorized by rule 31 (228 S. W. x), that the appeal was duly taken and the bill of exceptions duly filed, the abstract of record proper was fatally defective, though such matters of record proper may have appeared in the bill of exceptions in appellant's abstract of the record.

2. Appeal and error  $\S$  590—Under rule appellant obligated to obviate objections to abstract of record by filing addition or correction.

Under the amendment adopted December 31, 1920, to rule of the Supreme Court No. 13 (228 S. W. viii), in response to respondent's timely objections in writing to appellant's abstract of the record proper, it was incumbent

upon appellant to obviate such objections by filing an additional or corrected abstract of and from the record proper, showing the record entries of the filing and overruling of the motion for new trial, and the signing, allowing, and filing of the bill of exceptions, the amendment meaning that if matters of record proper are permitted in the abstract, but are shown in the bill of exceptions, that will be sufficient, unless respondent objects, in which case appellant must file a corrected abstract.

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

Action by Ida Burrus against Valentine Hendricks. From judgment for defendant, the plaintiff appeals. Judgment affirmed.

Tom B. McGinnis and Lulu M. Collins, both of Bowling Green, Frank J. Duvall, of Clarksville, and Guy M. Wood, of Bowling Green, for appellant.

Pearson & Pearson, of Louisiana, Mo., and Hostetter & Haley, of Bowling Green, for respondent.

SMALL, C. On March 23, 1921, appellant served upon the respondent her abstract of the record and brief herein. On March 30, 1921, respondent served upon appellant his written objections to said abstract of the record, in words and figures as follows:

"In the Supreme Court of Missouri, Division No. 1, April Term, 1921.

"Ida Burrus, Appellant v. Valentine Hendricks, Respondent. Case No. 22184.

**"Respondent's Objection to Appellant's Abstract.**

"Now comes Valentine Hendricks, respondent in the above-entitled cause, and makes the following objections to the appellant's abstract of the record, together with his reasons therefor, to wit:

"Said abstract fails to set out any of the direct examination of Valentine Hendricks, and such direct examination would disclose the fact affirmatively that he made no promise of marriage to Mrs. Burrus, and it would further disclose more fully the agency of Lulu M. Collins for Mrs. Burrus, and in that respect it would further tend to justify the admission of the testimony of S. M. Gillum, a witness for respondent, who testified to a conversation between him and Lulu M. Collins, and such omitted testimonies would be useful in giving this court a clear idea of the situation, and would further tend to justify the action of the jury in its decision that there was in point of fact no marriage engagement at any time between the respondent and the appellant.

"Said abstract fails to set out any of the cross-examination of the appellant, Mrs. Burrus, which omitted testimony would bear upon same issues, and would also tend to make respondent's position in the eyes of this court justifiable and tenable in every particular.

"Said abstract fails to show in the record proper that a final judgment was entered, or that a motion for a new trial was filed and overruled, or that a bill of exceptions was allowed and filed and signed, or that an appeal

was allowed, such abstract therefore does not show facts sufficient to invest this court with full and complete jurisdiction to hear and determine this cause on its merits on account of such deficiencies.

"Pearson & Pearson and

"Hostetter & Haley,

"Attorneys for Respondent."

The original abstract of appellant contains the matters of record proper complained of by respondent in the above notice in the bill of exceptions, but not in the part of said abstract purporting to abstract the record proper. Nor does said original abstract state the appeal was duly taken, nor that said bill of exceptions was duly filed, as authorized by rule 31 (228 S. W. x) of this court.

On April 22, 1921, appellant served her additional abstract of the record upon the respondent, which contained a copy of the judgment rendered Tuesday, June 24, 1919, in the court below, but failed to contain a copy or abstract of any other entry of the record proper in the case, complained of by respondent in said objections to appellant's original abstract.

The respondent in his brief insists that said additional abstract does not comply with the amendment to rule 13 of this court adopted December 31, 1920 (228 S. W. viii). Said amendment is as follows:

"If in any case any matter which should properly be set forth in the abstract as a part of the record proper shall appear in the abstract as a part of the bill of exceptions, or vice versa, such matter shall be considered and treated as if set forth in its proper place, and all objections on account thereof shall be deemed waived, unless the other party shall, within fifteen days after the service of such abstract upon him, specify such objections and the reasons therefor in writing and serve the same upon the opposing party or his counsel; and in the event such objection be so made, the other party may within ten days from the service of such written objection upon him or his counsel, correct his abstract so as to obviate such objection, if under the facts as shown by the record proper or the bill of exceptions in the trial court, such correction can truthfully be made."

[1] Prior to the adoption of the above amendment, unless all matters of record proper were shown in the abstract of the record proper, or there was a statement, as authorized by rule 31 (228 S. W. x), that the appeal was duly taken and the bill of exceptions duly filed, such abstract of record proper was fatally defective, although such matters of record proper may have appeared in the bill of exceptions in the appellant's abstract of the record. *Tracy v. Tracy*, 201 S. W. 902, loc. cit. 903; *Squares v. Peters et al.*, 202 S. W. 530; *Livasy v. Jackson et al.*, 204 S. W. 186; *Fleiger v. U. R. Co.*, 204 S. W. 182; *Bower v. Dantel*, 198 Mo. 289, loc. cit. 317, 95 S. W. 347; *St. Charles ex rel. v. Deemar*, 174 Mo. 122, 73 S. W. 469.

[2] Respondent's learned counsel insist that under the above amendment to rule 13, in response to his timely objections in writing, above set forth, it was incumbent upon the appellant to obviate such objections by filing an additional or corrected abstract of and from the record proper, showing the record entries of the filing and overruling of the motion for new trial, and the signing, allowing and filing of the bill of exceptions.

We think, this is a correct interpretation of said amendment. Said amendment means that if matters of record proper are omitted from the abstract of the record proper, but are shown in the bill of exceptions in appellant's abstract, that will be sufficient, unless the respondent objects, as provided in said amendment, in which case the appellant must file a corrected abstract of and from the record proper, showing the record entries referred to in respondent's objections, as was required before said amendment was adopted. The appellant, in this case, having in her additional abstract only set forth a copy of the judgment, and omitted to insert therein an abstract of and from the record proper, showing the filing and overruling of the motion for new trial, and the signing, allowing, and filing of the bill of exceptions, there is nothing before us for consideration, except the pleadings and the judgment, and, there being no error upon the face thereof, under the foregoing authorities, we have no alternative except to affirm the judgment. It is so ordered.

BROWN, C., not sitting.  
RAGLAND, C., concurs.

PER CURIAM. The foregoing opinion by SMALL, C., is adopted as the opinion of the court.

All the Judges concur.

#### SMITH v. SMITH et al. (No. 20937.)

(Supreme Court of Missouri, Division No. 2  
July 19, 1921.)

1. Deeds ⚡196(3)—Undue influence not presumed from existence of relation of parent and child.

The relation of parent and child was not sufficient to justify cancellation of a deed and lease from a mother to her son without proof of undue influence, fraud, or any advantage taken by the son of the mother's weak condition of mind.

2. Evidence ⚡574—Expert evidence showing plaintiff was not of sound mind held overcome by opinion of acquaintances.

Where plaintiff at the trial eight months after execution of lease and deed was able to clearly relate transactions concerning the lease

and deed, and her evidence was corroborated by the other party to the lease and deed, and disinterested witnesses who had known plaintiff for years testified as to plaintiff's statements to the same effect at time of the execution of the lease and deed, the testimony of medical experts that plaintiff was of unsound mind and incapable of entering into a contract was overcome.

3. Deeds ⚡85—Failure of some grantees to accept does not render deed void.

Where plaintiff executed deed to her six children as an advancement, but the deed was accepted by only two, the refusal of four grantees to accept does not render the deed void as to the two who accepted it in the absence of any condition in the deed avoiding it unless accepted by all.

4. Deeds ⚡89—Landlord and tenant ⚡40—Deed and lease part of one transaction to be read together.

Where a deed and lease were executed contemporaneously as one transaction, they should be read together.

5. Deeds ⚡75—Landlord and tenant ⚡32—Acceptance of benefit of contract prevents party from having contract canceled.

Where a deed and lease were executed at the same time and as part of the same transaction, and plaintiff later demanded and accepted part of the rent specified in the lease, plaintiff is prevented from having the lease and deed canceled, although mutual mistakes in the deed and lease may be reformed.

6. Cancellation of instruments ⚡56—Canceled as to grantees not accepting.

In a suit by a mother to cancel a deed to her children, it should have been canceled as to such of the children as had refused to accept it.

7. Reformation of instruments ⚡11—Lease which fails to express intent of parties to be reformed; "fixed charges."

According to the agreement between lessor and lessee, lessee was to pay taxes and other fixed charges on land leased to him, and in return was to receive an extension of the lease after the death of the lessor, but the lease as written failed to include the agreement as to payment of interest on two deeds of trust and taxes. Held that the lease should be reformed to include the payment of taxes and interest, as the term "fixed charges" meant interest on the deeds of trust.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Fixed Charges.]

Appeal from Circuit Court, Lincoln County; Edgar B. Woolfolk, Judge.

Action by Matilda S. Smith against Thomas R. Smith and others. From a judgment reforming a deed and a lease and an order overruling plaintiff's motion for a new trial, plaintiff appeals. Reversed and remanded.

Sutton & Huston, of Troy, for appellant.  
Creech & Penn, of Troy, for respondents.

HIGBEE, P. J. Plaintiff brought this suit September 9, 1916, to cancel a lease which she had executed August 24, 1916, of her farm of 217 acres in Lincoln county, Mo., to her oldest son, Thomas R. Smith, and a deed of the same date conveying said farm to her children, Thomas R., Hugh B., George W., Grover C., Edward B., and Josephine S. Williams, subject to said lease and two deeds of trust, one for \$1,700 to Zula Thurman, dated July 18, 1913, the other for \$921.50 to her daughter Josephine S. Brady, now Williams, dated August 19, 1914.

The plaintiff's first husband died in 1888. She was beneficiary in life insurance policies on the life of her husband and another relative in the total sum of \$4,500. She lived on and managed the farm indifferently for some years after her husband's death. She later married a man by the name of Luckett, who had a large pack of hounds, built a race track on the farm, exhibited a freak animal at county fairs, squandered nearly all of her insurance money, and grossly mistreated her. All of her grown children advised her to divorce him. She did so in 1903, and paid him \$1,000 by way of settlement. She had poor health, and suffered a paralytic stroke. Her children advised her to move to St. Louis, where Thomas, Josephine, George, and Hugh lived. She did this in 1903, after selling off her live stock, farm machinery, and household goods, and leased her farm to a Mr. Hughes at an annual rental of \$620, subject to abatement on account of droughts and floods. During the subsequent years to 1915, she did not receive over \$400 per year out of the rents. This was inadequate for her support and payment of taxes, and her medical bills. Some of the time, when able, she kept boarders. The leasing of her farm, then estimated to be worth at least \$15,000, was the subject of many conferences for two or three years between Mrs. Smith, Thomas, and some of her other children. There was a fairly good house on the farm but the barn, other outbuildings, and fences were falling into decay. Owing to its distance, her age, and the impairment of her health and mental faculties, it was believed she was unequal to the task of looking after her property and protecting her interests. After paying the taxes and interest on the mortgages, there was little left to her out of the rents.

At that time there was \$1,000 arrears of rent due her from Hughes. Thomas insisted that the farm could be rented for \$500 per year, but they failed to secure a tenant who would pay that sum. She talked the matter over with him and Hugh, and probably with some of her other children. Finally, Thomas said he would take a lease on it for 10 years at \$500 per year, and pay her that sum each year, and that whatever amount it should be necessary for him to pay for permanent improvements, to the extent of \$1,500, and for taxes

and other fixed charges over the said \$500 a year, should be a lien in his favor on the land, and should be taken to extend the term of the lease after his mother's death at \$500 per year for such time as should be covered by any sum he should so advance during her lifetime, or for her benefit, or upon said property in excess of said \$500 per year. This appeared to be satisfactory to Mrs. Smith and Hugh, and accordingly she and Thomas on the evening of August 24, 1916, took the train for Troy, the county seat of Lincoln county, arriving there after midnight. The following morning they called upon Mr. Charles Martin, who had been her attorney for many years, who had secured her divorce in 1903, and attended to the settlement of her first husband's estate and other business matters. They talked the matter over with Mr. Martin, who made memoranda, and told them he was busy, and for them to go to see the farm and return the next day, which they did. Mr. Martin had written the lease and his son, Robert, the deed. They were read over, signed, and acknowledged by Mrs. Smith. Robert Martin had them recorded, and mailed them to Thomas in St. Louis, who showed them to Hugh and to Josephine in her mother's presence. Josephine, who had been a stenographer in a law office for four years, said:

"Why Mamma, you deeded everything away; you haven't got a penny, and Tom is the only one that could give it back."

Mrs. Smith was then and had been for some time living with her daughter, Josephine.

The second amended petition charges that plaintiff was without any means of support except as derived from her land, and was afflicted with physical and mental infirmities due to old age and disease, and was without previous business experience, and wholly incapable of resisting the influence of those about her, and particularly of Thomas R. Smith, who was her confidential business adviser and had an irresistible influence over her, and that by reason thereof she was induced against her will to execute the lease and deed which were set out in the petition; that she did not understand the terms and conditions of said instruments, and that they failed to reserve to her a life estate in said land, and the rents thereof during her life, but she believed said instruments were so drawn as to reserve to her a life estate in said lands and the rents accruing thereon during her life; that she did not understand that by said lease defendant was permitted to deduct the value of improvements made by him from the annual rents, but that she believed that, by the terms of said lease, she should receive \$500 annually in cash, without deductions for improvements, or any other account, and believed said lease pro-

vided that defendant should have the privilege of making permanent improvements not to exceed \$1,500, and, in case the annual rental of \$500 was insufficient to maintain plaintiff in a suitable manner, then that defendant should advance plaintiff adequate funds for that purpose during her life, and in case of such advancements being made to plaintiff, or of such improvements being made upon said land by defendant, then that this should operate as an extension of the terms of said lease after plaintiff's death for a period sufficient to reimburse defendant for such advancements and improvements at a rental of \$500 per annum, and that defendant should keep all buildings on the premises insured and pay the premiums thereon, and pay all taxes on the premises as further rental in addition to the \$500 per annum aforesaid, and believed that the children should assume and pay the debts secured by said deeds of trust aforesaid; that plaintiff did not understand that the taxes and insurance on the premises should be taken as credits on the annual rents received; that she was induced to execute the said instruments by the undue influence of the said Thomas amounting to overpersuasion and coercion, and by false representations, pretenses, and deception practiced upon her as aforesaid, and relied upon by her, and by reason of the fiduciary relation existing between them, and her implicit confidence in her said son, and by reason of plaintiff's physical and mental infirmities, and by reason that plaintiff did not understand the nature and purport of said instruments; that said lands were reasonably worth at least \$15,000, and that by their execution she had stripped herself of every vestige of property and means of support; that said deed was never delivered to any defendant other than Thomas R. Smith, and the same was executed and recorded without the knowledge of, and was never accepted by, said other defendants, but was renounced and rejected by them as soon as they learned of its execution. Wherefore, plaintiff prays that said deed and lease be canceled, and for other proper relief.

Hugh B. Smith filed an answer which was a general denial. Thomas R. Smith answered, admitting that plaintiff was, on August 24, 1916, owner of said farm, and that she was in an aged and feeble condition of mind and body, without business experience, and incapable of resisting the influence of those who might have sinister and selfish aims against her property, or who might seek to defraud her of the same; that, realizing said fact, she had, prior to said date, repeatedly requested him to enter into an agreement with her by which she would be guaranteed from said property an income of \$500 per annum, and by which said property would remain intact for her heirs, the defendants in this suit; that \$500 is the full rental value

of said property, and it was agreed that he would rent it at that sum per year, and pay her that sum annually, and whatever sums it should be necessary for him to pay for necessary improvements, not to exceed \$1,500, taxes and other fixed charges, should be a lien in his favor on the land, and should be taken to extend the term of his lease after plaintiff's death at \$500 per year for such time as should be covered by any sums he should so advance to plaintiff during her life or for her benefit or upon said property over the said \$500; that said arrangement was entered into by him at his mother's solicitation, solely for the purpose of protecting her and her presumptive heirs against the dissipation of said property in her lifetime; that the instruments drawn for that purpose are as set out in the petition; that they were drawn by his mother's counsel; that it was a mutual mistake that the warranty deed should be drawn without reserving a life estate to his mother, and he is willing that the court, by its decree, vest a life estate in said property in his mother, subject to said lease, and, if said lease fails to conform to the intentions of the parties, he consents that the court may reform it to conform to the intentions of the parties. All other allegations of the petition were denied. Defendant further says that, on December 7, 1916, after this suit was commenced, the plaintiff, with full knowledge of the nature of said lease, accepted from this defendant \$170 in part payment of the rent reserved to her in said lease. The reply was a general denial. The other defendants entered their appearance, but did not plead to the petition.

The cause was tried to the court in June, 1917, taken under advisement, and on September 28, 1917, the court entered its finding that, in order to make the deed contain the understanding of the parties, the following item should be incorporated therein, to wit: It is understood and agreed that the grantor reserves to herself in and to the lands herein described a life estate, and this deed is made subject to the life estate of the grantor during her natural life.

The court also found that there was a mutual mistake of fact made in the execution of the lease, and it was ordered and decreed that the said lease be reformed by incorporating therein the following clause, to wit:

"It is understood and agreed by the parties to this lease that the value of improvements that may be made by the party of the second part under the provisions of this lease shall not be taken as credits on the annual rents reserved, but such improvements shall operate as an extension of the term of this lease for a period sufficient to pay the party of the second part for the same at an annual rental of five hundred dollars.

"And it is further ordered, adjudged, and decreed by the court that the plaintiff and defendant Thomas R. Smith pay the costs of this

suit in the proportion of one-half each, and that execution issue therefor."

After motion for new trial was overruled, plaintiff appealed.

[1] 1. Appellant insists that, in view of the relation of parent and child between her and her son Thomas, the burden of showing fair dealing and the absence of undue influence shifted to the defendant.

There was no evidence tending to show any relation of trust and confidence between plaintiff and her son Thomas except that which exists between parent and child, and such relation is not sufficient to justify the cancellation of a deed or conveyance from a parent without showing the exercise of undue influence, or the existence of fraud, or that some advantage was taken by the son of the mother's weak condition of mind. *McKinney v. Hensley*, 74 Mo. 326, 332; *Hamilton v. Armstrong*, 120 Mo. 597, 615, 25 S. W. 545; *Doherty v. Noble*, 138 Mo. loc. cit. 32, 39 S. W. 458; *Bonsal v. Randall*, 192 Mo. 525, 531. 532, 91 S. W. 475, 111 Am. St. Rep. 528; *Huffman v. Huffman*, 217 Mo. 182, 192, 117 S. W. loc. cit. 3; *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84.

It is unnecessary, and would be unprofitable, to set out the voluminous evidence on this or any other issue in the case. It justified the learned trial court in finding that the utmost fairness and a desire to secure to Mrs. Smith an adequate income from her farm, which, from her age and infirmities, she was unable to operate, and to preserve the estate intact for her children, characterized the dealings of her son Thomas. He took upon himself a burden that he alone of all the children was able to carry, which required the advancement of considerable sums of money and his personal attention for probably 10 or more years before he could be reimbursed for his outlays.

[2] 2. It was attempted to be shown by medical experts that at the time the lease and deed were executed Mrs. Smith was of unsound mind, and incapable of entering into such contractual relations with her son. That issue was not tendered by the petition. It is not averred she was of unsound mind, or mentality incapable of transacting her business. At the trial, 8 months after the lease and deed were executed, she very clearly related the conversations and agreement between herself and her son and prior to their execution in August, 1916. The evidence of her son Thomas differed in a few details from that of his mother in this respect. This circumstance alone explodes the testimony of the medical experts. Aside from this consideration, there was the testimony of disinterested witnesses who had known Mrs. Smith for many years as to her contemporaneous statements of the transaction, which harmonized with Thomas' evidence at the trial.

[3-6] Appellant contends that, because four

of the grantees refused to accept the deed, it is therefore void; that is, all of the grantees must accept the deed before it becomes operative. *McNear v. Williamson*, 166 Mo. 358, 66 S. W. 160, is cited. This question did not arise in that case. It was there held that delivery of a deed is the consummation of the act, and in order to its accomplishment there must be a meeting of the minds of the parties on the purpose. It is admitted in the petition that the deed was delivered to Thomas. There is no question that Hugh also accepted it. The legal effect of the deed was to convey an undivided one-sixth part of the farm to each of the grantees, if accepted by them. Mrs. Smith did not write in the deed a condition avoiding it unless all the grantees should accept it. It was intended as an advancement to each of her children, and the law will not imply a condition of defeasance in case one or more of the grantees should fail to accept the deed. The petition avers that the deed was never delivered to any defendant other than Thomas, but was rejected by the other grantees. The petition does not seek relief against Thomas on the theory of nondelivery to and nonacceptance by the other grantees, but solely because of undue influence, and the failure to reserve a life estate for the grantor. The deed and lease were executed contemporaneously, as one transaction, and should be read together. The deed was made subject to the lease. This was explained by Mrs. Smith's attorney, Mr. Martin, at the time the instruments were drawn. Moreover, after Mrs. Smith had consulted her attorneys about this action, she asked Thomas to pay the first installment of rent, \$250, due January 1, 1917, saying she wanted to buy some hogs to eat her part of the damaged crop on the farm. He paid her \$170, which she paid to her attorneys on their fee in this case. She then knew all the conditions. She cannot play fast and loose. By demanding and accepting part of the rent received in the lease she affirmed the contract with her son Thomas, subject, of course, to her right to have mutual mistakes in the deed and lease corrected. But the court should have canceled the deed as to the defendants George W. Smith, Grover C. Smith, Edward B. Smith, and Josephine S. Williams, because of their refusal to accept it.

[7] 4. There remains a question about the payment of taxes and interest on the two deeds of trust on the farm, which, no doubt inadvertently, is not settled by the decree. Thomas admitted in his answer that he was to pay these, and he was not to have credit on the rent therefor. If the \$500 annual rentals should be insufficient for the comfortable support of his mother, he agreed to advance such further sums as would be sufficient. He also agreed to make permanent improvements, not to exceed the value of \$1,500, pay the taxes and other fixed charges

(which we understand to be interest on the two deeds of trust) over and above the \$500 per year, "for which he should have a lien on the farm, but such payments and improvements shall operate as an extension of the terms of this lease for a period sufficient to pay him therefor at an annual rental of \$500." There was little, if any, dispute about the facts; the pleadings entitled the parties to have the lease reformed. The decree, however, reforming the lease should include the payment of taxes and interest as above indicated.

The judgment is therefore reversed, and the cause remanded, with directions to enter a judgment and decree as indicated in the foregoing opinion.

All concur.

**COLEMAN v. NORTHWESTERN MUT. LIFE INS. CO. (No. 21903.)**

(Supreme Court of Missouri, Division No. 1. July 11, 1921.)

**1. Appeal and error §1097(1)—Decision on former appeal law of case.**

On a second appeal, the decision on the former appeal is the law of the case.

**2. Bankruptcy §143(1) — Trustee in bankruptcy of corporate beneficiary may recover despite attempted change of beneficiary in absence of ratification or estoppel.**

Though the president of the corporate beneficiary of a life insurance policy attempted to change the beneficiary and the insurance company issued a new policy to the new beneficiary, the trustee in bankruptcy of such corporation could recover on the policy, despite its insolvency and the discontinuance of premium payments by it, and though the policy had no cash surrender, loan, paid-up insurance, or other value available for the company or its creditors, if there was in fact no change of beneficiary, ratification of the attempted change, nor estoppel to deny it; there being no general rule that a trustee in bankruptcy never has rights superior to those of the bankrupt.

**3. Insurance §668(1)—Instruction change of beneficiary by direction of president of corporate beneficiary valid, though not authorized by board of directors, if president allowed complete management of corporation, held error.**

In an action on a life insurance policy, defended on the ground of a change of beneficiary authorized by the president of the corporate beneficiary, an instruction to find for defendant, even though the board of directors did not authorize such change, if all the directors and stockholders of the company for a long time prior thereto permitted the president to have the absolute management of it and such change was made pursuant to such permission, was erroneous; his authority to authorize the change being for the jury, which was the judge

of the credibility of the oral evidence elicited to establish such authority.

**4. Appeal and error §1064(1)—Contradictory instructions, one of which may have misled jury, held reversible error.**

In an action on a life insurance policy, defended on the ground of a change of beneficiary authorized by the president of the corporate beneficiary, the giving of contradictory instructions as to whether certain acts of the board of directors, after a change of personnel, by which the president's wife, whom he had designated as such new beneficiary, became a member, constituted a ratification of such change or estoppel to deny it, was reversible error, since the jury may have understood one of the instructions to authorize a finding of such ratification or estoppel from the acts of the directors after such change in personnel.

Appeal from St. Louis Circuit Court; Moses Hartmann, Judge.

Action by Frank B. Coleman, trustee of the estate of George D. Allen Paper Company, bankrupt, against the Northwestern Mutual Life Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Grant & Grant and Leahy & Saunders, all of St. Louis, for appellant.

Nagel & Kirby and Allen C. Orrick, all of St. Louis, for respondent.

**JAMES T. BLAIR, J.** This is an action on an insurance policy. This is its second appearance here. *Coleman v. Ins. Co.*, 273 Mo. 620, 201 S. W. 544. There is no allegation in the petition which suggests a fraudulent change in the beneficiary of the policy sued on. The answer avers that the beneficiary was duly changed in August, 1910, and also pleads ratification of the change and estoppel to deny the legal validity of the change. The reply denies there was a change of beneficiary, admits Allen attempted to change the beneficiary, and avers that Allen was, in August, 1910, largely indebted to the paper company; that the paper company was then insolvent; that the then existing indebtedness has since been proved up and allowed against the estate of the paper company; that there was no consideration for the transfer of the policy to Rhoda Allen; that respondent had notice that the transfer was without consideration and without authority and a fraud upon the creditors of the paper company and null and void. It is also alleged in the reply that in August, 1910, Allen, Dana, and Cavanaugh were the only stockholders and directors of the paper company; that Rhoda Allen succeeded Dana as director, and that from October 1, 1910, Allen, Rhoda Allen, and Cavanaugh were the only stockholders and directors of the paper company; that the Allens dominated Cavanaugh; and, in effect, that from October 1,

1910, there was no stockholder or director of the paper company except those "interested in the perpetration and carrying out of said fraudulent transfer in fraud of creditors."

[1] I. Many of the facts are stated in the opinion on the former appeal. *Coleman v. Ins. Co.*, 273 Mo. 620, 201 S. W. 544. Appellant reargues the questions decided on the former appeal. Respondent again presents the grounds upon which it then contended it was entitled to a directed verdict. The former decision is the law of the case. It does not appear from the arguments again advanced that there is any reason for disregarding now what was decided then.

[2] II. At the time the beneficiary was changed, or the attempt to change it was made, the policy had no cash surrender value, no loan value, no paid-up insurance value, and no value which was available to extend it as temporary insurance. This was true both under the statutes of this state and on the face of the policy. The policy was issued June 15, 1909, on the life of George D. Allen, president of the paper company. The paper company was the beneficiary and Allen reserved no right to change the policy in that respect. The premium was payable in quarterly installments, and these, to and including that due June 15, 1910, were paid by the paper company. The next installment became due September 15, 1910. August 5, 1910, Allen inquired of the insurance company concerning the requirements for changing the beneficiary. August 29, 1910, he forwarded to the insurance company a paper which on its face formally and, so far as concerned its terms, sufficiently authorized the substitution of Allen's wife as beneficiary. This paper was signed by the paper company, by Allen, as its president, and by Cavanaugh, as its secretary, and was sealed with the corporate seal. These men held these positions on the board of directors. They and Dana were then the only directors and the only stockholders. Allen then owned 2,400 shares of the stock, and Cavanaugh and Dana each owned 50 shares. Dana's testimony tended to show that during the time he continued as director he was told of the change of beneficiary. He made no complaint. The method pursued in this matter was the usual, in fact, the invariable, method by which the board of directors acted or attempted to act. Allen ran the company. He entirely dominated it and its directors. The change in beneficiary was made by issuing a policy under the same number, payable to Rhoda Allen. This was done about August 31, 1910. Thereafter, the September installment on the policy in force became due on or about September 15, 1910. To pay this George D. Allen gave his personal note, which the general agent of the insurance company at St. Louis accepted and discounted at a St. Louis

bank. The paper company neither paid nor offered to pay this installment. No director or stockholder at any time offered to pay anything or took any action with respect to the matter looking toward any claim or suggestion to the insurance company that the paper company was any longer in any way concerned with the policy. September 18 or 20, 1910, Dana sold his stock to Allen and retired from the paper company. October 1, 1910, Rhoda Allen, who had acquired one share of stock, became a director of the paper company. She and George D. Allen and Cavanaugh thenceforward constituted the directors and sole stockholders. December 3, 1910, one of the bookkeepers of the paper company paid to the bank which held it the amount of the personal note Allen had given the insurance company to pay the September premium installment. This payment was made out of the paper company's funds. Who directed this payment is not shown. The employé who attended to the matter testified that the sum used to pay the note was charged by him on the paper company's books to the personal account of George D. Allen.

There is other evidence relevant to the issues. Most of it was adverted to in the decision on the former appeal, as were most of the facts restated here. There was, again, an effort to make the financial condition of the paper company an issue in the case. The real issues in this case, as held on the first appeal, are whether there was a change in beneficiary, in the policy sued on, which was effectual to substitute Rhoda Allen for the paper company; or whether an ineffectual attempt to make a change in the beneficiary was ratified; or whether the paper company is estopped to deny the legal validity of the attempted change. Appellant is in no position to contend that the first-issued policy is to be treated as independent of that subsequently issued in the effort to change the beneficiary. If that policy is so considered, then appellant's case fails because the premium installment payment due September 15, 1910, was not made by the paper company or any one for it. If he contends that the second policy which, according to the insurance company's custom in such circumstances, was issued in the attempt to change the beneficiary, was, in legal effect, but a continuance of the original policy, and that the premium installment paid thereon by George D. Allen carried the policy for the paper company, then his position must be that the attempted change in beneficiary was a nullity and that there was no ratification and there is no estoppel, and that the death of Allen entitled the paper company, and appellant as its trustee, to the fund arising from the policy.

There is no question of setting aside the change of beneficiary as a fraud upon creditors. The question is whether there was in fact such a change, or whether a formally



ineffective change was ratified, or there arose an estoppel to deny the sufficiency of the execution of the change. Concerning the question of the insolvency of the paper company, the ruling on the former appeal is adhered to. That the paper company, solvent or insolvent, could have discontinued premium payments and dropped the policy is beyond question. That it did discontinue premium payments is clear from the evidence. That the policy, when this was done, had no cash surrender value, no loan value, no paid-up insurance value, or any value which either the policy or our statutes made available for either the paper company or its creditors, is indisputable on this record. Nevertheless, this does not defeat this action if there was neither change in beneficiary, ratification, nor estoppel. From these observations, as well as from the former decision, it may be seen that this court did not and does not announce any general rule that a trustee in bankruptcy never has any rights superior to those upon which the bankrupt might have insisted. The facts of this case are, as heretofore pointed out, wholly different from those of the cases upon which appellant relies.

[3] III. Complaint is made of the instructions.

(1) Instruction 8, given at respondent's instance, reads thus:

"The court instructs the jury that if you find and believe from the evidence that for a long period of time prior to and up to the time of the alleged change of beneficiary in the policy, from the Garnett & Allen Paper Company to Rhoda Allen, all the directors and stockholders of the Garnett & Allen Paper Company (later the George D. Allen Paper Company) permitted George D. Allen, as president of said company, to have full, absolute, and complete charge of its financial and business management, and that its directors and stockholders had permitted said Allen to exercise the full powers of said company in all business matters of every character without action on the part of the board of directors; and if you further find and believe from the evidence that the said Allen executed the alleged transfer of the policy in evidence, as president, under the seal of the company, attested by the signature of its secretary, and that in executing such transfer he was exercising the full powers and the complete and absolute management and control of said company, pursuant to such permission on the part of the directors and stockholders—then your verdict must be for the defendant, even though you further find that the board of directors did not expressly or in meeting assembled authorize said transfer."

Under the rule announced in paragraph III of the opinion on the former appeal, this instruction is erroneous, as appellant now contends.

[4] (2) Instruction 7 may have been understood by the jury to authorize a finding

of ratification or estoppel upon the acts of the directors after October 1, 1910—George D. Allen, Rhoda Allen, and Cavanaugh. The court gave an instruction for plaintiff on this phase of the case which put a contrary view before the jury. The two are not in agreement, and that given for respondent may have misled the jury. Counsel for appellant include in their brief some general remarks concerning the instructions which point out nothing for decision. It may be, as they say, that there was error in the instructions ample to have reversed a judgment for either party at the application of the other. The specific complaints made are those just referred to. They apply to more instructions than those mentioned. The issue was a simple one and remains so. On the last trial the instructions are numerous and involved. Confined to the presentation of the case to the jury they need be neither numerous nor involved.

For the errors noted the judgment is reversed, and the cause remanded.

All concur, except ELDER, J., not sitting.

#### MONTAGUE v. MISSOURI & K. INTERURBAN RY. CO. et al. (No. 22132.)

(Supreme Court of Missouri, Division No. 2.  
June 23, 1921. Rehearing Denied  
July 19, 1921.)

1. Pleading  $\S$  248(2)—Amendment based on statute of another state states a new cause of action.

Where a suit is brought under the statute of one state, an amendment to the petition based on the statute of another state will be construed to constitute a new and different cause of action, but such rule is to be construed subject to the qualification that a well-defined change in the cause of action pleaded by the amendment from that originally brought must appear as in any other case.

2. Pleading  $\S$  248(10)—No departure where matter subsequently alleged strengthens position.

There is no departure where the matter subsequently alleged in a petition fortifies or strengthens the position in the original pleading, and an action brought in Missouri for wrongful death in Kansas, whose statutes were similar, was properly amended by insertion of the Kansas statutes; the original petition stating a cause of action under Rev. St. 1919,  $\S\S$  4218, 4219, and imperfectly stating a cause of action under the Kansas statutes.

3. Appeal and error  $\S$  959(1)—Pleading  $\S$  236(1)—Liberality exercised in permitting amendments.

The rule is to allow amendments to pleadings and the exception to refuse them, and the courts should not be less liberal in the con-

struction of Rev. St. 1919, § 1274, than it is in its declarations, and the discretion of the trial court, as exercised under such statute, should not be interfered with unless it appears that it has been abused, or, in other words, that injury has been suffered by reason of the amendment.

**4. Pleading** ⚡246(1)—Amendments permissible to controvert new matter set up by way of defense.

An amendment to the petition is permissible when it controverts or avoids new matter set up by way of defense, under Rev. St. 1919, § 1274.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by William A. Montague against the Missouri & Kansas Interurban Railway Company and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Kelly, Buchholz, Kimbrell & O'Donnell and Lyon & Lyon, all of Kansas City, for appellant.

Reed & Harvey, of Kansas City, for respondent Missouri & K. Interurban Ry. Co.

**WALKER, J.** This is an action brought in the circuit court of Jackson county for damages for the death of plaintiff's wife, by reason of the alleged negligence of the defendants. The latter, in addition to the railway company, are E. K. Brown and Charles F. Dinklage, doing business as the Automobile Livery Company. The substantial allegations of the plaintiff's petition are that the defendant railway company was, at the time of the accident which resulted in the death of plaintiff's wife, operating a line of interurban railway between Kansas City, Mo., and Olathe, Kan.; that the individual defendants were at the time operating an automobile line for the carrying of passengers for hire between Rosedale, Kan., and Kansas City, Mo.; that plaintiff's wife at the time of the accident was a passenger on one of said automobiles for the purpose of being carried from the Elm Ridge Golf Club, in Kansas, to her home in Kansas City, Mo.; that the individual defendants thus operating said automobile line engaged and undertook to carry plaintiff's wife as a passenger from said golf club to her home; that while said automobile in which plaintiff's wife was at the time being carried was moving eastwardly at a point in said city of Rosedale and was approaching a point on Forty-Third street, in said city, where the tracks of the defendant railway company crossed said street, an employé of the individual defendants so negligently and carelessly operated said automobile that it collided with one of the railway defendant's cars, then and there being operated by employés of

said railway company; that as a result of said collision plaintiff's wife was thrown violently to the ground and her skull crushed, from which injury she died; that her death was caused by the negligence of the defendant railway company and the individual defendants, acting through their servants, agents, and employés; that the motorman in charge of the street car of the defendant railway company was negligent, in that he failed and omitted to give any warning while approaching Forty-Third street, or while crossing the same; that he was at the time negligently and carelessly operating said street car at a high, reckless, and dangerous rate of speed; that an ordinance of the city of Rosedale prohibited said defendant railway company from operating its cars at a point where plaintiff's wife received her injuries, at a greater rate of speed than fifteen miles per hour.

Other allegations of the negligence of said motorman are that he failed to keep said street car under reasonable control so as to avoid a collision with vehicles that might be passing along Forty-Third street and across the tracks of said street car line; that by the exercise of reasonable care he could have seen said automobile approaching the point where said street car tracks crossed said street and could have stopped said car or slackened its speed in time to have avoided a collision with said automobile; that by the exercise of ordinary care said motorman realized or could have realized that if he did not stop or slacken the speed of said car said collision would occur; and that he failed and neglected so to do. Actual damages for \$10,000 are asked against the defendants.

On the day the case was set for trial the defendant railway company, having theretofore filed as its answer a general denial and a plea of contributory negligence, filed by leave of court an amended answer, alleging that the accident which resulted in the death of plaintiff's wife occurred in the state of Kansas, and that there was at the time no statute in force in that state similar to the Missouri statute, under which the plaintiff brought his suit, and that he had, therefore, no right of action under the laws of this state. In this amended answer the plea of contributory negligence was abandoned and the allegation concerning the Kansas statute substituted. On the same day the plaintiff, by leave of court, filed an amended petition, which was the same as the original, except that it was alleged therein that certain statutes, to wit, sections 7323 and 7324 and section 11829, were in force in the state of Kansas at the time of the accident, as follows:

"Sec. 7323. When the death of one is caused by the wrongful act or omission of another, the

personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"Sec. 7324. That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said action may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

"Sec. 11829. The common law as modified by the constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but such statutes shall be liberally construed to promote their object."

"That said plaintiff and his intestate were residents of the state of Missouri on the 16th day of August, 1914, and that no personal representative of deceased was appointed in the state of Kansas, or elsewhere, and that the plaintiff was the husband and next of kin of said deceased."

Thereupon the defendant railway company moved to strike out the amended petition, alleging that it constituted a departure from the original cause of action. This motion was sustained. Plaintiff refused to plead further. There was a judgment for the defendants, and, after the formal procedure necessary thereto, the case was appealed by the plaintiff to this court.

1. The gist of this action is for a breach of duty on the part of the defendants. The original petition shows that the collision which resulted in the death of plaintiff's wife occurred in the state of Kansas. The duty of obligation created by law and arising under the facts which the defendants owed to the decedent to avoid causing her death is alleged in conventional form, as well as the breach of that duty by defendants characterized as negligence, with its resultant effect. This is followed by a prayer for damages, as authorized by the statutes. This breach constitutes the ultimate fact upon which the action is based and is of primary importance, while the evidentiary facts are of secondary importance.

A comparison will demonstrate that the amended petition is in no wise different from the original, except that it pleads the statutes of Kansas defining the conditions under which a personal representative of a decedent may maintain an action for the death

of the latter; the maximum amount of damages that may be recovered therefor; to whom they shall inure; and that the widow of a decedent may sue where no personal representative has been appointed; declaring the extent to which the common law is in force in Kansas, and that the plaintiff and the decedent were residents of the state of Missouri at the time of the accident which resulted in her death. The allegations, therefore, as to the ultimate fact or the cause of the death are the same in both petitions.

[1] The ground of the defendants' objection to the amended petition on which the circuit court based its ruling striking out the same must therefore find its support in the Kansas statute incorporated therein. Preliminary to the determination of this fact, the correctness of the general rule where applicable may be conceded, that where a suit is brought under the statute of one state, an amendment to the petition based on the statute of another state will be construed to constitute a statement of a new and different cause of action. *Bolton v. Ga. Pac. Ry. Co.*, 83 Ga. 659, 10 S. E. 352; *Boston & Me. Ry. Co. v. Hurd*, 108 Fed. 116, 47 C. O. A. 615, 53 L. R. A. 193.

The rule thus announced is to be construed subject to the qualification that a well-defined change in the cause of action pleaded by the amendment from that originally brought must appear as in any other case. For example, the rule as applied in the *Bolton Case*, supra, is made dependent upon the fact that the amendment changed an action founded on a common-law right to one based on a statute. A like fact sustains the application of the rule in the *Boston and Maine Case*, supra. These cases sufficiently illustrate the application of the rule as applied to an amendment pleading another statute than that on which the action was originally based. From them it appears, as it does in other cases where the facts are similar, that it is not the fact that the amendment pleads another statute than that on which the action was brought, which renders the rule applicable, but that another and a different cause of action is thereby set up. It is not whether a change from law to law changes the cause of action, but whether the facts essential to constitute the cause of action are the same or different in the two pleadings.

As determinative of the effect of the incorporation in the amended petition of the Kansas statutes, it is necessary to consider the nature of the original action. Measured by its allegations from which we must determine the object and purpose of the pleading, and hence the character of the proceeding, we find that the right of the plaintiff to sue is found in section 4219, R. S. 1919, and that the liability of the defendants is defined in section 4218, R. S. 1919. The formal

allegations of the petition as to the duty owing by defendants to the decedent, the breach of such duty, and that such breach caused the death of the decedent, and the nature and amount of the damages prayed for indicate in the language employed that the action was based on said sections 4218 and 4219, rather than upon section 4217, R. S. 1919. A comparison of the subject-matter of these statutes with that of the Kansas statutes pleaded in the amended petition discloses no material difference between them.

The subject-matter and purpose of the two statutes being the same, if the original petition stated a cause of action under the Missouri statutes, it likewise, although imperfectly, stated a cause of action under the Kansas statutes. This is true because it is evident from the comparison of these two petitions that the character of the proof required, the measure of the damages, and the judgment authorized to be rendered upon a finding for the plaintiff are the same in both cases. Under such circumstances, the basis for the contention that such a departure, due to an alleged dissimilarity in the statutes, was created by the amendment as to change the cause of action, is of exceeding tenuity.

II. There is no dearth of authority to sustain the conclusion that a petition which states a cause of action imperfectly may be amended so as to cure the defect without running counter to the rule forbidding a departure. In *Cravens v. Gilliland*, 73 Mo. loc. cit. 528, *Sherwood* speaking for the court in a quotation from *Chitty's Pleading*, that storehouse of legal learning on the subject, said that "matter which maintains, explains, and fortifies the declaration or plea is not a departure." Later, in *Hoover v. Railroad*, 16 S. W. loc. cit. 482, the same judge tersely said that "matter which maintains a pleading is not a departure therefrom."

In *Schroeder et al. v. Edwards et al.*, 205 S. W. 47, it was held that an amended petition of judgment creditors of an Illinois corporation against former stockholders against whom creditors had recovered judgments, by confession before the clerk of an Illinois circuit court, did not state a different cause of action from a petition alleging judgment to have been recovered in the circuit court.

[2] Here and elsewhere, as the cases attest, the rule obtains that there is no departure where the matter subsequently alleged fortifies or strengthens the position in the original pleading. This may be done by restating the cause more fully or in a more specific manner. 7 *Stan. Cyc. Proc.* p. 214. An action brought in one state, in which the cause of action accrued in another, under statutes similar to our own (sections 1162 and 1163, R. S. 1919), may be

amended where the cause of action has been imperfectly pleaded, without causing a departure. In *Martin v. Cotton Oil Co.*, 194 Mo. App. 106, 184 S. W. 127, the question here involved is discussed at some length, and, among other things, the court said:

"The question of whether a change from law to law is or is not a change of the cause of action depends at times on the question of whether the facts essential to constitute the cause of action are the same or different in the two pleadings rather than whether the pleader intended the one law or the other law to apply."

In *Madden v. Railroad*, 192 S. W. 455, where it appeared that the injury occurred in the state of Kansas and none of the allegations of the petition referred to the existence of a Kansas statute, the court clearly indicates without directly ruling thereon that, where the answer of the defendant alleged by proper pleading the terms of the Kansas statute bearing on the right of the plaintiff to recover upon the facts stated in his petition, the proper course of the plaintiff, instead of replying by a general denial and proceeding to trial, was to amend his petition so as to set forth the statute of Kansas creating the cause of action upon which he sought to recover.

In *Hanson v. Springfield Traction Co.*, 226 S. W. 1, this court in effect holds that an amendment of a petition pleading the violation of a city ordinance was proper, and that the trial court erred in striking the same out. In reversing and remanding the case, Judge Goode, speaking for the court, said:

"The new ground or recovery set up in the amended petition based on violations of the city ordinances did not constitute a departure or the substitution of a new cause of action. What is relied on in support of the contention that it did is that other evidence, to wit, proof of the city ordinances, would be required to establish it that was not needed to establish a case under the first petition. That a new cause of action is substituted by an amendment, unless the same evidence will support it that would have supported the original cause of action, must mean that the same evidence will establish the event or transaction declared on as the cause of action in the original petition and in the amended one; will show the two pleadings are based on the same occurrence. It cannot mean that every detail and every item of the evidence must be exactly the same, or otherwise the right of amendment would be of little use. *Walker v. Railroad*, 193 Mo. 453, 477, et seq., 92 S. W. 83; *Clothing Co. v. Railway Co.*, 71 Mo. App. 241; *Stewart & Jackson v. Van Horne*, 91 Mo. App. 647."

In *Cunningham v. Patterson*, 89 Kan. loc. cit. 689, 132 Pac. 199, 48 L. R. A. (N. S.) 506, the court, in ruling upon this question, said:

"The existence and contents of the statute of another state are always capable of exact ascertainment and proof. With respect to a

matter of this character the same definiteness of pleading ought not to be required as in the case of the disputable facts—the statement of the special circumstances upon which an action is founded. Anything should be regarded as sufficient which advises the defendant of the nature of the plaintiff's claim. The bringing of the action amounts to an allegation that the statute of the place of inquiry authorizes a recovery; since it asserts a liability which could not otherwise exist. Here the original petition contained an allusion to the Missouri statute, for it expressly alleged that the death took place within six months prior to the commencement of the action, a statement having no possible relevancy under the Kansas act, but pertinent to that of Missouri, which limits to that period the widow's right to sue. The defendants were necessarily advised that the plaintiff sought a recovery under the laws of Missouri. They could not possibly have been misled by the failure to set out the statute. The amended petition did not state a new cause of action. It merely amplified and corrected the statement of facts constituting the only cause of action the plaintiff had or professed to have."

In Louisville, etc., *R. R. v. Pointer's Adm'r*, 113 Ky. 952, 69 S. W. 1108, a petition was filed in a Kentucky circuit court in an action for damages for the death of plaintiff's intestate. An amended petition was subsequently filed, setting out sections of the Code of Virginia, allowing a recovery by a personal representative of one whose injuries had resulted in death and providing for the apportioning of damages. The Court of Appeals of that state held that the amendment was germane in that it supplied a lacking element of the original cause of action otherwise sufficiently pleaded.

In *Tex. & Nor. R. R. Co. et al. v. Gross*, 60 Tex. Civ. App. 621, 128 S. W. 1173, the original petition by the parents of the deceased, in an action to recover for his death occurring in another jurisdiction, the state of Louisiana, alleged as damages the pecuniary loss sustained by them from the son's death and also the damages which deceased himself had suffered, as surviving to plaintiffs, both under these statutes of the state where the cause of action accrued and the statutes of the forum. In an amended petition the latter claim for damages was abandoned, and plaintiffs alleged that by the statute law of the state where the cause of action accrued they were given a right of action against defendants for the damages sustained by them, by the death of their son, caused by defendants' negligence, which statute is similar to that of the forum, giving parents a right of action for the death of their son as a result of negligence. Held that the amendment was properly allowed and did not set up a new cause of action.

In Nashville, etc., *Ry. Co. v. Foster*, Adm'r, 78 Tenn. (10 Lea) 351, the personal representative of a deceased brought suit in Tennessee against a railroad company for

killing his intestate. There was a trial and verdict for plaintiff. A new trial was granted, it having been developed that the killing took place in Alabama. An amended declaration was then filed averring the venue in Alabama and pleading the statute of that state. Defendant pleaded to the amended declaration the statute of limitations of one year. It was held that the amendment neither changed the cause of action nor the parties to the suit, nor did it deprive the defendant of any defenses which he had to the original suit, and that the amendment related to the issuance of the original summons and was issued one year after the killing.

In *Walsh v. Walsh*, 137 La. 157, 68 South. 392, a nonresident married woman was sued by attachment on a note executed by herself and her husband in Dublin, Ireland. The petition disclosed on its face that plaintiff's cause of action arose under and must be determined by the laws of Ireland. It was held that the trial court properly allowed plaintiff to amend during the trial so as to allege that the defendant was bound on the note, under the laws of Ireland, and that the trial judge erred in dismissing the amended petition.

In *Lammars v. Chicago Gr. West. R. R. Co.*, 187 Iowa, 1277, 175 N. W. 311, in an original petition to recover for personal injuries, an amendment pleading the Employers' Liability Act, made more than two years after the accrual of the cause of action, was held to relate back to the original petition and did not constitute a departure.

In *Jorgensen v. Grand Rapids, etc., Ry. Co.*, 189 Mich. 537, 155 N. W. 535, the original petition contained no allegation that the defendant was engaged in interstate commerce, but, on the contrary, pleaded a cause of action under the Michigan Employers' Liability Act (Pub. Laws Ex. Sess. 1912, No. 10). By an amendment filed more than two years after the cause of action arose plaintiff alleged that the defendant owned and was at the time the injury was received operating a railway system extending through the states of Michigan and Indiana. The court held that this amendment related back to the original petition and did not state a new cause of action.

In *Robinson v. Railway Co.*, 90 Kan. 426, 133 Pac. 537, a plaintiff by leave of court filed an amended petition reciting therein substantially the same facts as in her original petition and added allegations as to the nonresidence of the deceased and the authority to bring the action under the laws of another state. It was contended that no cause of action was stated in the original petition because the plaintiff therein did not sue as the personal representative of the deceased and it did not appear that she had the right to bring the action in her own name until the nonresidence of the deceased at

the time of the accident, and the laws of the state of Colorado were pleaded in the amended petition. The trial court overruled this contention and held that the amendment was proper and did not constitute a new cause of action. This ruling was upheld by the Supreme Court.

In *Stewart v. B. & O. R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, it was held:

"An action may be maintained in a District of Columbia to recover damages for a death caused by negligence in Maryland, since in both jurisdictions the statutes have removed the common-law obstacle to such a suit, and permitted a recovery for the benefit of the near relatives of the deceased. The fact that in Maryland the action must be brought in the name of the state, while in the district it is brought in the name of the personal representative, or the fact that the Maryland statute names as beneficiaries the wife, husband, parent, and child of the deceased, while the district statute provides for a distribution of a recovery according to the statute of distribution, does not show such an inconsistency between the two statutes as would prevent the maintenance of the suit."

In *Seaboard Air Line Ry. Co. v. Renn*, 241 U. S. loc. cit. 292, 36 Sup. Ct. 568, 60 L. Ed. 1006, in ruling upon the propriety of an amendment to a petition similar in its material features to that at bar, the court said:

"The original complaint was exceedingly brief and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce."

\* \* \* The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in section 6 that 'no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.' Whether in what was done this restriction was in effect disregarded is a federal question and subject to re-examination here, however much the allowance of the amendment otherwise might have rested in discretion or been a matter of local procedure."

\* \* \* If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time. \* \* \* But, if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested."

\* \* \* The original complaint set forth that the defendant was operating a line of railroad in Virginia, North Carolina, and elsewhere, that plaintiff was in its employ, that when he was injured he was in the line of duty and was proceeding to get aboard one of the defendant's trains, and that the injury was sustained at

Cochran, Va., through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition. Of course, the right of action could not arise under the laws of North Carolina when the causal negligence and the injury occurred in Virginia; and the absence of any mention of the laws of the latter state was at least consistent with their inapplicability. Besides, the allegation that the defendant was operating a railroad in states other than Virginia was superfluous if the right of action arose under the laws of that state, and was pertinent only if it arose in interstate commerce, and therefore under the act of Congress. In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And, this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and related back to the commencement of the suit, which was before the limitation had expired."

In *Tiffany on Death by Wrongful Act* (2d Ed.) § 202, it is said:

"The plaintiff whose right of action arises under a foreign statute must allege and prove it. Where the declaration sets out a good cause of action according to the law of the forum without alleging that the killing was in the state, the declaration will be held good as setting out a cause of action arising within the state. If the declaration fails to allege the foreign statute an amendment alleging it is not open to the objection that it sets up a new cause of action, although the period of limitation prescribed by the foreign statute has lapsed."

This rule is in harmony with that announced in other treatises on the same subject.

From all of which it appears that the courts and the texts are in accord in holding that such an amendment as was made in the instant case is proper.

[3] III. While the power of the courts in regard to the amendment of pleadings had its origin in the common law, this power has been given legislative recognition in many states, the effect of which is to amplify and liberalize the courts' rulings in that regard, limited only by sound judicial discretion applicable to the facts in each particular place.

The statute of this state authorizing such amendments is exceedingly liberal and provides that:

"The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Section 1274, R. S. 1919.

The liberal trend of this statute prompts epigrammatic interpretation of same that the rule is to allow amendments, the exception to refuse them, and that the court should not be less liberal in the construction of the statute than it is in its declarations. *Corrigan v. Brady*, 38 Mo. App. loc. cit. 657; *House v. Duncan*, 50 Mo. 453; *Lottman v. Barnett*, 62 Mo. 159; *Ensworth v. Barton*, 67 Mo. 622; *Carr v. Moss*, 87 Mo. 447.

The discretion of the trial court as exercised under the ample provisions of this statute should not be interfered with unless it appears that has been abused, or, in other words, that the defendants have suffered injury by reason of the amendment. *Wright v. Groom*, 248 Mo. 158, 151 S. W. 465; *Broyles v. Eversmeyer*, 262 Mo. 384, 171 S. W. 334.

With these textual declarations for our guidance, let us inquire how or in what manner the amendment complained of injured the defendants; this evidently being the limit in construing the power conferred by the statute in addition to that already possessed under the common law.

The amendment did not require a different character of evidence from that necessary to support the original petition. The measure of damages and the identity of the subject-matter is the same in both petitions, and a judgment rendered upon either would have constituted a complete bar to an action on the other. In the presence of these facts, there is nothing left upon which to base a contention that the amended pleading sought to impose any burden or demanded the satisfaction of any obligation other than that prayed for in the original petition. Construing the amendment, therefore, in the light of the statute, we find nothing therein which violates the rule prohibiting a departure and the consequent statement of a new cause of action.

[4] IV. The amendment of which the defendants complain was rendered necessary by their tendering an issue on the eve of the trial. Under such circumstances they are in no position to complain. We so held in *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799. A like conclusion was reached in *Hoover v. Railroad*, 16 S. W. 460, where it is said that an amendment is permissible when it controverts or avoids new matter set up by way of defense.

In an early Connecticut case it was held that, where defendant by his plea in bar had rendered it necessary that the plaintiff amend his pleading to entitle him to a recovery, such amendment might be made by replication and would not constitute a departure. *Fowler v. Maccomb*, 2 Root (Conn.) 388.

Our statute (section 1274, supra) renders the rule in the Connecticut case as to the amendment of replies applicable to petitions.

In *Friederichsen v. Renard*, 247 U. S. 207,

38 Sup. Ct. 450, 62 L. Ed. 1075, it was held that where a plaintiff was compelled by an order of the court to change his suit in equity for cancellation of a contract and debt to a suit at law for damages because of fraud, it did not constitute a departure so as to warrant the striking out of the petition or the application of the statute of limitations to the suit for damages. In the instant case the plaintiff was compelled to ask for permission to amend his petition by the act of the defendants or rather by the act of the court in permitting the defendants to file an amended answer on the eve of the trial, and consequently it comes within the rule announced in the *Friederichsen Case*, supra.

We have reviewed with care the cases cited and conclusions drawn therefrom in the defendants' brief, and do not find that they sustain the action of the circuit court in dismissing the plaintiff's petition. Its judgment is therefore reversed, and the cause remanded, with directions to set aside the order of dismissal herein, and to reinstate this case for trial.

All concur.

#### AMIS v. STANDARD OIL CO. OF INDIANA et al. (No. 21466.)

(Supreme Court of Missouri, Division No. 1.  
June 6, 1921. Motion for Rehearing  
Denied July 23, 1921.)

##### 1. Master and servant §103(1)—Employer's duty to provide appliances nondelegable.

An employer is required to provide employees with reasonably safe appliances for the work and to keep such appliances in a reasonably safe condition, and cannot delegate such duty to others.

##### 2. Master and servant §190(9) — Foreman superintending construction of tank required to furnish employees with safe appliances.

A foreman superintending construction of an oil tank 60 feet in diameter and 40 feet high from metal sheets weighing from 1,000 to 1,500 pounds is under the duty, in view of the dangerous character of the work and the expert supervision required, of providing the employees with reasonably safe appliances.

##### 3. Master and servant §107(1)—Permitting metal sheet to be hoisted by defective hooks negligence.

An employer who knowingly permitted metal hooks to be used in hoisting metal sheets weighing from 1,000 to 1,500 pounds, though hooks were in worn and weakened condition and were in danger of straightening out, held negligent.

##### 4. Master and servant §291(4)—Instruction on negligence in furnishing defective hook for hoisting held within issue.

In action for injuries to boiler maker sustained on fall of scaffold on which he was work-

ing when scaffold was struck by a metal sheet, petition held to plead negligence of employer in furnishing hooks to hoist the sheet that were in such worn and weakened condition that they were in danger of straightening out, so as to justify an instruction submitting such negligence.

**5. Master and servant §—201(1)—Negligence of fellow servant and employer actionable.**

Negligence of a fellow servant does not relieve the employer from liability, where negligence of employer contributed to injury.

Appeal from Circuit Court, Jackson County; Willard P. Hall, Judge.

Suit by Otis L. Amis against the Standard Oil Company of Indiana and George Hackett. Judgment for plaintiff, motion for new trial and in arrest overruled, and defendants appeal. Affirmed.

John H. Lucas and William O. Lucas, both of Kansas City, for appellants.

T. J. Madden, of Kansas City, for respondent.

**BROWN, C.** This is a suit for personal injury suffered by the plaintiff while engaged in work incident to his employment by the defendant corporation as a boiler maker. The defendant Hackett was the superintendent and foreman under whose direction the work was being done.

The petition states that the plaintiff was employed with others, under the direction of Hackett, in building a circular oil tank at Sugar Creek, Mo. It was about 60 feet in diameter and 40 feet high, constructed of metal sheets about 6 feet wide, 15 feet long, weighing from 1,000 to 1,500 pounds each, and curved so as to follow the contour of the tank. Wooden platforms were erected both outside and inside the structure to support the workmen while putting these plates in place. They were raised with tackle operated by horse power, and fastened in place by the workmen with bolts and rivets. At the time of the accident they were engaged in putting and fastening in place one of the top row or ring of plates. In raising this it was held by the tackle with two hooks, the points of which were inserted in the rivet holes which had already been punched in its edges. Hackett was present in charge of and directing the work. Plaintiff and one Thompson were on the inside platform. The petition states what happened as follows:

"After the last sheet on the top ring of said tank had been drawn up in place it was temporarily fastened at one end by means of a bolt or rivet, and as the same was being lifted so as to bring the entire sheet into proper position the hooks on said rope and pulley, which had been inserted into the rivet holes in said sheet, straightened out and gave way, permitting said sheet to swing loose at one end and to crash

down upon and against the platform upon which plaintiff was standing and working, thereby breaking, tearing, and knocking said platform loose and throwing the plaintiff to the iron floor of said tank, a distance of about 35 or 40 feet, injuring him as follows, to wit: He was bruised, cut, and otherwise injured in and on all parts and organs of his body, head, and limbs, but most severely in his back and spine, hips, shoulders, neck, and head."

After a description in detail of these injuries, the petition proceeds to charge negligence as follows:

"Said injuries were due to and occasioned by the negligence of said defendants in that they provided for use in lifting said metal sheet certain metal hooks which were not reasonably safe for said work, instead of using clevises or some other device that would not give way; in that said metal hooks were old, worn, and weakened and too small and weak for said work and not reasonably safe for the purposes for which defendants used them; in that defendants used draft horse power for raising said sheets in place instead of mechanical power such as steam, electricity, or gasoline. Defendants were further negligent in that they ordered and directed that said means and appliances be used in said work when they knew, or in the exercise of ordinary care could and should have known, that the same were not reasonably safe for their employees engaged in said work at said time. Defendants knew, or by the exercise of ordinary care could have known, of said conditions and defects for such a period of time prior to plaintiff's injuries that they, in the exercise of ordinary care, should have repaired, rectified, or remedied said defects, or substituted other appliances that were reasonably safe, before the date of plaintiff's injuries."

Judgment is asked for \$75,000.

The answer of the Standard Oil Company, after admitting its incorporation and denying generally all other allegations of the petition, pleads assumption of the risk "in entering the employment in which he was then engaged," and also pleads contributory negligence as follows:

"And still further answering, this defendant says that, if plaintiff sustained any injury at the time and place mentioned in his said petition, the same was occasioned by his own carelessness and negligence directly contributing thereto, in that he knew, or by the exercise of ordinary care he should have known, the danger, if any, incident to the handling and doing of the work complained of at the time and place mentioned in his said petition, and with such knowledge, or means of knowledge at his hand, if he sustained any injuries the same were on account of his own carelessness and negligence."

Hackett answers by general denial. Issue was taken upon the answer of the Standard Oil Company by replication.

At the trial the evidence tended strongly



to show the following facts, the most of which are undisputed: The plaintiff was a boiler maker working at his trade for the defendant Standard Oil Company in the construction of a circular steel oil tank, 60 feet in diameter and 40 feet high, at Sugar Creek, Mo., from steel plates about 15 feet in length, 6 feet wide, and weighing 1,100 or 1,200 pounds each. It was constructed in rings from the floor, which was of steel laid upon concrete. Each ring was put in place before the erection of the next was begun. Its height represented the width of the plates. These were raised to place by tackle running over pulleys at the top of a gin pole, and operated by horses; the driver taking signals for their movements from the foreman on the work. The structure had been completed, with the exception of placing the last plate of the top ring, which was the first work of the gang in the morning. The defendant Hackett was the general foreman of the work, and had not arrived when the men were ready to proceed, and one Snider took charge as foreman. Scaffolds had been built both outside and inside the structure, just below the bottom of the ring upon which the work was to be done. The plate was to be raised from the ground to its position over the outside scaffold and through the opening it was to fill, to be placed in the structure by the plaintiff and one Thompson from their position on the inside scaffold. It went directly from the tackle which raised it to the opening which it was intended to fill, and the duty of plaintiff and Thompson was to fasten it in place for riveting, with the help of Snider and others on the outside. For the purpose of raising it two hooks were attached to the tackle. These were made of steel or iron rods three-eighths of an inch thick and 8 inches long, attached to a ring on the tackle, and each terminating in a hook which was to be inserted in one of the rivet holes in the top of the plate. These hooks were worn in the bed where the lead would rest. They had been used on the work the day before and had straightened out twice under the weight of the sheet and were pounded back into form with a hammer while cold. They were inserted in the plate as usual, and it moved up toward its place in the tank, but while rising swung against the scaffolding and one of the hooks straightened and came out of the hole, but the other, although distorted, clung to its load, which was promptly lowered. Snider got down from his position on the outside scaffold, took the hooks, and started for the toolhouse, when Hackett arrived and asked him why the sheet had been lowered. Snider answered: "Those damned hooks have straightened out again. They straightened out twice yesterday." Mr. Hackett took the hook and bent it back, and the sheet was hooked and started up again. It was to be placed in posi-

tion and riveted on the inside of the tank, beneath the top sheet south of it and over the top sheet north of it. The men in handling them used spud bars, which were pieces of metal of from 18 inches to 45 inches in length and larger than the rivet holes punched in the plates. They were sharpened at one end to a point, the taper making them small enough to pass through a rivet hole 4 or 5 inches. When in this second attempt the sheet reached its proper position, the point of Mr. Thompson's spud bar was thrust through a rivet hole in the corner and into a corresponding rivet hole in the sheet already in place, and that corner was worked under the top sheet south of it, and it was held in that position, which was the position in which it was to be riveted into the work. When this was done it was ascertained that the north end had sagged several inches below its proper place, and its curvature at that end, where it was to be riveted over the edge of the next top plate to the north, was so great that it could not be caught with the spud bar, and Snider took his position for that purpose on the outside scaffold at about the middle of the plate. It was drawn by the tackle a foot or so higher, when the hooks again straightened, and, the south end being held fast in place by the bolt which had been inserted in the south lower corner, the north end fell with such force as to shear the inside scaffold from the wall of the tank, and it fell 30 feet or more to the floor of the tank, taking plaintiff and Thompson with it. The plaintiff survived his injuries, which are shown by the evidence to have been very serious. Mr. Hackett testifies that, when the sheet was lowered on account of the failure of one of the hooks before the accident, he put the end of it in a rivet hole and bent it to an angle of about 90 degrees. After the accident the hooks were pulled down off the gin pole, and he does not know that there was any examination made except by himself. Some one climbed the pole to get them. They were put under lock and key by a superintendent. The witness identified them by a piece broken off the point of one of them.

The foregoing fairly represents the general character of the evidence, which will be noticed more particularly as necessary. At the close of the evidence defendants asked that the jury be peremptorily instructed to return a verdict for them, which was refused, and this is assigned for error.

The court then gave for plaintiff an instruction as follows:

"The court instructs the jury that defendant the Standard Oil Company of Indiana was bound, in the specific respects hereinafter mentioned, to exercise ordinary care in providing its employees reasonably safe appliances for doing its work and also in keeping the same reasonably safe.

"If, therefore, you believe and find from the

evidence that at the time and place in question plaintiff, Otie L. Amis, was in the service of defendant the Standard Oil Company of Indiana, and that defendant George Hackett was its foreman, and that plaintiff at the time in question was under his direction and control, and that defendant company was engaged in building the oil tank mentioned in evidence, and that plaintiff was working upon the platform on the inside of said tank, assisting in placing in position a metal sheet, and that defendant Hackett was in general charge of the work of building said tank as defendant company's foreman, and that said sheet was temporarily fastened at one end, and that while it was being hoisted in an effort to put it into proper position the metal hooks holding it straightened out and gave way, thereby permitting said sheet to swing loose at one end and to crash down upon the platform where plaintiff was standing, thereby breaking and tearing said platform loose, and that plaintiff was thereby thrown to the floor of said tank and injured; and if you further believe and find from the evidence that defendant company provided said hooks, and that defendant Hackett, acting as its foreman, ordered, caused, and permitted said hooks to be used in said work at the time in question, and that said hooks were in such worn and weakened condition (if you so find) that they were in danger of straightening out and giving way when holding and lifting said sheet, and that to use said hooks in said condition (if you find it existed) was not reasonably safe for the employees doing said work, including plaintiff, and that as a direct result of said condition of said hooks (if you find it existed) the same straightened out and gave way and let the sheet swing loose as aforesaid; and if you further believe and find from the evidence that both defendants knew, or in the exercise of ordinary care could have known, of said condition of said hooks (if you find it existed) and of the danger (if any), as aforesaid, attending their use while in such condition, and that under all the facts and circumstances shown in evidence it was negligence (if you so find) for defendants to furnish, order, cause, and permit said hooks to be used in said work while in said condition (if you so find), and that as a direct result of said negligence (if any) plaintiff was injured, and that at said time and place plaintiff was in the exercise of ordinary care for his own safety—then your verdict should be in favor of the plaintiff and against both defendants.

"'Ordinary care' as used in this instruction means such care as a reasonably prudent person would ordinarily use under the same or similar circumstances.

"'Negligence' as used in this instruction means the absence of ordinary care.

"Which said instruction the court gave to the jury."

This is also assigned for error.

The defendant then asked three instructions, which, excluding the modifications in parentheses, are as follows:

"(3) If you shall believe from the evidence that the plaintiff was injured by his failure to use the spud bar that he held in his hand in adjusting and raising or lowering the sheet, or

his failure to put a bolt in the north end of the sheet at the time of raising or lowering the sheet, and that such negligence (if the jury find it was negligence) directly contributed to his injury, then he cannot recover, and your verdict will be for the defendant.

"(4) If the sheet was caused to fall by the sudden starting of the sheet upward by the team being put in motion, then the plaintiff cannot recover, and your finding will be for the defendant (unless you further find from the evidence that said sheet was caused to fall in part by the negligence of defendant in furnishing unsafe hooks, if any, as explained in other instructions herein).

"(5) The defendant cannot be held liable in this action for the negligence of any fellow servant, and for all such negligence, if any, there can be no recovery. If the sheet fell by reason of the sudden starting of the team or by the failure of any fellow servant in lowering or lifting the sheet into position, the plaintiff cannot recover, and your verdict will be for the defendant (unless you further find from the evidence that said sheet was caused to fall in part by the negligence of defendant in furnishing unsafe hooks, if any, as explained in other instructions herein)."

The court refused them as asked, but gave them as so modified. This is assigned as error. The court also, of its own motion and without objection from defendant, instructed the jury as follows:

"The law requires the defendant to exercise ordinary care, that is, such care as an ordinarily prudent person engaged in like business would have exercised under like circumstances, and required of the plaintiff the exercise of ordinary care in the discharge of his duties while in the employment of the defendant. The burden of proof is upon the plaintiff to show the failure of defendant to exercise such care, and unless you are satisfied there was such failure your verdict will be for the defendant."

The court then, at the request of defendant, instructed the jury as follows:

"(7) The court instructs the jury that an accident may happen and a person may be injured thereby that is not caused by the negligence of any person connected therewith. If the jury believe from the evidence that plaintiff was injured by reason of an accident as here defined, then your verdict must be for the defendant, and in this connection you will take into consideration all the circumstances and facts detailed in evidence, and if from such facts and circumstances you believe that plaintiff was injured accidentally, you will return a verdict for the defendant. The defendant is not liable except for negligence, and the sole negligence submitted for your consideration is, Did the defendant use, in hoisting the sheet into its position, hooks that were reasonably sound and safe, that is, such hooks as a reasonably prudent person engaged in like business would have furnished under like circumstances? If you shall believe that the defendant did so furnish hooks of such character and description, then there can be no recovery herein, and your verdict will be for the defendant.

"(8) The plaintiff can only recover if there was negligence as charged and set forth in the instructions given, and even though defendant was negligent there can be no recovery unless the same was the proximate cause of the injury, and that the plaintiff, at the time himself in the discharge of his duties as an employee of the defendant, was in the exercise of reasonable care, that is, such care as an ordinarily prudent person engaged in like service would have exercised under like circumstances. It devolved on the plaintiff to show that such negligence was the proximate cause of the injury, and unless he has satisfied you therein, your verdict will be for the defendant.

"(9) If you find the issues for the plaintiff, then in estimating his damages you can only take into consideration the loss sustained by him on account of such accident, and in considering the same you are limited to such sum in your judgment as will be reasonably fair compensation for the injury sustained by him. The law does not authorize you to penalize the defendant. It only accords to the plaintiff compensation for such injuries as he may have sustained on account of the negligence, if any, of the defendant, and if the defendant was not negligent there can be no recovery herein.

"(10) The defendant was not required to furnish absolutely safe hooks for the use of the plaintiff. All that the law required was that it should exercise reasonable care, that is, such care as a reasonably prudent person engaged in like business would have done under similar circumstances, and if it did exercise such care there can be no recovery herein, and your verdict will be for the defendant. And this is true even though plaintiff was injured by the straightening out of the hooks."

The jury returned its verdict for plaintiff for \$15,000, upon which judgment was rendered, from which, after motions for a new trial and in arrest were overruled, the defendants have appealed to this court.

1. The many assignments of error with which this record abounds all sprang from the single charge in the petition that the injury for which plaintiff sues was caused by the negligence of defendants in providing and using hooks for the suspension of the plates they were hoisting that were too small and too weak for the service, both in original structure and from the effect of previous wear and injury from their previous use in the same service. The defendants in their statement in the trial court planted themselves on this issue, and the plaintiff presents it as the theory of his right in this court. We will therefore practically confine ourselves to the phases in which it is presented here by appellants.

That the pull of the plate held by these hooks was the direct and immediate cause of this injury is admitted by all the facts. That its fall destroyed the scaffold on which plaintiff stood, and precipitated him with all its debris to the steel floor 35 feet below, is evident. That had the hooks resisted the pull and retained their hold upon it, as they were

used and intended to do, it would not have happened, is plain, and that the unfortunate result was the natural effect of their failure to perform the office for which they were used needs no further demonstration. The purpose of this inquiry is simply to fix the blame. The first element of safety in the handling of all work involving the use of deadly forces consists of appliances sufficient for the purpose, and the next is skill, care, and fidelity in their use. This skill involves an intimate knowledge of the force and operation of the machinery, the strength of the materials of which it is composed, and the consequences which may flow from the imposition of strains greater than it can bear. Care means watchfulness and attention commensurate with the danger of injury to both persons and property. Fidelity means the due appreciation of the rights of all who may be injuriously affected by a failure of duty. The duty of direction is the element which enables each laborer, skilled or unskilled, to proceed in the performance of his own work with reasonable certainty that both the place and appliances are kept reasonably safe for its performance. It needs no argument to show that such rules operate for the mutual benefit of employer and employed.

2. The actual facts to which we must apply these simple principles are that this gang of men, under the defendant Hackett, the general foreman of his codefendant in this class of construction, were building an oil tank 40 feet high and 60 feet in diameter with plates of steel which must be hoisted to place and riveted together in a circular form. These plates, each containing more than 2 cubic feet of solid steel, weighing half a ton or more, were bent approximately, but not exactly, to the curve of the wall of which they were to be a part, so that they might be conformed exactly to that curvature by application of force when riveted. The last plate of the top row was being put in place to fill an aperture 6 feet in vertical width and 15 feet in length. It was being raised by tackle, that is to say, ropes passing through blocks of pulleys attached to the top of a gin pole 60 feet high, operated by horses attached to a rope on the ground. This appliance was used instead of a steam or gasoline derrick for greater facility in moving it, as was necessary, around and around the structure as it was erected. Half-inch rivet holes were already punched around the edges of these plates. Two scaffolds for the men engaged in the work had been erected, one outside and the other inside the structure. The plates were raised on the outside, and, when they had reached the top, those to be riveted on the inside of the wall of the tank were swung over the top of the completed wall and dropped into place where the men on the inside scaffold could handle them. They were then let down until the bottom

row of rivet holes were even with the top row in the plate below it, and when at the right height were so manipulated that a pointed iron instrument could be run through opposite holes in the two plates, so as to keep the one upon which they were working in position. In this case its edge would be shoved under the edge of the plate just south of it, and a bolt put through the three plates to hold them in place at that point where Thompson, the plaintiff's companion on the inside scaffold, was working. This was all done, so that the south lower corner was fixed in its place by a bolt, and the north end of the plate could swing up and down upon that bolt as a pivot. That it did so swing with perfect freedom was soon demonstrated.

When this operation was completed it was discovered that the north end of the plate was a few inches below the position in which it must be riveted. It, of course, had to be raised. Its curvature was greater than the curvature of the wall, from which it was consequently so far removed that the latter could not be caught by the point of a spud bar through a rivet hole at the end, and Snider, the subforeman, took his position on the outside scaffold at the middle of the plate to ascertain whether, at that point, the two plates might be so near each other as to be drawn together by a bolt and tap. These operations are so simple as to present themselves clearly to one familiar with the manipulation of such structural material. The first movement necessary was to raise the north end of the plate a few inches to a level position. The tackle still had its hold upon it, necessarily at the middle, where it would balance itself in its movements upon the hooks, which are denounced by plaintiff as the proximate cause of the accident.

The evidence tends to show that these hooks were slender pieces of mild steel or wrought iron (the dividing line between which seems to be dimly drawn, so that they could be described as steel or iron with equal propriety). They are described as about three-eighths of an inch in diameter at the head, or place where a load supported by them would naturally rest, a little larger at the shank, where they were attached to the ring of the tackle, and tapering to a point at the end. When the signal or order was given by Snider, the subforeman, to raise the plate, the north end was raised above the sheet to which the south end was attached, the hooks straightened so much as to lose their hold upon the plate, the north end of which swung downward upon the pivoting bolt and sheared the scaffold from the wall plates to which it was attached, so that it dropped to the floor more than 30 feet below, killing Thompson and seriously injuring the plaintiff.

One would very naturally surmise that these hooks would then become the subject of great interest, and be thoroughly examined

and commented upon by all present. They had already been in use on the work a month or six weeks. They had been straightened out the day before by their load. When they began to handle this sheet they again straightened, the sheet was let down, and the hooks taken off. Just then defendant Hackett says he came on the job and asked why the sheet had been lowered. They said one of the hooks got bent a little bit and they were lowering the sheet to fix it. He looked at the hook, stuck it into a rivet hole, picked up an old hammer, straightened it back, handed it to the boys, and told them to go on with their work. He watched them put up the sheet, swing it into place, and put in a bolt. He watched them a little longer and started to walk away, and when he had gone 25 or 30 steps he heard a crash and saw that the scaffold had fallen. The hooks were run down by the tackle and handed to Hackett, and, without examination by any other person, they were put under lock and key and produced by him at the inquest and also at this trial. While he testifies that they were the same hooks that were taken from the tackle that day, the fact is denied by witnesses who seem to have the same means of knowing and to speak definitely to their conclusions. There is nothing in these circumstances tending to give his testimony any greater weight than is due to that of other disinterested witnesses.

[1, 2] We have referred to this evidence to show that the work was dangerous in its character, requiring expert supervision of the condition of the appliances used in the handling of such heavy material. It demonstrates the unfortunate results which are liable to follow carelessness in this respect. It shows that the appliance in its then condition was weakened, unfit, and unsafe, and that the resulting accident would not have happened but for this unsafe condition; that these hooks, or one of them, had straightened three times under its load during the previous 24 hours; and that it would not have been used at that time but by direction of the foreman, who should have been an expert as to the condition of appliances which he placed in the hands of his workmen, and his assurance that it was safe. This man says in his testimony that he has constructed a hundred such tanks for his codefendant, and the workmen had the right to believe in him and to rely upon his judgment and experience, which they must do or take the consequences that follow disobedience. His employer was under the duty to provide reasonably safe appliances for use in the work, and under the circumstances of this case his duty is coextensive with theirs.

These little hooks were not only insufficient for their work in size and structure, but had been further weakened by straightening and bending as they failed in their work. It needs no expert to explain this evidence. If

we wish to break a piece of flexible iron we bend it back and forth a few times. Each flexion weakens the cohesion of its particles until they separate entirely and the job is done. The defendant Hackett learned all this in his experience in building a hundred such tanks for his codefendant, and in that work, where the plates were too heavy to be raised by hooks, he testifies that he used a clevis, which this little instrument would be, in principle, were its point and shank tied together by a bolt and tap to keep it from straightening.

3. That these hooks were instruments furnished by the defendant company for the work in which plaintiff was injured is not disputed. That they were weak, insufficient, and unfit to do that particular work is not only shown to the exclusion of any reasonable doubt by the testimony of the witnesses Pollard, Snider, the plaintiff, and defendant Hackett, but is conclusively demonstrated by the facts. That the defendant Hackett took them from the hands of a subforeman, who was on his way to the shop of the defendant corporation to have them repaired, or others substituted, and with a hammer put them in the condition out of which the accident grew, is not denied by him in his testimony. Nor is it denied that he directed their use in that condition at that time. Nor can it be questioned that the condition of the hooks made the scaffold on which plaintiff was required to work abnormally dangerous.

That the furnishing of these appliances for the work was in pursuance of a nondelegable, direct, personal, and absolute duty of the defendant corporation, from which nothing but performance could relieve it, is a doctrine too well established to again vex the court. *Prevost v. Refrigerating Co.*, 185 Pa. 617, 40 Atl. 88, 64 Am. St. Rep. 659; *Long v. Railroad*, 65 Mo. 225; *Condon v. Railway Co.*, 78 Mo. 567; *Bowen v. Railway Co.*, 95 Mo. 268, 8 S. W. 230; *Moore v. Railway Co.*, 85 Mo. 588; *Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 16 S. W. 924; *Herdler v. Stove & Range Co.*, 136 Mo. 3, 37 S. W. 115; *Coontz v. Railroad Co.*, 121 Mo. 652, 26 S. W. 661. This duty is described in the cases cited as personal and nondelegable, and the responsibility flowing from its negligent nonperformance by the master is absolute.

[3] The court, in the first instruction given for the plaintiff and fully set out in our statement, correctly charged, in substance, that it was the duty of the oil company to exercise ordinary care in providing its employees reasonably safe appliances for doing its work, and keeping such appliances in a reasonably safe condition, and that if the hooks were in such a worn and weakened condition that they were in danger of straightening out and giving way when holding and lifting said sheet, so that to use them in said condition was not reasonably safe for plaintiff under the facts and circumstances shown in evi-

dence and detailed in the instruction, it was negligence for defendants to knowingly cause or permit said hooks to be used in said work while in said condition. This insufficiency of the hooks to perform the particular work exacted from them is the only negligence charged in the petition or predicated in the instruction.

[4] We cannot understand the argument of defendants that the instruction broadens the issue tendered by the petition. They say that it amounted to an entire abandonment of the cause of action stated in the petition, which charged with sufficient detail that the sheets had to be raised to their place in the structure by means of pulleys, hooks, and horse power; that for that purpose the defendant negligently provided and used two metal hooks too weak and insufficient for the purpose, which were inserted in the rivet holes of the sheet; and that while the sheet was being lifted into proper position the hooks broke, straightened out, and gave way, permitting the sheet to swing loose, breaking the platform upon which plaintiff stood, and throwing him a distance of 35 or 40 feet to the iron floor at the bottom of the structure. The instruction complained of conforms in all respects substantially to this charge. The only issue presented in the petition related to the sufficiency of the hooks, and the same issue was presented, after the evidence was in, in greater detail in the instruction.

To make doubly sure that no other issue should get to the jury, the defendants asked and the court gave their instruction No. 7 to that effect. Perhaps they had forgotten this before preparing their argument in this court.

4. The defendants also presented another theory in the form of a request for an instruction directing a verdict for defendant if the jury should believe from the evidence "that the plaintiff was injured by his failure to use the spud bar that he held in his hand in adjusting and raising or lowering the sheet, or his failure to put a bolt in the north end of the sheet at the time of raising or lowering the sheet." There is nothing in the evidence to justify this instruction. So far from showing the duty of the plaintiff to use his spud bar in this manner, the evidence shows that it would have been impossible to do so. The sheet was to be raised to fill an aperture about 15 feet long in this ring of plates. It must go under the plate at the south end of the aperture, that is to say, between that sheet and the top sheet of the ring below, and be riveted through the three sheets after having been first bolted in that position. It must then be riveted to the outside of the sheet south of it by a vertical row of rivets. That after being raised it must be shoved to the south for that purpose is evident, and the evidence shows that the first work to be done was to fasten this corner of the sheet by a bolt through the three plates. To under-

stand how it happened we must remember that the south corner was fastened in the structure by a bolt upon which it was pivoted, and turned freely inside the plate beneath it and outside the plate to the south of it, to both of which it must be permanently riveted. It had been curved already to a radius less than the radius of the structure, so that the north end was so far inside, the structure that a spud bar could not reach through one of the north end rivet holes far enough to catch a rivet hole in the plate already in place. For this reason Snider stepped to the middle of the plate with the intention of catching and holding it in that place, but failed. It is in obedience to a simple law of nature that in stopping the descent of a moving weight, the force used must overcome its impetus in addition to sustaining its weight, and the operation of this simple law was demonstrated. When the team was stopped the loose end of the plate kept on, straightened the little hooks by which it was suspended, and continued its downward course with all the terrible consequences in evidence. A careful study of this evidence falls to impress us that there is in it any suggestion of negligence in the performance of this work by any of those present and taking part in the simple movement. It was necessary that the plate should be held fast by a force strong enough to control all its movements. To be fit for the work it must be able to stop the weight while moving and sustain the resulting jerk without injury. These strains being but ordinary incidents in the performance of the work by the method adopted by defendants, the appliances must, to fill the requirements of the law, be sufficient for the use. This is a requirement the burden of which, in the performance of such work, cannot be cast upon any servant. The person who furnishes the appliance or keeps it in repair and hands it to the servant for use in his work is the employer himself, who has selected him to perform a personal duty which can be delegated to no one. These hooks were too weak and defective to do the work required of them, which was not only to sustain the weight of the material handled but the shocks resulting from sudden changes from movement to rest. The inertia of the material in motion is as necessary to be reckoned with as its dead weight. They both represent the same force. The conditions for which provision is required by law to be made include all ordinary conditions arising in actual practice. The hair which safely sustained the hanging sword over the head of Damocles was not such a safety appliance as would satisfy the practical requirements of the common law in its application to the modern industries.

[5] 5. Even though the plaintiff's fellow workmen may have been negligent with respect to their work, and though such negligence may have contributed to the injury by

combining with the defendants' negligence in furnishing defective and dangerous appliances, the defendants are not thereby relieved from the consequences of their own wrong. Each one guilty of negligence which directly contributes to the injury, although such negligence operates in combination with that of others, is responsible. This doctrine is well settled in this state, as well as in most other jurisdictions. It is stated in Shearman and Redfield on Negligence (5th Ed.) § 122, and approved by this court in numerous cases, including *Vessels v. Kansas City Light & Power Co.*, 219 S. W. 80, loc. cit. 87, in the following form:

"Concurrent as distinguished from joint negligence arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently. That the negligence of another person than the defendant contributes, concurs, or co-operates to produce the injury is of no consequence. Both are ordinarily liable. And unless the damage caused by each is clearly separable, permitting the distinct assignment of responsibility to each, each is liable for the entire damage. The degree of culpability is immaterial." *Donoho v. Vulcan Iron Works*, 75 Mo. 401; *Brennan v. City of St. Louis*, 92 Mo. 482, 2 S. W. 481; *Straub v. City of St. Louis*, 175 Mo. 413, 75 S. W. 100; *Krehmeyer v. Transit Co.*, 220 Mo. loc. cit. 655, 120 S. W. 78; *Ratliff v. Mexico Power Co. (App.)* 203 S. W. 232; *Kribs v. Jefferson City Light, Heat & Power Co. (App.)* 215 S. W. 762; *Harrison v. Electric Light Co.*, 196 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293; *Applegate v. Railroad*, 252 Mo. 173, loc. cit. 196, 158 S. W. 376; *Benton v. St. Louis*, 248 Mo. 98, 154 S. W. 473; *Campbell v. United Railways*, 243 Mo. 141, 147 S. W. 788; *Westervelt v. Transit Co.*, 222 Mo. loc. cit. 344, 121 S. W. 114; *Hickman v. Union Electric Light & Power Co.*, 226 S. W. 570.

The court, in modifying instruction No. 4 asked by the defendant by adding the words "unless you further find from the evidence that said sheet was caused to fall in part by the negligence of defendant in furnishing unsafe hooks if any," conformed it to the doctrine stated in this paragraph, and committed no error, as it would have done had it given the instruction as asked. We think the case was well submitted upon the evidence produced by both parties without error against the defendants.

Seeing no error against the defendants, or either of them, in the record, the judgment of the Jackson county circuit court is affirmed.

SMALL and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

WOODSON, P. J., concurs.

GRAVES and JAMES T. BLAIR, JJ., concur in the result.

ELDER, J., not sitting.

**ANDERSON v. KANSAS CITY RYS. CO.**  
et al. (No. 22117.)

(Supreme Court of Missouri, Division No. 1, June 8, 1921. Rehearing Denied July 11, 1921. Motion to Transfer to Court in Banc Overruled July 23, 1921.)

**1. Carriers — 316(1)—Doctrine of res ipsa loquitur stated.**

Under the rule of *res ipsa loquitur*, where a vehicle or conveyance is shown to be under the control or management of a carrier, or his servants, and the accident is such as under an ordinary course of things does not happen if those who have such management use proper care, the happening of the accident affords reasonable evidence, in the absence of explanation, that it arose from a want of proper care.

**2. Carriers — 302(3)—Bound to keep catch holding door open in good condition.**

Where an interurban car equipped with an automatic spring device to keep a door open was operated with the door open while the car was in motion, it was the duty of the carrier to keep the catch or spring in good condition.

**3. Carriers — 317(5)—Closing of door held to raise inference that catch was defective.**

That a door of an interurban car equipped with an automatic catch or spring to keep the door open closed on a passenger's hand spoke for itself, and raised an inference that the catch was defective, though there was testimony that after the accident the conductor examined the catch and found it in good condition.

**4. Evidence — 588—Jury may refuse to believe witnesses.**

It is within the exclusive province of the jury to pass upon the credibility of the witnesses, and it may refuse to believe any witness or witnesses.

**5. Carriers — 337—Passenger placing hand on door jamb to steady herself not guilty of contributory negligence as matter of law.**

A passenger on an interurban car having a vestibule in the center, with swinging doors communicating with back and forward compartments, was not guilty of contributory negligence, as a matter of law, in placing her hand against the door jamb and immediately behind the rear of the door to steady herself while alighting, preventing a recovery for injuries to her hand from the closing of the door.

Appeal from Circuit Court, Jackson County; Willard P. Hall, Judge.

Action by William J. Anderson against the Kansas City Railways Company and others. From an order granting a motion for a new trial, defendants appealed to the Kansas City Court of Appeals, which affirmed the judgment and, on motion for rehearing, certified the case to the Supreme Court. Affirmed.

L. T. Dryden, of Independence, and Cooper, Neel & Wright, of Kansas City, for appellants.

C. W. Prince, E. A. Harris, J. N. Beery, and J. E. Westfall, all of Kansas City, for respondent.

**Statement.**

WOODSON, P. J. The plaintiff brought this suit in the circuit court of Jackson county against the defendants to recover \$3,500 damages for loss of services and the society of his wife, caused by personal injuries inflicted upon her through the alleged negligence of the defendants.

The trial resulted in a verdict and judgment in favor of the defendant, and upon a motion for a new trial being filed the court sustained the same, and from the order sustaining the motion the defendants duly appealed the cause to the Kansas City Court of Appeals, which latter court in due time delivered an opinion written by Bland, J., in which all concurred, affirming the judgment of the circuit court, and upon motion for a rehearing being filed one of the judges dissented from the opinion, believing it was in conflict with two opinions of this court, namely, *Brown v. Railroad*, 256 Mo. 522, 165 S. W. 1060, and *Simpson v. Railway Co.*, 192 S. W. 739, and consequently certified the cause to this court, as provided for by the Constitution of this state.

**Opinion.**

We have very carefully read the opinion of the Court of Appeals delivered in this case, and are satisfied that it is not in conflict with either of the two cases mentioned. The opinion of the Court of Appeals is as follows:

"This is a suit by the husband for the loss of the society, companionship, etc., of his wife. The facts show that plaintiff's wife was injured on the 11th day of March, 1917, at Eighth street and Grand avenue, in Kansas City, Mo., while a passenger on a car owned and operated by the defendants. The car was an interurban car with a vestibule in the center thereof, with swinging doors communicating with back and forward compartments where the passengers were seated. The floor of the compartments was about 8 inches above the vestibule. The car in question was stationary and headed south on Grand avenue. A single swinging door, 22 inches wide, standing immediately to the rear of the aisle between the seats in the forward compartment, the aisle being 24 inches wide, was hinged on the west side of the aisle of the car and separated the compartment from the vestibule platform below. The car was operated with this door opened; it being fastened back and inward at right angles to the door jamb by means of springs attached to the bottom of the door, with a holder attached to the car to which the springs were fitted.

The catch operated automatically. There was a handhold, about 48 inches long, in the vestibule attached to the outside wall of the compartment on the west side, and within 2 or 3 inches of the door. But one in leaving the compartment would not see this handhold unless he knew it was there or looked particularly for it. If one knew the handhold was there, he would have to reach out and around the vestibule in order to get hold of it. It was evidently placed there to assist one in stepping up from the vestibule into the compartment.

"After the car stopped about 15 people alighted from the forward compartment, followed by plaintiff's wife, a woman 58 years of age, who was immediately followed by 3 or 4 others. She had in her right hand a suitcase, and when she reached the door and was about to step down to the vestibule platform, in order to steady herself, she placed her left hand upward against the door jamb and immediately behind the rear of the door, whereupon the door instantly closed, crushing her finger and mashing it, resulting in its amputation. The conductor testified that after the accident he examined the catch and found it in good condition. There was no testimony on the part of plaintiff to deny this testimony of the conductor.

"The petition alleged the relationship of carrier and passenger, followed by a charge of general negligence. Plaintiff tried his case on the *res ipsa loquitur* theory. There was a verdict and judgment for the defendants. Plaintiff filed a motion for a new trial, which the court sustained, assigning no reason therefor, and defendants have appealed.

"The court refused to give plaintiff's instruction No. P-2, which covered his *res ipsa loquitur* theory. This instruction sought to tell the jury that, in the absence of negligence on the part of plaintiff's wife, an inference of negligence on defendants' part was raised by the closing of the door, and that the onus was upon defendants to explain the occurrence and that they were not guilty of negligence. Plaintiff insists that the facts in this case show that this is a *res ipsa loquitur* case, and that his instruction No. P-2 should have been given. Defendants insist that the court erred in granting a new trial for the reason that there was no error, and, in addition, that their demurrer to the evidence should have been sustained, because, first, the case is not a *res ipsa loquitur* case and defendants were not shown to have been guilty of any negligence; second, that plaintiff was guilty of contributory negligence as a matter of law.

"[1] We think that this was a *res ipsa loquitur* case. The rule is said to be brought into play ' \* \* \* where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, and the accident is such as under an ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.' *Madden v. Mo. Pac. Ry.*, 50 Mo. App. 666, 677. The rule is said to be applicable if the injury is shown to have been produced 'by the breaking down or failure of the carrier's vehicle, roadway, or

other physical appliances.' *Dougherty v. Mo. Pac. Ry.*, 9 Mo. App. 478, 480.

"[2, 3] The door which closed, injuring plaintiff's wife, was equipped with an automatic spring device to keep the door open. At the time of the injury it was not performing its function as a door, as the conductor testified that: 'It stands open; we keep them open; it had been fastened. Q. It stands open during the trip? A. Yes, sir.' It was the duty of the defendants to keep the automatic catch or spring in good condition. The car was not in motion, and no explanation appears in plaintiff's case as to how the door came to close. Under ordinary circumstances the door would not likely have closed. The fact that it did not perform its function at the time it closed upon the hand of plaintiff's wife speaks for itself and raises an inference that it was defective. *Och v. M., K. & T. Ry. Co.*, 130 Mo. 27, 51, 52, 31 S. W. 962, 36 L. R. A. 442; *Jorden v. Railroad*, 122 Mo. App. 330, 385, 386, 99 S. W. 492; *McCarty v. Ry. Co.*, 105 Mo. App. 596, 80 S. W. 7; *Lemon v. Chancellor*, 68 Mo. 340, 30 Am. Rep. 799; *Jenkins v. L. & N. R. Co.*, 104 Ky. 673, 47 S. W. 761; *Carroll v. C. B. R. Co.*, 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872; *White v. Boston & Albany Rd.*, 144 Mass. 404, 11 N. E. 552; *Horn v. New Jersey Steamboat Co.*, 23 App. Div. 302, 48 N. Y. Supp. 348; *Cramblet v. Chi. & N. W. Ry. Co.*, 82 Ill. App. 542; *Weir v. Union Ry. Co.*, 112 App. Div. 109, 98 N. Y. Supp. 268; *Chicago City Ry. Co. v. Carroll*, 102 Ill. App. 202; *Allen v. United Traction Co.*, 67 App. Div. 363, 73 N. Y. Supp. 737.

"[4] Defendant has cited two cases, where the facts seem to be in many features like the facts in the case at bar. These cases are *Christensen v. Oregon Short Line Ry. Co.*, 35 Utah, 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159, and *Goss v. Northern Pac. Ry.*, 48 Or. 439, 87 Pac. 149. Plaintiff was denied recovery in those cases for the reason that defendant's evidence tended to show that after the injury the catch was examined and found to be in good condition. However, it would seem that in both cases there was no positive evidence that the door was pushed back where it would be securely fastened by the catch, if a good one. There was evidence in this case, as already stated, that defendants kept the door opened and caught back all the time the car was in use. The conductor's station was in the vestibule. He stood practically at the door itself, and it must have been under his eye practically all the time. It was held, under the evidence in those cases, that the inference of negligence, if any, arising from the closing of the door, was overcome, as a matter of law, by defendants' evidence. This is not the rule in this state. Under our decisions it is within the exclusive province of the jury to pass upon the credibility of the witnesses, and it may refuse to believe any witness or witnesses. *Simpson v. C., R. I. & P. Ry. Co.*, 192 S. W. 739, 741, 742; *Brown v. Railroad*, 256 Mo. 522, 165 S. W. 1060; *Wolven v. Springfield Traction Co.*, 143 Mo. App. 643, 128 S. W. 512; *Heller v. C. & A. Rd. (App.)* 209 S. W. 567, 569; *Schroeder v. C. & A. Ry. Co.*, 108 Mo. 322, 18 W. 1094, 18 L. R. A. 827; *Wolf v. Campbell*, 110 Mo. 114, 19 S.



W. 62; *Kenney v. K. C. P. & G. Rd. Co.*, 79 Mo. App. 204, 206, 207; *Craig v. United Rys. Co.*, 175 Mo. App. 616, 626, 158 S. W. 390; *Bate v. Harvey* (App.) 195 S. W. 571. The other cases cited by the defendants are clearly not in point.

"[5] There is no merit in defendants' contention that plaintiff's wife was guilty of contributory negligence as a matter of law. *Cleveland, Cincinnati, C. & St. L. Ry. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1; *Wood v. N. Y. C. & H. Ry. Co.*, 109 App. Div. 770, 93 N. Y. Supp. 419; *Larson v. Boston Elev. Ry. Co.*, 212 Mass. 262, 98 N. E. 1048; *Goldweber v. N. Y. Consol. Ry.* (Sup.) 173 N. Y. Supp. 470. [The Supreme Court adds the following case to the cases cited: *Lafferty v. Kansas City Casualty Co.*, 229 S. W. 750.]

"From what we have said it follows that plaintiff's instruction No. P-2 should have been given, and the court properly sustained the motion for a new trial.

"The judgment is affirmed. All concur."

In adopting the opinion of the Kansas City Court of Appeals as the opinion of this court, we wish to add that if the door of the car that injured the plaintiff's wife's hand had the catch at the bottom thereof, and was in perfect working order, as the defendants' evidence tended to show, then the inference must be drawn that the car was being negligently run and operated without the door being fastened by the catch; for, had it been, it would have been a physical impossibility for it to have slammed and caught the plaintiff's wife's fingers.

For the reason stated, the judgment of the circuit court is affirmed.

All concur; GRAVES, J., in separate opinion, in which WOODSON, P. J., concurs.

GRAVES, J. I think the Court of Appeals opinion is correct in holding that a new trial might have been properly granted upon the failure to give plaintiff's instruction No. 2, which presented her case upon the *res ipsa loquitur* doctrine. In other words, I agree to the opinion of that court. As the car was standing and not moving at the time of the accident, I do not concur in the remarks added at the end of the opinion. I therefore concur in so far as our opinion adopts the opinion of the Court of Appeals.

The last remarks of my Brother might lead to the view that the car was running at the time of the accident, whilst as a fact a number of passengers had left the compartment (the car being at a standstill) before plaintiff's wife reached the door, and some few were following her. Up to the time she reached the door the fastening seems to have performed its function, but as she passed through the opening of the door, for some reason not explained, the door closed and caught her fingers. It is suggested that the following passengers may have pushed the

door, but of this there is a question. I concur as aforesaid.

WOODSON, P. J., concurs in these views also.

## HILL v. KANSAS CITY RYS. CO. (No. 22128.)

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921.)

1. Negligence  $\S$  103 $\frac{1}{2}$ —Law of forum applicable to action for injury occurring in another state founded on common law.

In an action for an injury occurring in another state, founded on common-law negligence, where defendant invokes no law of such other state, the case is properly tried under the rules of negligence of the forum.

2. Street railroads  $\S$  117(35)—Negligence under humanitarian rule held for jury.

In an action for injuries to a child run over by a street car, evidence held sufficient to take the case to the jury under the humanitarian rule.

3. Negligence  $\S$  119(1)—Recovery may be had on humanitarian rule alone.

The negligence covered by the humanitarian rule may be pleaded with other acts of negligence in a single count of a petition, and plaintiff may abandon all other alleged negligence.

4. Street railroads  $\S$  103(1)—Humanitarian rule stated to avert injury.

Under the humanitarian rule, if the operator of a car sees one in peril and oblivious thereto, he is required to use any and all means at his hand to avert the injury of such person, by stopping his car, if he can, or, if not, by slackening its speed or by sounding a warning.

5. Street railroads  $\S$  118(15)—Instruction on humanitarian rule held sufficient.

In an action for injuries from being run over by a street car, in which the allegations in the petition as to the failure of defendant's motorman to stop the car, slacken its speed, and give warning were in the disjunctive, an instruction so placing them, though it left out of consideration the slackening of speed, was not error, where plaintiff submitted her case on the humanitarian rule alone; it being unnecessary that the jury find all three of the things specified in the petition.

6. Appeal and error  $\S$  1052(4)—Sustaining objection to qualification of witness cannot be urged, where he later qualified and testified.

In an action against a street railway company for personal injuries, where plaintiff's counsel, after the court sustained an objection to the testimony of a witness as to the speed of the car on the ground he had not shown himself qualified to testify thereto, qualified the witness, whereupon he testified as to the speed without further objection, the question

as to the admissibility of such testimony cannot be urged on appeal.

**7. Witnesses**  $\S$ 246(1)—Where witness testified plaintiff hesitated on track, court could ask whether she stopped on track.

In an action against a street railway company for personal injuries, where a witness testified that plaintiff hesitated while crossing the track in answer to a question as to whether she stopped, and that he thought she was standing still when his view was shut off as the car approached her, the court did not err in asking the witness if plaintiff stopped when she got on the track and which way she was facing when she stopped; the testimony examined as a whole indicating that the witness meant that she stopped at least for a short time.

**8. Witnesses**  $\S$ 389—Written contradictory statement held admissible, though denied at trial.

In an action against a street railway company for personal injuries, the introduction of a written statement by a witness tending to contradict his testimony was not error, though he denied the statement and signature were his, where he signed his name on a paper and the two signatures were compared by the jury, and another witness testified that before the trial he had admitted the statement and signature were his.

**9. Appeal and error**  $\S$ 1046(5)—Court's misconduct in examination of witnesses to get at real issues held insufficient for reversal.

Misconduct of the court in the manner of examining witnesses held insufficient for a reversal of the judgment, where the conduct of counsel was such as to irritate a court trying to get at the real issue and facts.

**10. Appeal and error**  $\S$ 1003—Verdict not reviewed because against weight of evidence, if substantial evidence to support it.

The weight of the evidence being for the trial court, if there is substantial evidence to support the verdict, the appellate court will not review the evidence to determine its weight.

**11. Damages**  $\S$ 54—Instruction allowing damages for mental anguish resulting from cutting off parts of left arm and foot and two toes of right foot and breaking third toe thereof not error.

In an action for injuries from being run over by a street car, where plaintiff's left arm was cut off just below the elbow, her left foot back to the heel, and the big toe and the one next to it of the right foot were cut off, and the third toe was broken and bent, an instruction that plaintiff could recover for mental anguish suffered and likely to be suffered as a direct result of such injuries was not error; mental anguish being distinguishable from mere pain, and the condition for its production remaining through life.

**12. Evidence**  $\S$ 80(1)—Instruction allowing damages for impaired ability to earn money after becoming of legal age not erroneous, though injuries occurred in another state; presumption being law of forum same as that of such state.

In an action against a street railway company for personal injuries occurring in another

state, an instruction authorizing the jury to allow the plaintiff, a girl, to recover for impaired ability to earn money "after she became of legal age," was not erroneous; the presumption being that the law of the forum as to legal age is the same as that of the state in which the injury occurred.

**Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.**

Action by Irene Marie Hill, pro am, against the Kansas City Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. N. Sadler and E. E. Ball, both of Kansas City, for appellant.

Atwood, Wickersham, Hill & Popham, of Kansas City, for respondent.

GRAVES, J. Irene Marie Hill, a negro girl some five years old at the time of the accident which occasioned her injury, sues through her next friend for damages alleged to have been occasioned by the negligence of defendant's predecessor in title to the street railway property now operated by defendant. Defendant was the purchaser at a receivership and foreclosure sale of the property. The injury occurred whilst the railway property was in the hands of receivers, but no point is made as to the liability of this defendant if its predecessor in title or the receivers were liable. So the case proceeded as if the instant defendant had been the owner and operator of the street railway property at the time of the accident. The accident occurred June 16, 1915, at 7:30 p. m., in the state of Kansas, near the intersection of Quindaro boulevard and Seventh street, in Kansas City, Kan. There was a double-track street railway in Quindaro boulevard. The negligence charged is thus stated in the petition:

"Plaintiff states that the said receivers and their agents and servants in charge of said car were careless and negligent, in that they failed to give plaintiff any warning signals of the approach of said car to her and to said intersection, and in that they were negligently operating said car without keeping proper or reasonably sufficient lookout ahead, and without having or keeping same under proper and reasonable control. Plaintiff further says that those in charge of said car were further negligent, in that they saw, or by the exercise of ordinary care could have seen, plaintiff upon said track, or so near the same and in such position as that she was in a position of danger and peril from the approach of said car, in time, by the exercise of ordinary care, under the conditions then existing, and with the use of the appliances at hand, to have stopped said car, slackened the speed thereof, or have warned plaintiff of the approach thereof, and thereby have avoided injuring her, all of which they negligently and carelessly failed to do.

"Plaintiff further states that as a direct and proximate result of the negligent and careless

acts and omissions of those in charge of said car, as above described, all of said acts and omissions acting severally and concurrently with each other, she was struck, run over, and injured by said car, at said time and place, injuring her in the following manner and particulars, to wit:

The answer was a simple general denial. Plaintiff had a verdict for \$10,000, and from a judgment entered thereon the defendant has appealed. There are some five or six assignments of error, which, with the relevant facts, will be noted in the course of the opinion.

I. It is first urged that the demurrer to the evidence should have been sustained. This insistence has several subdivisions in the brief, stated thus:

"(a) The petition fails to state facts sufficient to constitute a cause of action against defendant.

"(1) This accident occurred in Kansas; therefore the laws of Kansas govern.

"(b) The evidence did not justify a submission of this case to the jury under the allegations of the petition."

When boiled down, there are but two real questions raised in the foregoing, i. e.: (1) The accident having occurred in Kansas, it is governed by the Kansas law, and, being so governed, we cannot presume that the common law exists in Kansas; and (2) that the evidence failed to show liability.

[1] As to the first proposition, *supra*, it must be conceded that the action is founded upon common-law negligence, as distinguished from statutory or ordinance negligence. The petition pleads no statute or ordinance. It states a cause of action under our general law of negligence. The defendant invoked no law of Kansas, statutory or otherwise. In such situation the case was properly tried under our rules of negligence. *Lyons v. Railroad*, 258 Mo. loc. cit. 150, 151, 161 S. W. 727, Ann. Cas. 1915B, 508. In the *Lyons* Case we discussed both the *Mathieson* Case, 219 Mo. 542, 118 S. W. 9, and the *Newlin* Case, 222 Mo. 375, 121 S. W. 125, relied upon by the appellant in his brief. We can add nothing to what was said in *Lyon's* Case. The action there was bottomed upon common negligence, as in this case. The answer there was a general denial, as in the instant case. We then said:

"In such case, unless defendant properly invokes the laws of the sister state, the law of Missouri is to be applied."

So say we in the case before us. As to whether the evidence on the part of the plaintiff made a case under our law, we take next.

[2] II. That there was evidence to take this case to the jury under the humanitarian rule we have no doubt. The main instruction for the plaintiff, whilst verbose and lengthy, places her case upon the humanitarian

rule. The little girl and her brother had gone to a water fountain near the street intersection. After getting water at this fountain they started to retrace their steps toward the north or northeast across the double railway tracks. Upon reaching the tracks upon which east-bound cars run, the plaintiff dropped a penny, and was looking for it at the time the east-bound car approached. The brother was ahead, and had reached the track upon which west-bound cars ran, when, hearing an exclamation from the sister, he turned and saw her looking for the penny, and "hollowed" at her, but she became confused and did not get off the track. He says the car was 50 feet away from her when he turned around. He further says that the motorman was talking to some person and not looking ahead. Other witnesses say that the little girl was on the track in clear view of the motorman for at least 75 feet. They likewise corroborated the brother as to the motorman being engaged in conversation. There was ample evidence that at the rate of speed shown the car could have been stopped in very much less than 50 feet; one witness placing it as low as 15 feet. So also there is evidence that no gong was sounded or other notice given to the child. The facts sufficed to take the case to the jury, and it then became the province of the jury to determine the credibility of the witnesses detailing the foregoing facts. The demurrer was properly overruled upon both the questions urged by appellant.

[3-5] III. The further point made is this couched in the brief:

"Where petition charges two or more concurrent negligent acts combined caused the injury, all must be proven to entitle plaintiff to recover."

The point is not clear to us in view of the record. The petition, after stating some other acts of negligence, thus pleads the humanitarian rule:

"Plaintiff states that the said receivers and their agents and servants in charge of said car were careless and negligent, in that they failed to give plaintiff any warning signals of the approach of said car to her and to said intersection, and in that they were negligently operating said car without keeping proper or reasonably sufficient lookout ahead, and without having or keeping same under proper and reasonable control. Plaintiff further says that those in charge of said car were further negligent, in that they saw, or by the exercise of ordinary care could have seen, plaintiff upon said track, or so near the same and in such position as that she was in a position of danger and peril from the approach of said car, in time, by the exercise of ordinary care, under the conditions then existing, and with the use of appliances at hand, to have stopped said car, slackened the speed thereof, or have warned plaintiff of the approach thereof, and thereby have avoided injuring her, all of which they negligently and carelessly failed to do,

"Plaintiff further states that as a direct and proximate result of the negligent and careless acts and omissions of those in charge of said car, as above described, all of said acts and omissions acting severally and concurrently with each other, she was struck, run over, and injured by said car, at said time and place, injuring her in the following manner and particulars, to wit."

We have so often ruled that the negligence covered by the humanitarian rule may be pleaded with other acts of negligence in the single count of a petition, and that a plaintiff may abandon all other alleged negligence and recover upon the negligence which is covered by the humanitarian rule, that citation of authorities would be superfluous. In this case the plaintiff chose to submit her case upon the humanitarian rule, although the instruction is cumbersome. The allegations in the petition as to stopping the car, slackening the speed of the car, and giving warning are all in the disjunctive, and the instruction so placed them; but the instruction leaves out of consideration the slackening of the speed of the car. The concluding portion of the instruction reads:

"And that the operator of said car saw, or by the exercise of ordinary care could have seen, plaintiff in such position of danger and peril, if any, and could by the exercise of ordinary care have known all of the above facts, if you so find such to be the facts, in time thereafter, by the exercise of ordinary care and by the use of the means at hand and with safety to said car and those aboard same, to have stopped said car or warned plaintiff of the approach thereof, if you so find, and could thereby have prevented injuring her, if you so find, and that the operator thereof fails to exercise ordinary care to stop said car or give reasonable warning of the approach thereof, if you so find, after he knew (if you so find he did), or by the exercise of ordinary care could have known (if you so find he could), that plaintiff was in such danger and peril, if any, as above set out, and that by such failure, if any, such operator was thereby negligent, if you so find, and that as a direct result of such negligence, if any, said car struck plaintiff and she was thereby injured, if you so find, then your verdict must be for plaintiff."

The previous portion of the instruction had required the jury to find that plaintiff was upon the track and was oblivious to her danger, and had defined the duty of defendant under such circumstances. Under these pleadings (so far as the humanitarian rule is concerned), the instruction did not have to require the jury to find all three of the things specified in the portion of the petition quoted supra. The instruction left out the matter of slackening speed. It might have included it, because there was evidence tending to show no slackening of speed until the child was struck, but there was no error in leaving that matter out. The instruction might have left out both the matters of slackening speed and failure to stop, and submitted on the

single matter of failure to warn. In *Hinze-man v. Railroad*, 182 Mo. loc. cit. 623, 81 S. W. 1137, Vaillant, J., said:

"If the engineer saw the man in a position of danger, apparently inattentive to the approaching train, and if, with the means at hand, by the exercise of ordinary care, he could have given him timely warning, yet neglected to do so, then the case falls within the exception to the rule that a plaintiff cannot recover if his own negligence has contributed to his injury."

See, also, *Cytron v. Transit Co.*, 205 Mo. loc. cit. 719, 104 S. W. 109, and cases therein cited, including the *Hinzeman Case*; *Meeker v. Union Electric Light Power Co.*, 216 S. W. 931; *State ex. rel. v. Ellison*, 223 S. W. loc. cit. 673.

Under the humanitarian rule, if the operator of a car sees one in peril and oblivious thereof, then he is required to use any and all means at his hand to avert the injury of such person. If he can stop his car, he must stop. If the slackening of speed, although unable to stop, will avert the injury, he must do that. If a warning will avert the injury, ordinary care requires that of such operator. So in this case, under the pleadings, supra, the cause was properly submitted to the jury

[8] IV. There are several objections made as to the admission of incompetent evidence. Generally the objections now urged are not of weight. It is urged that witness Wren was improperly permitted to testify as to the speed of the car. Objection was made, and the court sustained the objection on the ground that the witness had not shown himself qualified to speak upon that question. Thereupon counsel for plaintiff, with a question or two from the court, proceeded to qualify the witness, and the witness then gave his judgment of the speed without further objection by counsel for the defendant. Counsel are in no position to urge this question.

[7] Much is said about the court in what occurred in the following testimony from witness Sturges:

"Court: State what you saw.

"A. The little girl started across the track, and when she got on the track she became confused and the car struck her and it run over her.

"Court: Became confused at what? Just strike that out, and state what she did.

"A. When she got on the track (interrupted)—

"Q. When she got on the track, did she go across or stop? A. She did not have time before the car struck her.

"Mr. Hardin: I move the answer of the witness be stricken out as a conclusion.

"Court: The objections are sustained.

"Court: Did she keep going across?

"A. She became confused; apparently she had lost her head.

"Q. What did she do? A. She hesitated.

"Q. How long did she hesitate? A. Well, I could not say as to that.

"Q. Did she stop? A. Yes, sir; she hesitated on the track.

(333 S.W.)

"Court: What way did she go as she was walking across the track?

"A. Crossed from the south to the north.

"Q. She was going north? A. Yes, sir.

"Court: When she got on the track she stopped?

"A. Yes, sir.

"Mr. Hardin: I object to that; he did not say she stopped; he said she hesitated.

"Court: I will overrule it; go ahead. (To which ruling of the court the defendant by its counsel then and there duly excepted.)

"Mr. Hardin: I move that all be stricken out.

"Court: The motion is overruled. (To which ruling of the court the defendant by its counsel then and there duly excepted.)

"Court: Which way was she facing when she stopped?

"Mr. Hardin: I objected to that as assuming she stopped, and not proper examination.

"Court: Same ruling; objections are overruled. (To which ruling of the court the defendant by its counsel then and there duly excepted.)

"A. I could not say as to which way the little girl was facing when she stopped.

"Court: She had been going north?

"A. Yes, sir.

"Court: Did she turn or make any movement?

"A. I do not remember as to that.

"Court: Was she standing still or moving when the car struck her? Did you see the car strike her?

"A. No, sir; I was back a little too far for that.

"Court: The front end?

"A. Yes, sir.

"Court: How far did you see her ahead of the car?

"A. When I first noticed the little girl?

"Court: No; the last distance you could see her.

"A. Well, I should judge the little girl was 10 or 15 feet in front of the car.

"Court: When your view was shut off?

"A. Yes, sir.

"Court: At that time was she standing still or walking?

"A. I think she was standing still.

"Court: You don't know which way she was looking; you do not remember?

"A. No, sir; I do not remember."

When all this evidence is read, it is clear that the witness meant in the first instance to say that the little girl stopped upon the track. The question was, "Did she stop?" The answer was, "Yes, sir; she hesitated on the track." From that the court took it that the witness meant that she stopped (at least for a short time) on the tracks, and the subsequent testimony of the witness shows this to be a fact; for later he was asked whether she was standing still or walking, and the witness said: I think she was standing still." When the whole testimony is examined, we can see no error in the acting of the court.

[8] Complaint is made of the introduction of a written statement made by one G. B. Mitchell, who was at a former trial a wit-

ness for plaintiff, but at this time a witness for defendant. It was shown that Mitchell said that the signature and statement were his, but he in a way denied the statement and signature at the trial. Without objection the witness signed his name on a paper, and the two were admitted for comparison by the jury. The statement tends to contradict Mitchell's testimony. One witness testified that prior to the former trial Mitchell had admitted that the written statement and signature were his, and from it all we must rule that there was no error in the admission of the document.

Other objections as to testimony do not merit notice, and we pass to other questions.

[9, 10] V. Misconduct upon the part of the trial court is charged as error. This misconduct was in the manner of the court examining witnesses. In a previous paragraph, in discussing the admission of evidence, we have set forth the worst aspect of the court's conduct. The previous irritating conduct of the then trial counsel might be also set out with justification, but we shall not so do. Counsel briefing the case here did not appear below. Suffice it to say that it was sufficient to irritate a court, who was trying to get at the real issues and the facts therein. We do not think the action of the court sufficient for a reversal of the judgment. Nor do we think there was harmful error in refusing to admit some evidence offered by defendant. Further, this court will not disturb a verdict simply because it is against the weight of the evidence. That is for the trial court. If there is substantial evidence to support the verdict (as here), we will not review the evidence to determine the weight, or attempt to interfere with the province of the trial court in such matters. The defendant urges that we reverse the judgment because against the weight of the evidence. This, like its contention of the refusal to admit proper evidence, must be overruled. No question is made in the assignment of error as to the size of the verdict, so that the propriety of the instructions given is all that there is left to this appeal. There are so many subdivisions of contentions in the voluminous brief that we are forced to treat several of them in one paragraph—a bad practice, we admit.

[11] VI. In the assignment of errors the defendant complains of instructions A and B, given for plaintiff. Instruction A is the instruction on the humanitarian rule. We have, in connection with other matters, set out the material parts of this instruction, and we find no error in it. Instruction B is one upon the measure of damages. The instruction is a usual one in this class of cases, and the criticism thereof is supercritical. The following clause therein is criticized:

"Any mental anguish, if any, which the jury finds and believes from the evidence she has suffered, and such, if any, as the jury believe from the evidence she will with reasonable cer-

tainty hereafter suffer, as a direct result of such injuries."

It is urged that there is no evidence that the little girl suffered or will suffer any mental anguish, as distinguished from bodily pain. The fearful injuries to the child were fully described to the jury. The left arm was off just below the elbow. The left foot was off back to the heel. The big toe and the next one to it of the right foot were off, and the third toe was broken and bent out and under the foot in hook shape. This was the physical condition which she must carry through life. Mental anguish is distinguishable from mere pain, and may be the outgrowth of just such a condition as we have described. As the years pass, the condition for its production remains. We have omitted to state the nervousness shown to have been, and at the trial being, suffered by plaintiff.

[12] Next it is said that the instruction is erroneous, because it authorized the jury to allow her to recover for impaired ability to earn money "after she became of legal age." Of this it is said that this court will not presume that a Missouri jury would know the legal age of a girl in Kansas. The presumption is indulged that the law of the forum is the same as that of Kansas. We touched upon this question in the first portion of this opinion. We do not deem the instruction improper.

The judgment is affirmed.

All concur.

### ALBERS v. CITY OF ST. LOUIS. (No. 21929.)

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921. Rehearing Denied July 23,  
1921.)

1. Appeal and error ⇨1099(6)—Holding on appeal from judgment on demurrer held the law of the case on subsequent appeal.

The holding, on an appeal from a judgment sustaining a demurrer to the petition, that the facts alleged, if proved, required the cancellation of street improvement assessments, is the law of the case on a subsequent appeal from a judgment canceling such assessments, where the allegations of the petition have been proved.

2. Municipal corporations ⇨513 — Assessments against nonabutting property for widening street constituting part of boulevard scheme held properly canceled.

Under the St. Louis charter, which permits assessments of benefits against property not abutting in case of the widening of a street, but not in case of the opening of a boulevard, a proceeding to widen a street constituting part of a boulevard scheme held a mere subterfuge to evade the provision of the charter, and hence assessments against nonabutting property were properly canceled, though there was no bribery

or corruption in connection with the proceedings, and though the assessments had been approved and confirmed by judgment.

Appeal from St. Louis Circuit Court; Victor H. Falkenhainer, Judge.

Suit by Frank Albers against the City of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles H. Daues and H. A. Hamilton, both of St. Louis, for appellant.

Wm. L. Bohnenkamp and Benjamin H. Charles, both of St. Louis, for respondent.

JAMES T. BLAIR, J. The city appeals from a judgment of the circuit court, which cancels certain special assessments against parcels of land owned by respondent. These assessments purported to be levied as part of the cost of the widening of Bircher street. The case was here before on an appeal from a judgment for the city following the trial court's action in sustaining the city's demurrer to the petition. *Albers v. St. Louis*, 268 Mo. 349, 188 S. W. 83. This court held the petition good, and reversed the judgment and remanded the cause. On the hearing which followed that remandment the trial court found the facts to be as alleged in the petition, and canceled the special assessments, as stated. Appellant offered no evidence. The evidence offered by respondent proves the allegations of the petition considered in the opinion on the former appeal, and a reference to those allegations will therefore be substantially sufficient to disclose the facts of this record. In brief, to recapitulate, the petition alleges, the evidence shows, and the trial court found that the city undertook to open and improve a rather elaborate boulevard from the river on the south side of the city around the western limits and to the river again on the north side of the city. Kingshighway Northeast was to constitute a part of this boulevard, and it included Bircher street, then a little used street, 60 feet wide, in a sparsely settled residence district, upon which there was but scant traffic, and that of a sort found in such communities. The principal use was by a comparatively small number of delivery wagons, which served the people of the neighborhood. Under the boulevard scheme the width of Bircher street was to be increased to 200 feet. A service roadway and two pleasure driveways were to be constructed, and parkways, with trees, etc., and sidewalks were to occupy the remainder of the 200 feet. This plan conformed Bircher street to the general boulevard scheme. Its name was to be changed, and it was to become a part of Kingshighway Northeast. Under the charter the expense of opening the boulevard was required to be borne in part by the city at large and in part by the property abutting on the boulevard. To

pay the city's part of the expense the people of St. Louis voted bonds for \$500,000. These bonds were then sold and the money became available. Thereafter the major portion of this half million dollars was expended for purposes outside those for which the people voted it. About \$263,000 was expended for parks, and some of these were adjacent to Kingshighway Northeast. The amount thus expended would have been much more than sufficient to pay the city's share of the expense of transforming Bircher street into the proposed boulevard. As a result of these unauthorized expenditures from the funds voted by the people the city found itself without the funds necessary to complete the payment of its part of the cost of opening the boulevard as planned. It had no power under the charter provisions respecting the opening of boulevards to assess benefits against lands not abutting upon the boulevard. Parts of the boulevard had been opened according to the original plan, and the city had paid its share of the expense for some of these. In this situation the idea was hit upon to repeal the boulevard ordinance as to certain sections first included in it, but which there was no money left to open under the charter provisions respecting boulevards and then proceed to "widen" the streets along which these unfinished sections ran. Under the charter provisions respecting the "widening" of streets the benefit district might be made to include property other than that abutting on the street so widened. In furtherance of this the boulevard ordinance was repealed in so far as it affected Bircher street, and an ordinance was passed for "widening" that street, and, incidentally for changing its name to Kingshighway Northeast. By the widening ordinance there was proposed to be accomplished a result identical with that which would have been accomplished had Bircher street been transformed into a boulevard under the original boulevard ordinance affecting it. The ordinances, plats, and the testimony of the then city officials and of experts show that the actual result of the carrying into effect of the proceedings for "widening" Bircher street is to transform it, in fact, into a boulevard, and into the same boulevard, in kind and character, which would have resulted had the city proceeded under the original ordinance and paid its share of the expense, as the charter required, of establishing such boulevard. Under the street widening ordinance a boulevard in fact is established, but the city's responsibility for its part of the expense in establishing it is evaded by subter-

fuge. Respondent's lots do not abut upon the improvement. The evidence is indisputable that there was no traffic need for the change. This also tends to prove that the intent of the second ordinance was to evade the charter provisions.

[1,2] This statement of the evidence in part supplements and in part is supplemented by the facts which appear in the former opinion as allegations, but which, as stated, are now shown to be proved, and were so found by the trial court. These facts were held on the former appeal to be sufficient, if proved, to require the cancellation of the assessments against respondent's property. *Albers v. St. Louis*, 268 Mo. loc. cit. 357 et. seq., 188 S. W. 83. The points made on this appeal are substantially the same as those pressed on the former appeal. The former decision is the law of the case, and we do not find in the brief any insistence, directed against the former opinion, which did not have consideration in that opinion. We adhere to that decision.

It is said there is no evidence of bribery or corruption in connection with the ordinance and proceedings upon which the street widening proceedings depend. There is neither contention nor holding that there was anything of that kind. The question is whether by subterfuge the charter provisions respecting the opening of boulevards have been evaded and a boulevard in fact established, and its expense, in part, illegally assessed against property not subject to assessment therefor under the charter of the city, and the city, by that subterfuge and evasion, enabled to shift its financial burden to the shoulders of its citizens.

Complaint is made that the trial court set aside the judgment in *City v. Baker*, in which the assessments against respondent's property were approved and confirmed. The very purpose of this proceeding is to cancel these assessments. The power of the court to cancel them in this case on the facts which appear was affirmed in the former decision. The reasons are set forth in the opinion then delivered. The net result of the judgment on this trial is the cancellation of the special assessments mentioned, and the effect of that opinion and this is that the judgment in *City v. Baker* does not afford a cover which will protect these assessments against cancellation. This matter also is decided, in effect, in the former opinion, and no sound reason for abandoning that holding is advanced or occurs to us.

The judgment is affirmed.

All concur, except ELDEN, J., not sitting.

**CITY OF ST. LOUIS v. HYDRAULIC PRESS  
BRICK CO. (No. 21679.)**

(Supreme Court of Missouri, Division No. 2.  
July 19, 1921.)

1. Eminent domain  $\Leftrightarrow$  235—Municipal corporations  $\Leftrightarrow$  507—Order dismissing proceeding on sustaining of exceptions to awards for damages and assessments of benefits held erroneous, and properly set aside.

Under the St. Louis charter, which permits assessments only against abutting property when a boulevard is established and improved, but permits assessments against all property within a designated district when a street is widened and improved, an order, sustaining exceptions to awards of damages and assessments of benefits from the widening of a street constituting part of a boulevard system, and dismissing the proceeding, was erroneous, and properly set aside, whether the so-called street was in fact a street or a boulevard, as in either case the city had authority to make assessments against some of the property and to condemn and take abutting property, especially where all but a few of abutting owners had accepted the awards, and when the order was set aside the remaining exceptions filed by the owners of property taken had been withdrawn.

2. Municipal corporations  $\Leftrightarrow$  507—Party excepting solely to assessments of benefits not entitled to complain of order sustaining such exceptions and otherwise overruling exceptions to awards of damages and benefits where new assessment ordered.

Where an order, setting aside a previous order sustaining exceptions to awards of damages and assessments of benefits and dismissing the proceeding, sustained a party's exceptions solely as to the assessments of benefits, and otherwise overruled them, but also provided for a new assessment by other commissioners, such party was not injured, and had no ground for complaint as to the exceptions overruled.

3. Eminent domain  $\Leftrightarrow$  235—Municipal corporations  $\Leftrightarrow$  507—Order dismissing proceeding to assess damage and benefits properly set aside, though made in part on court's own motion.

Where an order dismissing a proceeding to award damages and assess benefits from a street improvement was erroneous, it was properly set aside, though the dismissal of the condemnation proceeding was on the court's own motion.

4. Eminent domain  $\Leftrightarrow$  253(1)—Municipal corporations  $\Leftrightarrow$  508(2)—Order setting aside order dismissing proceeding held subject to review, though court was acting in dual capacity.

An order, setting aside a previous order dismissing a proceeding to award damages and assess benefits from a street improvement, was subject to review, though the court was acting in the dual capacity of a court and a part of the taxing machinery of the city.

5. Eminent domain  $\Leftrightarrow$  253(1)—Municipal corporations  $\Leftrightarrow$  508(2)—Order setting aside order dismissing proceeding to assess damage and benefits held appealable.

An order, setting aside a previous order dismissing a proceeding to award damages and assess benefits from a street improvement, and ordering a new assessment, was appealable under Rev. St. 1919, § 1469 (Rev. St. 1909, § 2038), authorizing appeals from orders granting new trials.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Proceeding by the City of St. Louis against the Hydraulic Press Brick Company. From an order setting aside an order dismissing the proceeding and sustaining the defendant's exceptions in part and overruling them in part, it appeals. Affirmed and remanded.

Ellet, Chaplin, Blaney & Bedal, of St. Louis, for appellant.

Charles H. Daues, G. Wm. Senn, and H. A. Hamilton, all of St. Louis, for respondent.

DAVID E. BLAIR, J. The matters involved in this appeal grow out of condemnation proceedings of the circuit court of the city of St. Louis, which were instituted in furtherance of a general scheme adopted by said city in the construction of a boulevard system, known as Kingshighway boulevard, extending from points at or near the Mississippi river above and below said city through the western portion of said city and connecting with several parks. The portion of such boulevard system involved here is that section thereof lying between Easton avenue and Penrose street.

It was provided by Ordinance 22946, approved March 27, 1907, that Kingshighway boulevard between said streets be changed into a boulevard to be known as "Kingshighway"; that said boulevard be widened; that certain building restrictions be imposed; and that the traffic on said boulevard be regulated.

On March 6, 1909, an ordinance numbered 24220 was approved. This was an ordinance to repeal Ordinance No. 22946, above referred to, and to enact in lieu thereof an ordinance to change the name of Kingshighway boulevard from Easton avenue to Penrose street to "Kingshighway," and to establish, open, and widen said Kingshighway from Easton avenue to Penrose street. The question whether Ordinance No. 22946, establishing the boulevard between Easton avenue and Penrose street, could be repealed without the written consent of persons owning two-thirds of the abutting land, before any proceedings had been taken under said ordinance, came before this court in banc on a former appeal on another phase of the proceeding, and that question was answered in



the affirmative. That decision is of no particular importance here, except for its historical value. See *St. Louis v. Christian Brothers College*, 257 Mo. 541, 165 S. W. 1057.

In pursuance of the general plan for the establishment and improvement of the Kingshighway boulevard system \$500,000 to pay the city's part of the expense of the establishing and improving said boulevard had been previously authorized by the voters of the city as one of the items of a bond issue amounting to \$11,000,000. The sum appropriated for Kingshighway boulevard had been exhausted prior to the institution of this proceeding, and the city undertook to charge a large part of the cost of opening, widening, and improving said Kingshighway against all property within a specified benefited district. The property of the appellant is within such designated benefited district, but does not abut Kingshighway.

It appears that under the provisions of the charter of the city of St. Louis, article 6, § 1, when a *boulevard* is established and improved, only property abutting such boulevard may be charged with the benefits thereof. But when a *street* is opened, widened, and improved, not only abutting property, but all property within the district designated as the benefited district, may be charged with such benefit, and special assessment made against such property to pay its proper proportion of such cost.

It is contended that the repeal of Ordinance No. 22946 and the enactment of Ordinance 24220 are mere subterfuges to enable the city to lay the burden of the cost of the improvement, other than that apportioned to the city, upon a greater area, and that the improvement is in fact, although not so named, a boulevard. Ordinance No. 24220 did not specify whether Kingshighway is a street or boulevard. We do not deem it necessary or proper, in view of the conclusion we have reached on this appeal, to discuss this contention.

As part of the proceedings to condemn land for the widening of this section of Kingshighway, commissioners were appointed by the circuit court to determine the proper awards to be made to the persons whose land was taken for such improvement, to establish a benefited district and determine the benefit to all property therein, and to make assessments of such benefits against the land included in such district. The city counselor gave notice in the manner provided by law, and as part of said notice used the following words:

"The commissioners in the matter of widening Kingshighway *boulevard* from Easton avenue to Penrose street under Ordinance 24220 will meet in room 234, City Hall, on January 30, 1911." (Italics ours.)

In due course the commissioners established a benefit district, including land not

abutting on Kingshighway, and assessed benefits against such property. Damages were determined, and the city appropriated by ordinance and paid into court the sum of \$163,893.95 to cover the awards made by the Commissioners as damages for property taken. Exceptions as to the sufficiency of such awards and also as to the fairness and legality of assessments of benefits were duly filed. Upon hearing the exceptions of appellant and others were sustained, and the court on June 10, 1918, entered the following order and judgment:

"The court having duly considered the supplemental exceptions of \* \* \* defendant Hydraulic Press Brick Company, heretofore filed and submitted herein, together with the proof adduced in support thereof, doth order and adjudge that each of said exceptions be, and the same are hereby, sustained, on the ground that Ordinance No. 24220 is void. Wherefore it is ordered, adjudged, and decreed by the court that plaintiff's cause of action be, and the same is hereby, dismissed, and that the defendants have and recover of the plaintiff the costs of this suit, for which let execution issue."

Not only were the exceptions of appellant sustained by said order and judgment, but the cause of action of respondent was thereby dismissed, and costs were taxed against respondent.

On June 14, 1918, respondent filed its motion to set aside this order and judgment of the court. This motion was continued from term to term until April 22, 1919, when the court sustained the same and set aside its judgment of dismissal and reinstated said cause and the report of the commissioners. Said order is as follows:

"Thereupon comes the plaintiff; the city of St. Louis, by its counsel, and come also the defendants, Hydraulic Press Brick Company \* \* \* by their respective counsel; and, the plaintiff's motion for rehearing in this cause, filed on the 14th day of June, 1918, coming on to be heard, the court, having duly considered the same and now being fully advised in the premises, doth sustain said motion of plaintiff for rehearing, and doth set aside its order and judgment of dismissal in this cause entered on the 10th day of June, 1918, and doth reinstate said cause and the report of the commissioners.

"And it appearing to the court that all exceptions heretofore filed, relating to the awards and assessments of values and damages so made by and contained in said report of the commissioners, are now withdrawn by the respective defendants having severally filed such exceptions, the court doth now consider, order, and adjudge that the supplemental exceptions to the commissioners' report herein of the defendant Hydraulic Press Brick Company and of the defendant A. H. Eilers be each, and the same are hereby, respectively sustained solely as to the assessments of the benefits ascertained and made by the commissioners herein, and as such assessments and benefits are contained

in such report of the commissioners; and the court doth further consider, order, and adjudge that so much of said commissioners' report, making and assessing the benefits for and on account of the public improvement proposed herein, be set aside and for naught held, and that a new assessment herein by other commissioners of the benefits for and on account of such public improvement be made.

"And the court doth further order and adjudge that such respective supplemental exceptions to the commissioners' report aforesaid of the defendants Hydraulic Press Brick Company and A. H. Eilers otherwise and in other respects be, and the same are hereby, overruled."

The appeal is from this order, and the question involved here is the correctness of the action of the trial court in sustaining respondent's motion to set aside the order and judgment sustaining appellant's exceptions to the report of the commissioners and dismissing the cause and subsequent reinstatement of said cause and the report of the commissioners. In our opinion such action of the trial court was clearly proper and eminently just. In arriving at this conclusion it is unnecessary to consider the merits of the city's claim of right under the proceedings thus far had to assess a charge against the property of appellant as and for benefits arising from the opening, widening, and improvement of Kingshighway. It is interesting to note, however, that Division 1 of this court has passed on practically the very questions involved in the merits of this case as we understand them. *Albers v. St. Louis*, 268 Mo. 349, 188 S. W. 83; *Albers v. St. Louis*, (No. 21929) 233 S. W. 210, decided July 11, 1921, not yet [officially] reported. An interesting side light is thrown on the merits of the case as discussed in the case of *St. Louis v. Realty Co.*, 259 Mo. 126, 168 S. W. 721, involving a section of said Kingshighway other than the one here involved.

[1] Kingshighway as established by Ordinance 24220 is either a street or a boulevard. Whichever it may ultimately be held to be, a portion of the cost of opening, widening and improving such street or boulevard may be lawfully assessed against the abutting property, and, if a street, such cost may in addition be assessed against all property situated within the benefited district and not abutting the same. On either theory, if the improvement be held to be proper, and appropriate action in furtherance thereof taken, the city had the right to condemn and take such portion of the abutting property as was necessary to make such improvement. The order and judgment of June 10, 1918, not only purported to dispose finally of the exceptions of appellant, but dismissed the proceeding entirely. Such action was clearly erroneous. The city had paid out \$163,893.95 to abutting property owners as damages for property taken. At the time such order was entered

all but a few of the abutting property owners had accepted the award of damages made by the commissioners, and at the time such order was set aside on April 22, 1919, the remaining exceptions filed by the owners of property taken had withdrawn their exceptions and accepted the money deposited by the city with the circuit clerk. The order affected a large portion of the land taken to which the city's title for the purpose for which it was taken was complete at the time the order of dismissal was entered.

[2] In its order of April 22, 1919, the trial court sustained the supplemental exceptions of appellant as to the assessment of benefits against its property, but overruled such exceptions in other respects. In so far as the exceptions were sustained appellant prevailed in that part of the proceeding in which it was interested. In view of the fact that, by its order the court provided for a new assessment by other commissioners, the correctness of whose report may be challenged hereafter, the entire report of the first commissioners, in so far as it relates to the establishment of a benefit district and to the assessment of benefits, was in effect set aside. The appellant is not injured thereby, and therefore has no just cause for complaint as to such of its exceptions as were overruled.

[3, 4] Appellant contends that its exceptions went only to that part of the report of the commissioners which undertook to assess benefits, and that the action of the court in dismissing the condemnation proceeding was of the court's own motion. It also contends that in condemning land the circuit court proceeded as a court, and in making assessments for benefits received the court proceeded only as part of the taxing machinery of the city. Regardless of whether the court's error in dismissing the entire proceeding was made on the motion of appellant, the order was none the less erroneous. The trial court was right in setting the order aside to correct its error. Even though the court was acting in a dual capacity, its action was taken in one order, and in either capacity its action is subject to review by this court.

[5] Respondent contends that no appeal will lie from the order of April 22, 1919, because same is not a final judgment against appellant. If the court had overruled respondent's motion to set aside its order and judgment of June 10, 1918, appellant would have maintained a final judgment in its favor, and appellant is seeking to preserve this status by its appeal. Respondent's motion to set aside such judgment must be regarded as a motion for a new trial. Section 1469, R. S. 1919 (then section 2038, R. S. 1909), specifically authorizes an appeal from an order granting a new trial.

These considerations result in the affirm-

ance of the order of the trial court setting aside its order and judgment sustaining appellant's exceptions and dismissing the cause, and necessitates the remandment of the cause to the circuit court for further proceedings.

It is so ordered.

All concur.

**VIRGINIA C. MINING, MILLING & SMELTING CO. v. CLAYTON. (No. 21721.)**

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921. Rehearing Denied  
July 23, 1921.)

1. Corporations  $\S$ 319(7)—Evidence held to show valid loan, secured by pledge of stock, from officer and incorporator to foreign company.

In an action by a mining company against an officer and one of its incorporators to enjoin him from selling or hypothecating certain shares of its stock in his possession, evidence held to show a valid loan from defendant to plaintiff and a valid pledge of the stock under which defendant secured it, though there was no prior authorization from the board of directors, both loan and pledge having been validated by ratification.

2. Equity  $\S$ 87(1)—Limitation statutes apply to legal actions only.

Statutes of limitation, unless otherwise provided by law apply to legal actions only.

3. Equity  $\S$ 71(1)—Lapse of time only a single element of the doctrine of laches.

Lapse of time is one of the elements entering into the doctrine of laches, but is not the sole determining element, as all of the surrounding facts and conditions must be considered along with the lapse of time.

4. Equity  $\S$ 87(1)—Lapse of time as element of laches cannot be measured by statute of limitations.

Lapse of time as an element in the doctrine of laches cannot be measured by the statute of limitations.

5. Corporations  $\S$ 428(1)—Knowledge of officers is knowledge of company.

The knowledge of the officers of a corporation is the knowledge of the corporation.

6. Corporations  $\S$ 319(4)—Incorporator and officer of mining company entitled to invoke doctrine of laches against company seeking injunction as to his disposal of stock pledged to secure a loan to it.

Officer and incorporator of a mining company who made a loan to it secured by a pledge of its stock and subsequently received the stock under the terms of the pledge, held entitled to invoke the doctrine of laches against the mining company seeking to enjoin him from selling, hypothecating, or otherwise disposing of the stock, his efforts and expenditure having developed the mine, and the officers and agents of

the company having known of his claim to the stock.

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Bill by the Virginia C. Mining, Milling & Smelting Company against James W. Clayton. From judgment dismissing the bill, both parties appeal. Judgment affirmed.

Sturdevant & Sturdevant, of St. Louis, for appellant.

Marion C. Early, of St. Louis, for respondent.

George H. Williams, of St. Louis, amicus curiæ.

GRAVES, J. Action in equity, the particulars of which will more fully appear from an outline of the facts. Upon the completion of the issues in the lower court, Hon. Charles W. Bates was appointed as referee. Such referee took and reported the evidence, together with his findings of fact and conclusions of law. Both parties filed exceptions to the report of the referee, but the trial court overruled such exceptions, and entered judgment against plaintiff dismissing its said bill in equity, and adjudging against it the costs of the proceedings. Both sides moved for a new trial, and, these motions being overruled, both sides appealed. The points of difference had best be left to the opinion. Pleadings and facts can well be outlined together.

In the fall of 1905, Gonzales and two other Mexicans owned what is known as the Hidalgo mine, in the state of Chihuahua, Mexico. These owners had given Clayton (defendant herein) an option to sell the same for them. Clayton interested one Phil Chew of St. Louis, Mo., who sent Thomas B. Rains to Mexico as his agent. On or about November 1, 1905, Rains, then in Mexico, as agent for Chew, paid \$5,000 in Mexican money to hold the option, and to apply upon the purchase price, if the sale was consummated. The contract was taken in the name of Rains, acting for Chew as aforesaid.

In December Chew and certain associates organized the plaintiff company under the laws of Arizona. The purpose was to have such company take over the Mexico property. Clayton was made one of the incorporators, or was mentioned as such, although it appears that he had no knowledge of the fact at the time. It appears that Rains (agent of Chew) had an understanding that Clayton was to have \$10,000 in Mexican money by way of commission on the sale of the property, and in addition to have one-eighth of the stock of the company organized to take over the property. The \$10,000 commission was to be paid in three installments, just as the purchase price was to be paid.

This price was \$50,000 in Mexican coin. The original directors in plaintiff's company, as named in the article of association, were Chew, Clayton, Rains, Harris, and Straat. The actual incorporators were Chew, Rains, and Harris. After the organization of plaintiff corporation a resolution was passed authorizing and directing the purchase of the Hidalgo Mine from Rains, in return for the issuance to Rains of all the \$1,250,000 share of stock, except four qualifying shares. In January following Straat and Harris resigned from the directorate, and Candy and Stevens took their place. Chew, Rains, Candy, and Stevens then went to Mexico, where they were advised that it would be better to organize a Mexican corporation to take and hold the title to the mine. Accordingly a Mexican corporation, named Virginia C. Mining, Milling & Smelting Co., of Chihuahua, was organized with a capital stock of \$10,000 Mexican money, said stock being divided into 10 shares of \$1,000 each.

The incorporators were Chew, Rains, Clayton, Stevens, and Candy. Chew was made president, Rains, vice president, and treasurer, Clayton, second vice president, and Candy comisario. It seems that there are two kinds of corporation stock in Mexico, i. e., registered stock, which can only be transferred and registered on the books of the company, and the other so made that title would pass by mere delivery. The stock in this Mexican corporation was of the latter character.

Upon the organization of the Mexico corporation, the Hidalgo mines were transferred to it for \$50,000 Mexican money, payable one-third in cash, and the remainder in two equal annual payments, due in one and two years. If payments were not made there was a forfeiture under the deed. The 10 shares of stock were turned over to Chew, who held them in St. Louis, Mo. These 10 shares, with the knowledge of all parties, were to be the basis for the capitalization of the plaintiff company, and the plaintiff company was to operate the mine, which it did for a time out of money obtained by the sale of plaintiff's stock, and it was further understood that the mine was to be paid for out of sale of plaintiff's stock. Plaintiff's stock was of the par value of \$1 per share, and there were 1,250,000 shares. The first payment was made in cash, and the second payment was duly met, but when the time for the third arrived there was trouble getting the money. The panic of 1907 was on at that time. After sundry efforts it devolved upon Clayton to further finance the plaintiff. This he would not do without having delivered to him 6 of the 10 shares of the Mexican corporation. Clayton wanted the title so that he could control it, in the event he had to take the property for the money he was to advance, and he wanted this title in

Mexico, and not elsewhere. He demanded that 6 of the 10 shares of the Mexican company, then held by plaintiff company, be turned over to Dale Bros. at Chihuahua, Mexico. Finally Chew sent the 6 shares to Rains, who was there for the purpose of arranging for the loan from Clayton, and Rains, as the vice president and treasurer of the Mexican corporation, executed and delivered to Clayton the note of said Mexican corporation for \$24,378.65, Mexican money, due July 14, 1908, and this note was secured by the deposit with Dale Bros. (whose company was the Chihuahua Investment Company) of the 6 shares of stock, with the understanding that if the note was not paid after one extension of 6 months the stock was to be delivered to Clayton and become his property. The note was not paid at its maturity, nor after two 6 months' periods had elapsed. Clayton paid the remainder upon the property, and the balance due himself on commission, which aggregated the face of the note aforesaid. During this time Chew was president and Rains was vice president and general manager of plaintiff company. In fact the two were in control of both companies, having the same name but organized in different territory. The pledge of the Mexican corporation stock had not been specifically authorized by the board of directors of plaintiff, although Chew, Rains and Clayton were on that board, and of course knew all the facts.

Whilst plaintiff was the operator of the mine up to about January, 1910, the venture had not proven profitable. Chew died in March, 1909, and was succeeded by L. Vaughn Clark, but Clark left St. Louis, and seems to have had little to do with the company. In June, 1909, it was discovered by the Board of Directors that Chew had pledged these 6 shares of stock in the Mexican company to Clayton, and that he had sold large quantities of stock, some of which had not been accounted for by him to the company; at least, the corporation claimed some \$18,000 due from Chew.

Drifting backward a little, it appears that after two 6 months' extension periods had expired, and the Clayton note remained unpaid, Dale Bros. turned over the 6 shares of stock in the Mexican corporation to Clayton. Clayton, as vice president, then called a meeting of the stockholders of the Mexican corporation for January, 1910, and gave notice thereof. At the meeting, Clayton, who had transferred some of his shares to apparent friends, was elected president, and the Mexican corporation took over the operation of the mine, under the supervision of Clayton. It might well be here noted that by due action of plaintiff's board of directors the other 4 shares were pledged to secure funds with which to pay up debts owing by

the mine, under the operation thereof by plaintiff, and these shares ultimately turned up in the hands of Rains.

Under the management of the Mexican corporation the property seems to have reached a paying basis, and dividends were declared and paid. The referee finds, and the evidence tends to show, that Clayton in good faith thought himself to be the owner of the 6 shares of stock, and further, that all the active persons upon the board of directors of plaintiff company treated him as owner; that the said board were fully advised of the pledge in June, 1909, and authorized a repledge, which was not carried out. His ownership was not questioned until some time in 1913, when, by his efforts, the property has been put upon a dividend paying basis, and had of course advanced in value. The prayer of plaintiff's petition reads:

"Wherefore, the premises considered, plaintiff prays for an order restraining and enjoining the defendant from selling, hypothecating, or in any other manner making way with the 6 acciones, and from selling, transporting, or in any manner disposing of, pledging, or converting to his own use the said ores and products of said mines, or from interfering with plaintiff's control and management of said mines pending this action; and that defendant be restrained and enjoined from holding or attempting to hold any meeting of stockholders of said Mexico corporation by virtue of his possession and claim of ownership of said 6 acciones and from voting, causing or permitting same to be voted while thus in his possession and control at any meeting or attempted meeting of said Mexico corporation, pending the final termination hereof; that defendant be required to answer herein and state fully the amount of money received by him from said mines as aforesaid, or from any source which would be subject under the orders of this court to be applied to the discharge of such indebtedness, and to state any balance still due thereon, if any; that if it be found that any balance still remains due defendant on account of said indebtedness, or interest thereon, that plaintiff be permitted to pay the same and that thereupon plaintiff have a judgment and decree against the defendant for the redemption of said 6 acciones, and that defendant be compelled to surrender and deliver up to the same to this plaintiff discharged of any lien or incumbrance because of said loan or their hypothecation thereon and from any claim or interest of defendant, and that plaintiff have such further orders, judgment and decrees, not herein specifically prayed for, as to the court may seem just and equitable in the premises, and judgment for the costs of this action."

The answer sets up several defenses, which, so far as necessary, will be noted later. Reply placed at issue the new matter in the answer. The learned referee made a very lengthy finding of facts, including among them the outlined facts above. His conclusion of law was thus stated:

"I find, upon the basis of the foregoing facts, that, as an action in equity, this suit cannot be maintained, because of inequitable laches and acquiescence upon the part of the plaintiff. *Patterson v. Hewitt*, 195 U. S. 309 [25 Sup. Ct. 35, 49 L. Ed. 214]; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587 [23 L. Ed. 328]; *Hayward v. National Bank*, 96 U. S. 611 [24 L. Ed. 855]; *Joseph v. Davenport*, 116 Iowa, 268 [89 N. W. 1081]; *Gilmer v. Morris*, 80 Ala. 79 [60 Am. Rep. 85]; *Story on Bailments*, §§ 246, 347; *Schouler on Bailments*, § 250 and note. The authorities referred to as opposed to the application of laches are not pertinent to the facts of this case."

From this conclusion, both parties have appealed, and lodged their complaints here. Defendant not only declares that the laches of plaintiff defeated the action, but he avers: (1) That plaintiff corporation was doing business in Missouri without a license, and cannot maintain this suit; (2) that the pledge of the stock was duly ratified and recognized by plaintiff company, and therefore the plaintiff's action is groundless; (3) that our courts will not interfere with the operation of a foreign corporation; and (4) that the Mexican corporation was a necessary party to the suit. It would appear that defendant's appeal was taken as a matter of precaution to preserve the questions above stated.

This outlines the case. The details of the evidence and of the findings will be noted in the course of the opinion.

1. As said, the learned referee found that there were laches in the institution of this suit. He found, and we think rightfully, that there was no record action of the board of directors of the plaintiff corporation authorizing the pledging of this stock in the Mexican corporation to the defendant. So that the doctrine of laches invoked by the referee is necessarily dependent upon two lines of facts, i. e.: (1) As to the ratification of the acts of the officers of the plaintiff company in the pleading of this stock to defendant; and (2) as to the conduct of plaintiff company, after the alleged foreclosure of the pledge made to defendant. The facts are elaborately detailed by the referee, but space forbids a setting out in full of his findings of the facts. Suffice it to say that, generally speaking, they were carefully found. From these findings it appears (and the evidence so shows) that the whole board of directors did not know of the pledge of the stock of defendant until some time after it was made. The active officers, and the active directors of the plaintiff did know of it, and did pledge the stock as security for the debt to plaintiff. The referee finds (and the finding is well supported by the evidence) that:

"On July 29, 1909, a meeting of the directors of the plaintiff company was held, at which Rains presided. He reported the failure of the McIntire negotiations because Mrs. Chew had

refused to grant an extension of the time. He further reported that Clayton's loan was past due; that the latter was threatening to foreclose his lien on the security that Chew had pledged therefor, namely, the 6 shares of the Mexican corporation. Rains further states that other creditors were due about \$2,300 or \$2,400 for supplies, and that he had been advised by Dale and Clayton to settle these claims, as the creditors were threatening, and the remaining 4 shares might be sold to pay this indebtedness.

"After protracted discussion Rains was called upon for his opinion, and stated there was nothing else to do except to borrow money on the 4 shares. It was thereupon resolved that Rains be authorized to borrow on the pledge of the 4 shares enough money to pay the creditors, outside of Clayton; and that he be authorized to negotiate, if possible, a new loan with Clayton for the amount due him, and, if successful, to pledge anew, as security therefor, the 6 shares of the Mexican corporation which had already been pledged to Clayton to secure the payment of the debt to him."

There was much other evidence tending to show the later knowledge of the loan from Clayton, but this action of the board of directors of the plaintiff corporation was an express recognition of the loan, as well as an express recognition of the pledge. The authority was granted "to the pledge anew," the stock to Clayton for a renewal of the loan. Such action amounted to a ratification by the corporation of all that had gone before, both as to the loan and the pledge. Many other acts found in the record tend to the same end. However, we do not gather from the brief that plaintiff seriously questions this situation, but they do urge that the pledge was not legally foreclosed, and for that reason title to the 6 shares in the Mexican corporation never passed to defendant.

[1] Of that situation the further facts will follow. Suffice it to say that the record shows a valid loan from defendant to plaintiff, and a valid pledge of the stock, notwithstanding there was no prior authorization from the board of directors. Both loan and pledge were validated by ratification.

[2-4] II. Going now to the matter of laches, it may be said that this is a doctrine peculiarly applicable to suits in equity. It is independent of the statutes of limitations, which, unless otherwise provided by law, apply to legal actions only. Lapse of time is one of the elements entering into the doctrine of laches, but by no means a sole determining element. All of the surrounding facts and conditions must be considered along with lapse of time. When so considered a comparatively short lapse of time may suffice. It is at least safe to say that lapse of time cannot be measured by the statute of limitations. The weight of authority is otherwise. *Patterson v. Hewitt*, 195 U. S. 319, 25 Sup. Ct. 35, 49 L. Ed. 214; *Bliss v. Prichard*, 67 Mo. 181; *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408.

So, whilst we recognize lapse of time as one of the chief elements in applying the doctrine of laches to suits in equity, there are other matters of practically equal importance. If a property is of practically no value, and parties interested therein have knowledge of the fact that another is claiming the title to such property, then, if the party claiming the title proceeds to take his chance, expend his money and his work upon such property, with the knowledge of the other parties, and by virtue of his acts the property suddenly becomes valuable, laches can be properly invoked, on the theory that the property only had a speculative value, which was suddenly placed in the category of real, or great value, by the money and work of the adverse claimant. The lapse of time, in such case, might be a very short one, if the acts of the adverse claimants were such as to lead the other party to the belief that they were recognizing his claim.

Mining claims are peculiarly subject to this rule. They are worthless today, and may be valuable tomorrow. So, too, are mining stocks. They may have no value today, but, by the expenditure of money and work upon the claims represented by the stock, they may become extremely valuable in a very short time. So that, in the application of the equitable doctrine of laches, there are many important things for consideration in addition to the mere lapse of time. *Patterson v. Hewitt*, supra.

[5] III. There is no better rule established than that the knowledge of the officers of a corporation is the knowledge of the corporation. The knowledge of the corporation as to the claim of title by defendant to these 6 shares of stock in the Mexican corporation is an important question in this case. This is a matter wholly different from the ratification and recognition of the original loan and pledge. It appears that, notwithstanding the agreement at the time to the effect that Clayton should have title to the shares of stock upon default in payment, the Mexican law required a given procedure to legally vest title. This procedure was not followed. Clayton, pursuant to his agreement, demanded the stock, and it was turned over to him. He thought that he had done all that was required to perfect his title. The others, from their conduct, for a long time evidently thought likewise. The learned referee has made a long and elaborate finding of the facts upon this question, and we wish that a reprint of his findings was justified in this opinion, but they are so full of details (fully covered by the evidence) that we find that a shorter résumé can be made to suffice here. It should be remembered that both corporations were largely officered by the same men.

On July 26, 1909, it appears that defendant wrote a letter to Stevens, who was not

only one of the directors of plaintiff, but seems to have been acting as one of the counsel of plaintiff. Defendant's letter is not in the record, but its contents can best be judged by the answer. Among other things Stevens says:

"I am well satisfied that you have secured the 6 shares of the Virginia City Mining Company. The board of directors of the Virginia City Company of Arizona had a meeting in St. Louis on Wednesday of this week, and Mr. Rains, vice president of the company, will be in Chihuahua some time next week. Mrs. Chew and her counsel acted rather peculiarly in this matter. We have given a man in New York an option on a majority of the stock which was to be placed by July 23d, but on the 11th he wrote and asked until August 1 to close the deal. Mrs. Chew's counsel promptly wired that he would give him no further time, and that the deal was off, saying to Mr. Rains that Mrs. Chew would furnish all the necessary means to protect the property, pay the note, etc., and develop the property as agreed to be done by the New York party. But it seems that between the time of sending the telegram and the time this matter became due Mrs. Chew changed her mind, and I suppose preferred to lose all interest in the property rather than to put up the money necessary to protect it and develop it. Mr. Rains will make all arrangements with you in regard to calling the extraordinary meeting of the Mexico company to elect directors, and has authority to act with you in all matters necessary to reorganize the company. Mr. Chew had gotten very many people of little means to put a few dollars in this company, and most of them are people who cannot afford to lose a cent, and every man who has an honest principle in his bosom should try to protect these people from losing the little money each one has advanced. Some of the people connected with this company are rich, and possibly do not care anything about it, and, if they do not, certainly we do not. Whatever you and Mr. Rains do in the matter will be satisfactory to me. Mr. Rains will give the name of directors; I do not know their first names."

[6] This letter followed a meeting of the directors of plaintiff. From its contents, and from what followed thereafter, it is evident that the board of directors knew of defendant's claim to this stock. This for the reason that Rains, as an officer of plaintiff, followed the letter to Mexico, and from that time forward every act done was one in recognition of defendant's title to these shares of stock. There are many transactions immediately following each other for the next several years, which show that the officers and agents of this plaintiff treated defendant as the owner of this stock. When defendant got the stock he pledged it for money to exploit the mine. His own resources had been crippled by the payment of the corporation's debt on the property. Upon getting the control of the Mexican cor-

poration, he devoted his time and energies, as well as his money, to the development of the mine. Upon Chew's death the mine was in debt, and the plaintiff company had to pledge the remaining four shares to pay up the debts contracted during its operation of the mine. These shares finally got back to Rains, who held them in trust for plaintiff company. Finally, and long before the institution of this suit, defendant, through his own efforts, and his own cash, so developed the mine that they had money with which to pay a dividend, and when it was paid Rains (trustee for plaintiff) received four-tenths on the stock held by him, and defendant received six-tenths, being the proportion due him on the six shares held by him. Thus, from July, 1909, until practically the day of filing this suit in 1913, plaintiff and all its officers treated defendant as the owner of this stock. Through its officers and agents plaintiff company not only knew of defendant's claim to title, but it likewise knew of the fact that defendant was spending time and money in the development of the mine, in the belief that he owned a six-tenths interest therein. By the use of his own money and time he made a rather promising prospect a real mine, but not with the help of plaintiff and its officers. As a fact plaintiff sent out a letter urging the stockholders to come to the rescue, and pay up the debt, and push the development, but not a favorable response was received. Under these and other details which might be mentioned, we conclude that the learned referee and the learned trial court were right in applying the doctrine of laches to the facts of the case. It follows that the judgment should be affirmed, and it is so ordered.

All concur.

STATE ex rel. ST. LOUIS-SAN FRANCISCO  
RY. CO. v. REYNOLDS et al.,  
Judges. (No. 22659.)

(Supreme Court of Missouri, in Banc. July 8, 1921. Motion for Rehearing Denied July 22, 1921.)

1. Certiorari  $\S$  64(1) — Supreme Court will take evidentiary facts in opinion for facts in case.

On certiorari to the St. Louis Court of Appeals on ground of conflict of decision, the Supreme Court will take the evidentiary facts in the opinion for the facts in the case.

2. Carriers  $\S$  327—Duty of prospective passenger crossing track.

Where decedent was awaiting the arrival of an accommodation train at a suburban station, and perceived a train rapidly approaching, it was her duty to see just where the moving engine was, and the rate of its speed, before attempting to cross the track directly in front of it.

**3. Carriers ⇐287(2)—Engineer may assume that one crossing track is not oblivious of danger.**

The engineer of a through train running late on the time of an accommodation train at great speed, when he saw persons at a suburban station attempting to cross the track, could assume that they saw his train and the speed of such train, and that, if waiting passengers, they knew the local train had not arrived on time, and that they would stop and look before entering on the track, which was the real danger zone.

**4. Carriers ⇐347(3)—Case of one killed while crossing track held not sufficient to go to jury.**

In an action for the death of one awaiting passage on a suburban train, who while crossing the track was struck by a through train running late on the time of the suburban train, held, that, in view of decedent's negligence and knowledge of the approaching train, and notwithstanding the humanitarian rule, plaintiff was not entitled to have the case go to the jury.

Walker, J., dissenting.

Certiorari to the St. Louis Court of Appeals by the State of Missouri, on the relation of the St. Louis-San Francisco Railway Company, against Hon. George D. Reynolds and others, Judges of the St. Louis Court of Appeals. Judgment and opinion of the St. Louis Court of Appeals (227 S. W. 129) quashed.

W. F. Evans, E. T. Miller, and A. P. Stewart, all of St. Louis, for relator.

Perry Post Taylor, Emil Mayer, and Ben L. Shifrin, all of St. Louis, for respondents.

GRAVES, J. Certiorari to the St. Louis Court of Appeals. Our writ was invoked in a case decided by that court entitled Charles N. Martin v. St. Louis-San Francisco Railway Co. (227 S. W. 129), wherein a judgment of \$5,000 obtained by plaintiff in the circuit court was affirmed by the Court of Appeals. The action was one by the husband for the alleged negligent killing of his wife. All charges of negligence were abandoned except the negligence covered by the humanitarian rule. In other words, the case in the trial court was submitted solely on the humanitarian rule. Relator urges many conflicts between our opinions and the opinion of the Court of Appeals, the particulars of which will be noted in the course of the opinion.

The evidentiary facts are thus outlined in the opinion of the Court of Appeals.

"At about 10 a. m., on August 6, 1917, plaintiff's wife was struck and killed by one of defendant's east-bound through passenger trains at Shrewsbury station, St. Louis county. Hence arose this action for damages under the compensatory death act (section 5425, R. S.

1909). All allegations of primary negligence were abandoned by plaintiff, and the case was put to the jury under the humanitarian doctrine, resulting in a verdict and judgment for plaintiff for \$5,000. Defendant appeals.

"Defendant's double track runs east and west at the point, and for about one-half mile west of the station the track is straight, and then curves to the south. West-bound trains use the north track, and east-bound trains the south track. North of both tracks is the station house, and south of the tracks is a platform where passengers board east-bound trains.

"On the morning in question, a local suburban accommodation train was due to stop at Shrewsbury station at 9:46 a. m. This train was late. About 10 o'clock a through passenger train, not scheduled to stop at this station, and running several hours late, and at the rate of 45 miles per hour, rounded the curve one-half mile to the west of the station and proceeded eastwardly on the south of east-bound track on a down grade of about 60 feet to the mile. At this time the deceased, Mrs. Martin, two other ladies, and two children were in the station on the north side awaiting the local train. Hearing a train whistle to the west, they proceeded out of the station and across the track for the purpose of getting upon the platform on the south side, so as to take what they supposed was the local accommodation train that was approaching, and which would stop at the station.

"The inference is plain from the evidence that this group of passengers, including the deceased, knew the train was coming down the grade, but supposed that it was the local train, and it would slow up and stop at the station. In that event there was ample time to cross the track in safety. As it turned out, the train was a through train, running very fast, and not scheduled to stop. The result was that the two ladies and the children barely crossed the track in time, and Mrs. Martin, who was just behind the others, was struck and killed just as she stepped off the south rail of the east-bound track. One second more, or two at the most, and she would have reached a place of safety.

"The testimony of the engineer, who was called by the plaintiff, shows that this train of 9 coaches was running on about the time of the local train which was passed by his train at Valley Park, 12 miles to the west; that as he approached the station traveling 45 miles per hour, and when about one-quarter of a mile (1,320 feet) west of the station he saw this group of passengers leave the depot and start across the tracks, and that he knew they were going to cross in front of his train. While the engineer says that he did not see the deceased until just before his engine struck her, he did see the group of passengers crossing the tracks, and other evidence is to the effect that Mrs. Martin was among the group. Realizing at that moment that these women and children were going to cross in front of his engine, the engineer testified he gave his brakes what is termed a 'service application,' which is the ordinary method of stopping the train as distinguished from an 'emergency application,' which slows up and stops the train quicker than the



'service application,' and which is used in cases of emergency. He says he took this action in order 'to give the group of passengers time to get across.'

"While the engineer testifies he applied the brakes as stated, and lessened the speed of the train from a point one-quarter of a mile from the station, there was evidence tending to show that the speed of the train was not slackened until after the deceased was struck. There was further evidence tending to show that, had the engineer given the brakes an emergency application, instead of a service application, the train could have been stopped within the 1,320 feet under the condition that existed. In any event, by such emergency application the speed of the train could have been so slackened that the deceased would have had time to have escaped from the oncoming locomotive. While the engineer says that, having once given the brakes the service application, he could not thereafter, for mechanical reasons, apply the emergency brakes, this is disputed by another experienced engineer, who testified for plaintiff."

Counsel for relator, after setting out the foregoing portion of the Court of Appeals' opinion, and directing our attention thereto, then thus proceeded to outline their conclusions of the rulings of the court:

"On this statement of facts, the Court of Appeals held: (1) That when the engineer saw the group of people leaving the station for the purpose of going to the south side of the track to take what they supposed was the local accommodation train, which he knew was following his train, and when he knew that they were going to cross the track, they were from that moment in the danger zone, and the duty then devolved upon the engineer to do everything he could reasonably do to either stop or slow up the train so as to prevent the accident, and that, as there was evidence tending to show that he failed in this duty, the case was properly submitted to the jury under the last chance rule; and (2) that, since the engineer admitted that he knew the group of people were going to cross the track from the time they left the depot building, he was not entitled to presume that persons who were *sui juris* would not step from a place of safety into one of peril.

"The Court of Appeals further approved the main instruction given by the trial court at the instance of plaintiff, which instruction submitted the case to the jury on the theory of the humanitarian doctrine, but omitted to require the jury to find, as a predicate to returning a verdict for plaintiff, that deceased was oblivious to the impending danger. The petition contained no allegation that deceased was oblivious to the impending danger. The Court of Appeals held that it was unnecessary that the petition should contain an allegation that deceased was oblivious to the impending danger, or that the element of obliviousness should be incorporated in the instruction, because of the evidence of the engineer, who admitted that he knew the group of persons, of which deceased was one, were going to cross the track in front of his engine."

These holdings, they say, conflict with diverse opinions of this court. This sufficiently outlines the case.

I. Relator is correct in urging that the Court of Appeals ruled that the deceased was in the danger zone from the time that she left the depot on the north side of the two tracks, and started to the south. On this question, the court said:

"When the engineer saw this group of passengers leaving the station for the purpose of going to the south side of the track to take what they supposed was the local accommodation train which he knew was following his train, and when he knew, as he admits, that they were going to cross the tracks, they were from that moment in the danger zone, the duty then devolved upon him to do everything that he could reasonably do to either stop or slow up his train so as to prevent the accident. As there was evidence tending to show that he failed in this duty, we think the case was properly admitted to the jury under the last chance rule."

[1] It should be noted that the court further says "there was evidence tending to show that the speed of the train was not slackened until after the deceased was struck." From whence this evidence comes the court does not enlighten us in the opinion. Under our rule we take the evidentiary facts in the opinion for the facts in the case, and we shall follow that rule in this case. Curiosity, however, prompted us to read the record in the Court of Appeals, and it there appears that the woman just ahead of the deceased looked up at the approaching train twice, and saw that it was coming very fast and was not slackening its speed. She was the leading witness for plaintiff. By other persons who were on the south side of the tracks awaiting this local train, it was shown that the speed of the train was not slackened, and that, by the time the train covered half of the clear distance between the curve and the depot, they discovered that it was not the local by the very facts that it was running so fast, and was not slackening its speed. What other waiting passengers saw, deceased might have seen. Of course these details, helpful as they might be, we cannot, and will not, consider. We shall take the evidentiary facts just as they are in the opinion, although it might weaken the ruling of our learned Brothers if the actual facts stated above appeared. They did rule that the danger zone for the deceased began at the depot, and extended clear across the tracks. In other words, they ruled that it was the duty of this engineer to begin the process of protecting deceased, as if in a perilous position, and oblivious thereof, from the time she emerged from the depot. Deceased was *sui juris* and possessed of all her faculties. Is this ruling in conflict with our rulings? Of that question next.

II. The Court of Appeals says:

"The inference is plain from the evidence that this group of passengers, including the deceased, knew the train was coming down the grade."

From the real record the word "inference" would apply to deceased rather than the others. This because her mouth was closed at the trial. The others testified, and we have indicated supra the character of their testimony. One went so far as to say that she discovered it was not the local train (by its speed) before she crossed. And she was just ahead of deceased. These facts we eliminate, however, and take the court's statement that "the inference is plain" that they knew of the approaching train. We also take the court's statement that the engineer knew that the purpose of these three ladies and two children was to cross those tracks. With both statements taken for the facts, we yet have those parties knowingly leaving a place of safety, and putting themselves in a place of peril. Concede that they thought it to be the local train, yet they were crossing railway tracks, one of which would be occupied by the engine of that train. They were crossing from the depot directly across to a platform opposite, as we gather the facts from the opinion. The engine of even the local train would have to cross their pathway before its train would be in position to receive passengers.

[2] The deceased was, under all the facts, head-bound for a place on the railway track, which she knew would sooner or later be occupied by the moving engine of the train, whether it be the local train or some other train. Her duty was to see just where the moving engine was, and the rate of its speed, before she attempted to cross the track. This because, as the Court of Appeals finds, she knew the train was coming. She, with knowledge of the fact of the approaching train, was not oblivious of her danger.

[3] Now, as to the situation of the engineer on the train. He saw these parties, and, the track being clear and straight, he had the right to assume that they saw his train and the speed of the train. Their actions indicated to him that their purpose was to cross the track, but their actions also indicated that they knew (as the Court of Appeals finds) of the approaching train, and its speed. He knew that the local was behind him, and he had the right to assume that they, if waiting passengers, knew the local train had not arrived on time. In other words, that such train was off of schedule time. But the mere fact that these parties were going to cross the tracks would not necessarily indicate that they were intending passengers. The engineer had the right to assume (knowing from their acts that they saw his train, and hence the speed thereof) that these parties would look and stop before entering upon the track, the real danger zone. The

mere fact that he might have believed, or even knew, that their purpose was to cross the tracks, and that, too, before the arrival of his train, did not deprive the engineer of the right to assume that they would stop their progress before real danger was reached; this because to him their actions disclosed their knowledge of his approaching train, which knowledge carried with it knowledge of the fact that the engine was approaching very fast. The Court of Appeals says that the engineer would have no right to assume that these parties, with knowledge of an approaching train, the engine of which must cross their pathway, whether such train be the local or some other train, would cease their progress across the tracks before placing themselves in actual danger by going upon a railroad track immediately in front of a rapidly moving engine. Once you concede that the parties had knowledge of the approaching train, and that there were acts to indicate to the engineer that they had such knowledge, then there is no danger zone until the track is practically reached; this for the reason that the engineer can assume that the approaching parties (knowing that the train was coming) would stop before going on the track, rather than hurl themselves upon the track directly in front of the rapidly moving train. This assumption, the Court of Appeals ruled, was not proper, and that the danger zone began at the depot. In this they contravene our cases.

The ruling clearly conflicts with *Boyd v. Ry. Co.*, 105 Mo. 371, 18 S. W. 909, and the many cases which have followed that case. The facts of the *Boyd* Case are in many ways similar to the case at bar. The Court of Appeals made an attempt to distinguish it from their case, but it cannot be successfully done. Judge Brace has succinctly stated the facts of *Boyd's* Case, thus:

"The evidence for the plaintiff disclosed the following facts; Charles Boyd, the husband of plaintiff, was a hotel keeper in the town of Renick in Randolph county. His hotel was situated about 100 feet north of the depot. The defendant's tracks are between the hotel and the depot. A plank walk leads from the hotel across the tracks to the platform of the depot, and was used as a public crossing. In the prosecution of his business, he was in the habit of going to the depot upon the incoming of all passenger trains stopping at that station. One of defendant's regular passenger trains, the mail from Kansas City to St. Louis, was due from the west at Renick daily at 12:30 p. m., and usually passed over the crossing from the hotel at a speed of three or four miles an hour, stopping at the platform just east of the crossing.

"On the 26th of September, 1887, an excursion train approached Renick from the west on the time of the Kansas City & St. Louis mail [and running as its first section]; it signaled its approach by whistling at the usual place. The

train, from the time it whistled until it passed the depot, at which it did not stop, was running at about 40 or 45 miles an hour; as the train approached the depot its bell was rung, and kept ringing, but its speed was not checked. When Mr. Boyd heard the train whistling he was in the house. He immediately came out, and started for the depot on the plank walk in a run or 'trot,' and, without breaking his gait, entered upon the track immediately in front of the engine, and was struck just as he was about to make his last step over the track, and instantly killed. Mr. Boyd was a small, active man, quick in his movements, about 52 years of age, and in the enjoyment of all his senses.

"The train was in plain view, and its sound in his hearing from the moment he started from his hotel on the plank walk until he entered upon the track. That he both heard the train and saw it, in a general way, there is no question; but he did not stop a moment in his course to observe its movement, to ascertain whether it was the regular train he was expecting, and which would stop at the depot, and whose speed, as it slowed up for that purpose, he could accurately gauge from his long and frequent experience, or, as it proved to be, a special going at a high rate of speed, and showing no evidence of an intention to stop. Dominated, perhaps, by the first impression, received in the house when he heard the whistle, that this was the regular mail, he hastened towards the depot, and onto the track, without stopping for a moment to test by sense of sight or sound the correctness of his first impression, and as the result of his heedlessness lost his life.

"This is one view of the case presented by plaintiff's evidence, as through it we look back at the unfortunate accident after it happened. Another may be taken of it, that, observant of his surroundings, he may have miscalculated his own speed, and that of the train, and hazarded the chance of getting across the track in safety before the engine could strike him. In either view his death was the result of his own negligence.

"The evidence for plaintiff further showed that the deceased, in going from his hotel to the track, was in plain view of the defendant's servants on the locomotive, and there was evidence tending to prove (upon the hypothesis that the train was going at the rate of 40 miles an hour) that, if the engineer had commenced checking his train at 300 feet from the point of collision, the speed of the train could have been so diminished that it would have reached that point two seconds later than it did, and the deceased would have escaped without injury."

There is every material fact in that case that there is in the case under consideration. It is true that Boyd was not an intending passenger, but his purpose to get to the depot where his expected train would stop is the same. In Boyd's Case, the deceased was running to get over the track to the depot; the engineer saw him, or could have seen him, in time to have so checked his train as to have avoided injury; Boyd was in view from the time he left this hotel, and his acts showed that he intended to reach the depot

across the tracks, just as the acts of these parties showed that they intended to reach the platform across the tracks; Boyd knew there was a train coming, but thought it to be a train which was then due to stop there, as did these parties think; Boyd was killed by an extra train running 40 to 45 miles per hour, which was not to stop, as was deceased killed in the case before the Court of Appeals. The facts are so nearly identical, and so very similar, that the same principles of law must be applied to each.

The Boyd Case ruled that the danger zone was the railroad track, and further ruled that, although the engineer saw Boyd running toward the depot, the engineer had the right to assume that he would check his progress before going upon the railroad track. We also then ruled that the plaintiff's evidence did not make a case for the jury upon the humanitarian rule, or any other rule, and reversed the judgment for plaintiff, which was rendered under her instruction covering the humanitarian rule. The doctrine of Boyd's Case has been consistently followed by this court (as the Missouri Citator will show) but we shall not stop to compare the other cases with the facts of the present case. The curious may examine *Kinlen v. Railroad*, 216 Mo. loc. cit. 158, 115 S. W. 523; *Holland v. Railroad*, 210 Mo. loc. cit. 351, 109 S. W. 19; *Sites v. Knott*, 197 Mo. loc. cit. 712, 713, 96 S. W. 206; *Mockowik v. Railroad*, 196 Mo. loc. cit. 570, 94 S. W. 256; *Boring v. Street Ry. Co.*, 194 Mo. loc. cit. 549, 92 S. W. 655. See, also, *Laun v. Railroad*, 216 Mo. loc. cit. 563, 116 S. W. 553; *Pope v. Railroad*, 242 Mo. loc. cit. 239, 240, 146 S. W. 790; *Reeves v. Railroad*, 251 Mo. loc. cit. 177, 178, 158 S. W. 2; *Keele v. Railroad*, 258 Mo. loc. cit. 78, 79, 167 S. W. 433; *Guthrie v. Railroad*, 204 S. W. 185. Boyd's Case is so similar in facts that, without departing from the rules announced in it, we can not sustain the judgment and opinion of our learned Brothers of the Court of Appeals.

[4] III. There are two or three other alleged conflicts between the opinion of our learned Brothers and our opinion, but we are so thoroughly satisfied that their opinion conflicts with Boyd's Case, and all of the cases following it, that we shall not go further. A discussion of these alleged conflicts would serve no good purpose in view of what we have just ruled. We might add, and properly so, that, under our ruling in Boyd's Case, the opinion of the Court of Appeals is wrong and conflicting in holding that, under the facts shown, the plaintiff was entitled to have his case go to the jury. We reversed Boyd's Case, because wrongfully submitted to the jury on facts fully as strong for the plaintiff there as are the facts for the plaintiff here. So the opinion conflicts wherein it says that defendant's demurrer to the evi-

dence was properly overruled by the trial court. Under these views review of other alleged conflicts can serve no purpose, because the Court of Appeals, following our views in this opinion, will have to reverse absolutely the judgment nisi.

The judgment and opinion of the St. Louis Court of Appeals, for the reason stated, is quashed.

All concur, except WALKER, J., who dissents in opinion filed.

JAMES T. BLAIR, C. J., concurs in result.

WALKER, J. (dissenting). The facts in the Boyd Case, as I read them, are different from those in *Martin v. Railroad*. In my opinion, the ruling of the Court of Appeals in that case does not contravene our opinion in the Boyd Case, and hence our writ should be quashed; which conclusion results in my dissenting from the majority opinion.

#### MORROW v. FRANKLIN. (No. 19783.)

(Supreme Court of Missouri, Division No. 1, July 23, 1921. Motion for a Rehearing Denied.

##### 1. Fraud §13(2)—"Scienter" defined.

In actions for fraud and deceit, "scienter" means knowledge on the part of the person making the representations at the time when they are made that they are false.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Scienter.]

##### 2. Pleading §381(1)—Matters to be proved should be pleaded.

As a rule, that which must be proved must be pleaded.

##### 3. Fraud §45—Scienter must be pleaded.

Scienter is an element necessary to be pleaded and proved in legal actions for fraud and deceit.

##### 4. Fraud §45—Petition charging scienter in effect sufficient.

While in actions for fraud and deceit, scienter must be pleaded, it is not necessary to use the words "that defendant knew such representations to be false"; it being sufficient if the language of the petition is tantamount thereto.

##### 5. Fraud §45—Petition held to allege scienter.

In an action against the directors of a trust company for fraud and deceit in a sale of stock to plaintiff, a petition, alleging that they had been accustomed to pay enormous dividends which had not been earned, for the fraudulent purpose of deceiving the public and to inflate the market value of the stock and to place false and fictitious values upon the assets of the company, and knowingly to cause or per-

mit false and fictitious entries on the books of earnings or profits, thereby giving the stock a highly inflated and fictitious value, and for the purpose of inducing the purchase of stock at fictitious prices, fraudulently caused false statements or audits of the books to be circulated and distributed, which pretended statements were false, etc., held sufficiently to allege defendants' knowledge of the falsity of the representations charged, especially after verdict.

##### 6. Fraud §64(3)—Substantial evidence of one false representation makes question for jury.

Where the petition in an action for deceit in a sale of stock charged more than one false representation, if there was substantial evidence of either, the matter was for the jury.

##### 7. Fraud §64(3)—Evidence held to make question for jury.

In an action for fraud and deceit in the sale of stock in a trust company, plaintiff's testimony that defendant represented to him that a railroad financed and built by the trust company had been sold at a profit of \$1,000,000 more than it was carried for on the books made a question for the jury, though denied, where the statement, if made, was knowingly false.

##### 8. Fraud §54—Evidence of conditions subsequent to sale of stock held admissible.

In an action against a director of a trust company for fraud and deceit in a sale of stock, where the corporation passed one of its usual dividends about a year after the sale, and the stock thereafter dropped in market value within three months from \$190 a share to \$3 a share, evidence of conditions found some months after the sale held admissible, especially where there were no radical changes in the real assets and liabilities, and some of such evidence consisted of audits made under the authority and direction of defendant, who had stated that he had inside knowledge of the company's affairs.

##### 9. Banks and banking §314—Directors of trust company presumed to know value of assets and extent of liabilities.

Under Rev. St. 1909, §§ 1131, 1133, imposing duties on directors of trust companies, the performance of which forces them to know the exact status of the company, the law presumes that they performed their duties and possessed the knowledge which would come from performance of such duties, especially in the case of the president, who stated he had inside knowledge, and it was not error to charge in an action for fraud that the law presumed a director was familiar with the surplus and profits and the intrinsic value of the assets and the amount of liabilities.

##### 10. Appeal and error §1064(1)—Instruction on presumption of knowledge harmless, where defendant admitted he had knowledge.

In an action against the president and director of a trust company for fraud in a sale of stock, an instruction that the law presumed that a director was familiar with the surplus and profits, the intrinsic value of the assets, and the amount of liabilities, if erroneous, was

harmless, where defendant in a letter to plaintiff had stated that he had inside knowledge of the company's affairs.

**11. Trial ¶219—Words held ordinary words of plain meaning, not requiring definition in charge.**

It was not error to charge that the law presumed that a director of a trust company was familiar with the intrinsic value of its assets, without defining "intrinsic" and "value," as both are plain English words of ordinary use.

**12. Fraud ¶13(2)—Trust company's directors chargeable with knowledge of value of stock.**

In an action against directors of a trust company for fraud and deceit in a sale of stock, the jury, in view of statutes making it the duty of directors of trust companies to know the condition of their corporation, might, in determining defendants' knowledge of the real value of the stock, consider the fact that they were and for some time had been directors, and as such had full opportunity to learn its financial condition, the value of its assets, and the extent of its liabilities, and that it was their duty to examine its books, and learn its financial condition, etc., especially where one of the defendants told plaintiff he was on the inside and did know.

**13. Fraud ¶23—Stockholder buying stock from director entitled to rely on representations.**

Though a purchaser of stock in a trust company from a director was a stockholder and had the legal right to examine the books and accounts for himself, he had a right to rely on defendant's statements and representations without examination, and was not bound to examine the books for himself.

**14. Fraud ¶13(2)—Instruction on representations in financial statement inducing purchase of stock held proper.**

In an action against directors of a trust company for fraud and deceit in a sale of stock, an instruction that if printed statements of the trust company's financial condition were issued and circulated in pamphlet or card form, with the knowledge and consent of the board of directors, for the purpose of inducing people to purchase stock, then the directors were liable for the false representations, if any, contained in such statements to the same extent as if the statements had been made by them directly, was properly given, though some of the statements circulated were after plaintiff's first purchase of stock, where they were circulated before his last purchase.

**15. Trial ¶191(5)—Instruction hypothesizing facts did not assume they were true.**

In an action for fraud, an instruction that "if you find" that false statements were knowingly made for the purpose of inducing plaintiff to purchase stock, it is not necessary to find that such false statements were the cause of plaintiff's purchasing the stock, but that it is sufficient that such false statements were one of the causes which substantially contrib-

uted to induce plaintiff to purchase the stock, does not assume that plaintiff was induced by such representations to purchase the stock.

**16. Fraud ¶59(2)—Measure of damages on sale of stock.**

The measure of damages recoverable in an action for deceit in inducing the purchase of stock in a trust company is the difference between the value the stock would have had if defendants' representations had been true and the real value of the stock at the time of its purchase, less dividends received by plaintiff, and with interest from the date of purchase.

**17. Trial ¶191(11)—Instruction on measure of damages held not to assume making of false representations.**

An instruction that the measure of damages recoverable in an action for deceit in inducing the purchase of stock in a corporation is the difference between the value it would have had if defendants' representations had been true and the real value of the stock at the time of its purchase, etc., did not, as claimed, assume that defendants made representations, and that they were false.

**18. Fraud ¶65(1)—Instruction on value of stock not erroneous.**

In an action for fraud and deceit in a sale of corporate stock, an instruction that the jury might ascertain the real value of the stock at the time of its purchase in the light of subsequent events in the history of the company, and all the facts in evidence relating to the assets, the history, and condition of the company might be considered, *held* not erroneous.

**19. Fraud ¶65(1)—Refusal to withdraw expressions of opinion made in connection with representations of fact not erroneous.**

Where statements by directors of a trust company in selling stock that it could continue indefinitely to pay a quarterly dividend of 4 per cent., that plaintiff could sell his stock at a profit, that it would be worth \$300 a share by the following January, and that the company could be liquidated and the sum of \$200 a share paid to stockholders, were made in connection with representations as to the condition of the company and its assets, and to bolster up those representations, and were a part and parcel thereof, it was not error to refuse to withdraw them from the jury, though they may have been mere expressions of opinion, not actionable in themselves, especially where the court had previously told the jury which statements were statements of fact, and not expressions of opinion.

**20. Appeal and error ¶1047(3)—Refusal to withdraw evidence from jury harmless in view of instructions.**

In an action for fraud and deceit, the refusal of instructions withdrawing representations, which standing alone were mere expressions of opinion, was at most harmless error, where the court had instructed the jury as to what representations would authorize a recovery, without making any mention of those sought to be withdrawn.

**21. Appeal and error ⇨1002—Findings on conflicting evidence conclusive.**

In a law case, the findings of the jury on disputed issues of fact are binding on appeal if supported by substantial evidence.

**22. Appeal and error ⇨1005(4)—Weight of evidence is for trial court.**

It is the province of the trial courts, but not of the Supreme Court, to weigh the evidence and determine its weight, and if the trial court permits the findings of the jury to stand, the Supreme Court can only examine the record to see whether or not there is substantial evidence in support of the findings.

Appeal from St. Louis Circuit Court; Thomas C. Hennings, Judge.

Action by Harry C. Morrow against John E. Franklin and others. Judgment for plaintiff, and the defendant named appeals. Affirmed.

John A. Hope, of St. Louis, for appellant.  
Judson, Green & Henry, of St. Louis, for respondent.

GRAVES, J. Action for damages based upon alleged fraud and deceit in the sale of certain shares of stock in the Bankers' Trust Company by appellant to plaintiff. As originally brought, the suit was against five directors of the said Bankers' Trust Company, viz. John E. Franklin, the present sole appellant, Charles S. Marsh, Lester S. Parker, Joseph B. Graham, and Stephen B. Hunter. Before trial the case was dismissed as to Hunter. Plaintiff had a verdict, in a trial before a jury, for \$103,388.88. This verdict was signed by 9 of the 12 jurors. Motions for new trial were filed, and the court sustained such motions as to defendants Marsh, Parker, and Graham, but overruled them as to defendant Franklin. After the motions of Parker, Graham, and Marsh were sustained plaintiff dismissed as to these three defendants, so that judgment went against Franklin alone, who is now the sole defendant and appellant. We used the term "motions for new trial," because there were (1) a joint motion for new trial, and (2) a separate motion for new trial by each of the four defendants. The vital parts of the petition are short, and we reproduce them:

"All of the said defendants were, during the times hereinafter mentioned, large holders of the stock of said corporation, and some of them were also largely interested in a syndicate or joint partnership which owned or controlled a large amount of stock in said corporation, and all of them were desirous of having the market price of said stock maintained at a high level so that their ability to sell the same at a profit or to borrow money thereon might be maintained and increased.

"Plaintiff further says that for several years prior to April, 1913, the said defendants, as directors of the said Bankers' Trust Company, had been accustomed to declare and pay to

themselves and other stockholders enormous dividends upon its stock which have not been earned, and the payment of which really impaired its capital stock in violation of the laws of the state of Missouri, for the fraudulent purpose of deceiving the public as to its earnings and in order to inflate the market value thereof, and had also from time to time been accustomed to place, or to cause or permit to be placed, false and fictitious values upon the assets owned and controlled by said corporation, and knowingly to cause or permit false and fictitious entries on its books of earnings or profits by said corporation, thereby giving to the said stock which they owned, and some of which they had for sale, a highly inflated and fictitious value, and thereby unlawfully paying to themselves large sums in unearned dividends thereon.

"Plaintiff further says that in February and June, 1913, these defendants, for the purpose of deceiving people and to induce the purchase of stock owned by them at fictitious prices, fraudulently caused false statements of audits of the books of the Bankers' Trust Company, showing its assets and liabilities, to be printed in pamphlet and card form, and circulated and distributed generally to the public in the city of St. Louis and elsewhere, which said pretended statements of the assets and liabilities of the said company were false at the time they were issued, in that they largely overstated the amount and value of its assets and understated the amount of its liabilities.

"Plaintiff further says that prior to April, 1913, he was a resident of Whitehall, Ill., and was engaged in business at that place; that the defendants herein at that time induced him to come to St. Louis by making a contract with him, by the terms of which he was to take charge of one of the departments of the Bankers' Trust Company which handled the promotion of new corporations, and was to become a vice president of the said company, but not a director; but plaintiff says that the real purpose of these defendants in inducing him to come to St. Louis and become connected with the Bankers' Trust Company, as aforesaid, was not to have charge of said department under said contract, or any other department, but it was to induce him to purchase from them, and from others, stock of the said Bankers' Trust Company at highly inflated and fictitious prices.

"Plaintiff further says that soon after his arrival in St. Louis these defendants, for the purpose of deceiving him and of inducing him to buy stock of the Bankers' Trust Company from them and others at a highly inflated and fictitious price, stated and represented to him that if he wished to hold the office of vice president he should own and hold a large amount of stock in the Bankers' Trust Company, and falsely stated to him that the actual value of the stock, as shown by the books, was \$200 per share, and that the company could be liquidated in 12 months and the sum of \$200 a share paid to the stockholders; whereas, in truth and in fact, the said company was then insolvent, and its liabilities exceeded the value of all its assets. They also falsely stated to him that the dividends of 20 per cent. per annum theretofore paid on said stock had all

been earned and paid out of profits, and that said company was then earning much more than 20 per cent. per annum on its stock; whereas, in truth and in fact, said dividends had been paid in whole or in large part out of capital, and the capital of the said company had then been impaired and dissipated and lost through the payment of said unearned dividends. They also falsely stated to him that a large part of the capital of the company was invested in the San Antonio, Uvalde & Gulf Railroad which had been built by said Bankers' Trust Company, and for the building of which there had been actually paid to the Bankers' Trust Company cash bonus amounting to more than \$1,000,000, which amount was a clear profit to said Bankers' Trust Company, and that said railroad had been sold for January 1, 1914, delivery, at a clear profit to the company of \$1,000,000, and that it was then upon a dividend-paying basis, and was being operated at a profit; whereas, in truth and in fact, the Bankers' Trust Company never received any cash bonus of any kind, nor any other money or property as a bonus for the building of said railroad, and said railroad was then being operated at a large loss with no prospects of its becoming self-sustaining in the future, and had not then been sold at a profit of \$1,000,000, or at all. They also falsely stated that the market value of the bank's stock then owned by the Bankers' Trust Company and the market value of the said railroad owned by it was largely in excess of the value at which they were carried on the books of the said company; whereas, in truth and in fact, the market value thereof was then a great deal less than the value at which they were so carried on the books of the Bankers' Trust Company. The defendants also exhibited to the plaintiff the false printed statements of assets and liabilities hereinabove referred to in order to induce him to purchase said stock. Plaintiff says he had no knowledge respecting the said various false statements and representations so made to him by these defendants and the said Bankers' Trust Company, except such as he derived from them, and that he trusted implicitly the said statements of these defendants, and in reliance thereon, at their urging, he purchased, in May, 1914, from J. E. Franklin, 500 shares of the stock of said corporation at the price of \$195 per share, paying therefor \$17,000 in cash and giving his negotiable notes for the balance of \$77,500, all of which notes were thereupon immediately negotiated and sold by the said Franklin to innocent purchasers for value; that, relying upon said false representations, and at the suggestion of these defendants, he also purchased, in April, 1914, 45 shares of said stock from other parties at \$195 per share, paying therefor in cash and notes. Thereafter he collected dividends upon said stock amounting to \$6,000.

"Plaintiff further says that in May, 1914, the said Bankers' Trust Company ceased paying dividends, and thereafter a receiver was appointed therefor, whereupon he discovered for the first time the falsity of the aforesaid statements so made to him, and that the Bankers' Trust Company was in fact insolvent when he bought said stock, and that its stock was in fact absolutely worthless, and had been in fact worthless since the beginning of the year 1913."

Each defendant filed a separate answer, in the nature of a general denial.

The several questions and the pertinent facts therewith connected can best be taken up in the course of the opinion. The errors urged are: (1) Admitting improper evidence; (2) the giving of improper instructions; (3) refusing to sustain a demurrer to the evidence; and (4) failure of the petition to state a cause of action. Of these in inverse order.

I. Does this petition state a cause of action? This is the first question urged by appellant. No demurrer was filed to the petition, and the point was first raised by an objection to the introduction of evidence under the petition. The appellant says that there is the fatal absence of an allegation of scienter. Learned counsel for appellant thus speaks:

"But the petition nowhere contains any allegation that defendants knew the alleged representations were false, or that defendants made the representations as to their own knowledge when they were without knowledge respecting the truth or falsity of the representations."

We have quoted practically all of the petition. It is true that the petition does not in words aver that defendant knew the representations to be false, nor does it allege that the representations were made as if of defendant's knowledge, when in fact he had no knowledge.

[1] In actions for fraud and deceit the term "scienter" has thus been defined in 12 R. C. L. p. 328:

"Scienter means knowledge on the part of the person making the representations, at the time when they are made, that they are false, and it is generally held that in an action of deceit scienter must be proved."

[2] As a rule that which must be proved must be pleaded. If scienter is a material element in actions for fraud and deceit, then it should be pleaded as well as proven. Thus in 12 R. C. L. p. 420, it is said:

"Fraudulent intent must be alleged in all cases where it is a material ingredient of the fraud relied on. In an action of deceit it is proper to allege facts showing knowledge on the part of the defendant that his representations were false, and generally in such action scienter must be alleged, either expressly or by alleging facts which are tantamount thereto."

[3] It is very generally held that in the legal action of fraud and deceit scienter is a material element. In this state we adhere to the doctrine that scienter is an element necessary to be pleaded and proven in legal actions for fraud and deceit. In speaking of such actions in the case of Remmers v. Remmers, 217 Mo. loc. cit. 557, 117 S. W. 1121, we said:

"It is essential to state a cause of action of that character to aver that such representa-

tions were false and so known to be by the defendant, and that such representations were made with the intention of deceiving plaintiff, and that plaintiff was deceived thereby, and relying upon such promises and representations he was induced to act to his injury."

[4] But whilst this is true, it does not necessarily follow that the pleader must use the words "that defendant knew such representations to be false." It is sufficient if the language of the petition is "tantamount thereto." Especially is this true of a petition which is attacked after verdict, as in the instant case.

To like effect is the rule announced in 20 Cyc. p. 99, whereat it is said:

"Except in those jurisdictions where a scienter is not an essential element of actionable fraud, it is necessary that a scienter be alleged. It is not always necessary, however, that knowledge of the falsity of the representations be alleged in so many words. Thus allegations that the representations were fraudulently or deceitfully made sufficiently aver a scienter, as the word 'fraudulently' or 'deceitfully' excludes the idea of mistake and imports that the representations were made with the knowledge of their falsity."

Our own courts have taken the same view, and adopted the rules, *supra*, as announced in *R. C. L. and Cyc.* Thus in *Arthur v. Wheeler & Wilson Manf. Co.*, 12 Mo. App. loc. cit. 839, the court said:

"Defendant objected to all evidence under the second count, because the petition states no cause of action, inasmuch as it does not allege that the representations made by defendant were known by it, at the time, to be false.

"As plaintiff in his petition alleged, not only that the statement made by defendant was false, but also that it was fraudulently made, we think that the scienter was sufficiently alleged to support the action for deceit, and that the objection to evidence on this ground was properly overruled."

In *Hoffman v. Gill*, 102 Mo. App. loc. cit. 324, 77 S. W. 147, the court says:

"Defendant insists that as the petition does not allege that the defendant falsely, fraudulently and knowingly made the statements, etc., it is wholly insufficient to support a judgment. The petition charges that 'the defendant corruptly and fraudulently, with the intent to cheat and defraud the plaintiff,' etc. This allegation is sufficient in a pleading to charge fraud in any court."

The question is more elaborately dealt with by *Nixon, P. J.*, in *Adams v. Barber*, 157 Mo. App. loc. cit. 385, 139 S. W. 494, in this language:

"Appellant assigns as error that the allegations of the petition are insufficient to sustain a judgment for deceit, and that his demurrer to the petition, on that account should have been sustained. The petition, after alleging the specific false representations, enumerates them in detail at great length, and then proceeds to charge what is commonly called the scienter,

in these words: 'Plaintiff further says that said representations so made by defendant were made to the plaintiff fraudulently and intentionally of the purpose of inducing plaintiff to enter into said contract and to make said exchange of his stock of merchandise and fixtures to defendant for said land.'

"The objections appellant makes to this petition are that plaintiff must allege and prove that the representations upon which his action is based were false, that they were known to be false by the defendant at the time they were made, or that the representations were made by defendant as of his own knowledge, when in part he had neither any knowledge on the subject nor any reasonable grounds to believe the representations to be true; and that the plaintiff's petition does not come up to these requirements.

"It will be seen that the specific statements of the petition are 'that the defendant fraudulently and intentionally for the purpose of inducing plaintiff to enter into said contract' made said representations. It must be remembered in the discussion of the sufficiency of these allegations to sustain an action for deceit that this is not an action in equity to rescind a contract procured by fraudulent representations, but an action at law for damages caused by deceit, and that under the law a scienter is an essential element of actionable fraud. It will be seen by a perusal of the petition that it first sets out the representations made by the defendant, and follows this with the allegation that the plaintiff entered into the contract relying upon the representations of the defendant, and then sets out the inducements and statements made by the defendant to induce the plaintiff not to go to Arkansas and examine the land before making the trade. The words used are that plaintiff 'fraudulently and intentionally, for the purpose of inducing plaintiff to enter into said contract,' made said representations. The word 'fraudulent' is defined by Webster as follows: 'Using fraud; trickery; deceit. Dishonest. Synonym: Deceitful, fraudulent, guileful, crafty; treacherous; dishonest,' etc.—and while the authorities hold with great uniformity that in action of this kind it is necessary to charge the scienter, no express form of words is required to be used for that purpose, nor is it always necessary that the knowledge of the falsity of the representations be expressly stated in so many words. \* \* \* And it has been held that the allegation that the representations were fraudulently or deceitfully made sufficiently avers the scienter, as the word 'fraudulently' or the word 'deceitfully' excludes the idea of mistake, and imports that the representations were made with knowledge of their falsity. The allegation of an intention to deceive is not always to be made in direct terms. And whilst the plaintiff must, in substance, aver that the representations were made with knowledge of their falsity, this requirement is complied with if from the averments of the petition it can be fairly gathered that the defendant falsely and fraudulently deceived the plaintiff. Especially is this considered sufficient after verdict. *Barber v. Morgan*, 51 Barb. (N. Y.) 116; *Zabriskie v. Smith*, 13 N. Y. 322; *Bayard v. Malcolm*, 2 Johns. (N. Y.) 550. In the case



of *Nauman v. Oberle*, 90 Mo. 686, the charge was held sufficient that 'the defendant falsely, fraudulently and deceitfully represented and guaranteed.' See, also, *Hoffman v. Gill*, 102 Mo. App. 320, 324, 77 S. W. 146; *Fenwick v. Bowling*, 50 Mo. App. loc. cit. 521; *Carr v. Spangler* (N. Y.) 138 App. Div. 32. Under the authorities cited, the charge of the scienter in this petition was undoubtedly sufficient, as the allegations charge that the representations were fraudulently made, which implies that they were knowingly made by the defendant in bad faith with knowledge of their falsity.

"Nor does this conclusion conflict with the statement of the law by our Supreme Court in the case of *Remmers v. Remmers*, 217 Mo. loc. cit. 557, 117 S. W. 1117, that in order to state a cause of action for deceit it is essential to aver that such representations were false, and so known to be by the defendant, and that such representations were made with the intention of deceiving plaintiff, and that plaintiff was deceived thereby, and, relying upon such promises and representations, he was induced to act to his injury. This opinion could not be reasonably construed to mean that the necessary allegations cannot be substantially stated without the use of formal statement, nor that any particular set phrase or formal words are necessary in order to substantially make the charge. The opinion in that case turned on the elements necessary to be stated, rather than the sufficiency of their statement. We conclude that the petition is sufficient to withstand the assault after issues joined, and especially after verdict."

Defendant relies particularly upon the *Remmers* Case, so clearly explained by the Springfield Court of Appeals, in the quotation, *supra*.

[5] So that the only question is to measure this petition by these rules as to sufficiency of pleadings in deceit cases, and determine the matter as to whether or not the language used is tantamount to an express allegation of scienter. We think it is. The following paragraphs in the petition amount to a charge of knowledge of the falsity of the alleged statements to plaintiff:

"Plaintiff further says that for several years prior to April, 1913, the said defendants, as directors of the said Bankers' Trust Company, had been accustomed to declare and pay to themselves and other stockholders enormous dividends upon its stock which had not been earned and the payment of which really impaired its capital stock in violation of the laws of the state of Missouri, for the fraudulent purpose of deceiving the public as to its earnings and in order to inflate the market value thereof; and had also from time to time been accustomed to place, or to cause or permit to be placed, false and fictitious values upon the assets owned and controlled by said corporation, and knowingly to cause or permit false and fictitious entries on its books of earnings or profits by said corporation, thereby giving to the said stock which they owned, and some of which they had for sale, a highly inflated and fictitious value, and thereby unlawfully paying to themselves large sums in unearned dividends thereon.

"Plaintiff further says that in February and June, 1913, these defendants, for the purpose of deceiving people and to induce the purchase of stock owned by them at fictitious prices, fraudulently caused false statements of audits of the books of the Bankers' Trust Company, showing its assets and liabilities, to be printed in pamphlet and card form and circulated and distributed generally to the public in the city of St. Louis and elsewhere, which said pretended statements of the assets and liabilities of the said company were false at the time they were issued, in that they largely overstated the amount and value of its assets and understated the amount of its liabilities."

These preliminary charges in the petition suffice to aver knowledge. The things here charged are things charged to have been done by the defendant himself, and therefore of necessity of his knowledge. The dividends are charged to have been paid for "the fraudulent purpose of deceiving the public." The false and fictitious entries as to profits are charged to have been "knowingly" done or made. As to false statements of assets and liabilities, it is said they were "fraudulently" made. These statements, when taken with the other portions of the petition, make it good after verdict, to say the least.

[6] II. The next vital contention is that this case should never have been submitted to a jury; in other words, that defendant Franklin's demurrer to the evidence should have been sustained. It will not be necessary to review all of the evidence in this voluminous trial record to pass upon this question. As will be noted by an examination of the petition, there are more than one false representation charged to Franklin; and, if there was substantial evidence upon either, the matter was for the jury.

A bit of history is apropos here. In April of 1913, Marsh invited plaintiff, a country banker and business man of Illinois, to come to see them. When he arrived he was turned over to Franklin, and from thence forward the basis of this lawsuit developed. According to a letter written by Franklin to a third party, the plaintiff was worth about \$100,000. With the alluring offer of making him a vice president at a salary of \$12,000 per annum, he was induced to accept a position in a department "to take charge of such underwriting, financing, syndicating and other work of this nature that our board of directors may deem it prudent for you to engage in." He was informed by Franklin that a syndicate formed was to take over stock of the Bankers' Trust Company, known as the Tally stock, and he (plaintiff) would be taken in on the ground floor in that coterie of financiers. This was preliminary. He was taken in on that deal. Plaintiff had hardly gotten his desk warm in his new department, when Franklin began to hold out further and greater things before his eyes. He was informed that he was wanted for a director

when they elected again, and to that end should have stock. Franklin offered to let him have 500 shares of his stock at \$190, assuring him that it could be arranged for him to pay a portion, and the other could be carried. This was persistently urged upon plaintiff from time to time, and it was during these times that the false representations were made to him. The representations ran from the time that plaintiff first talked to Franklin in April, 1913, to the time the stock was finally purchased by plaintiff, upon payment of \$17,500 in cash, and balance in notes. The stock was sold to him at \$190, with the assurance that the book value was more than \$200. In about a year the Bankers' Trust Company was in the hands of a receiver, and found to be one of the great financial wrecks of the country. Nor was its ultimate condition the result of happenings during this year, but, on the contrary, was the growth of years, carefully concealed by purely fictitious and imaginary profits, and by the payment of dividends not in fact earned. But these are just sidelights. Franklin was the dominating spirit, and Parker and others were rightfully dismissed by the trial court upon the record made.

[7] Going to the question of whether or not this case should have gone to the jury, one instance is sufficient. Plaintiff swears that Franklin represented to him that the San Antonio, Uvalde & Gulf Railroad, a road in Texas, financed and built by the Bankers' Trust Company had been sold "for January 1, 1914, delivery at a profit of \$1,000,000 more than it was carried for on the books of the trust company." Franklin denied that he made the statement, but this made it a question for the jury. This statement was a very vital matter, because in April, 1913, this railroad was a millstone around the neck of the trust company, and was one of the chief factors in its ultimate downfall, although there were many other factors not necessary to discuss.

If Franklin made that statement as to the sale of this railroad, it was false and knowingly false. He had given an 18 months' option on the road, but this was far from a sale. This matter alone would carry the case to the jury, and we need not burden this opinion as to other matters. All these disputed matters were for the jury. There was no error in overruling the demurrer to the evidence.

[8] III. The next matter urged is alleged error in the admission of evidence. The trial court permitted evidence of conditions found in the year 1914, which was some months after the sale of stock to the plaintiff. It is urged that the value of the stock at the date of the purchase is the value to be considered in determining the damages in deceit cases. This is true, but it does not follow from this that the subsequent history of the

corporation may not throw some light upon the value at the time of purchase, and it is upon this theory that such evidence is competent. Within one year after plaintiff purchased the stock the corporation passed one of its usual dividends in May, 1914. The next day after the passing of this dividend the stock dropped from \$190 to \$110, the second day after to \$85, and within three months it was selling for \$3 per share. True defendants' evidence tends to explain this situation, but it was a jury question.

The evidence of the happenings from May 28, 1913, the date of plaintiff's purchase, to the final decease of the corporation sheds much light upon the question of the real value of the stock at the date of the purchase. Especially is this true in the light of the further facts, that there were no radical changes in the real assets and real liabilities of the corporation during this time, and as said by Franklin in a letter to plaintiff of date January 2, 1914, he, Franklin had "inside knowledge of the company's affairs." Some of this subsequent evidence consisted of audits made by parties under the authority and direction of Franklin. In our judgment this evidence was competent as tending to show the value of this stock at date of the sale. During all this time Franklin and Marsh were unloading their stock, all no doubt occasioned by their inside knowledge. Nothing of this kind appears as to other defendants. We rule this evidence was competent. *Addis v. Swofford*, 180 S. W. 548; *Hindman v. Bank*, 112 Fed. 936, 50 C. C. A. 623, 57 L. R. A. 108; *Peek v. Derry*, L. R. Chan. Div. 541.

[9] IV. Instruction No. 1 for the plaintiff is sharply criticized. The criticism is thus expressed:

"Instruction 1, given at plaintiff's request, is erroneous, because the jury was thereby told that 'the law presumes that a director is familiar with the surplus and profits and the intrinsic value of the assets and the amount of the liabilities of any trust company of which he is a director, and the law presumes in this case that these four defendants were all familiar with the assets and liabilities, the past earnings, surplus and profits of the Bankers' Trust Company,' and because this instruction said 'the law presumes in this case these four defendants were all familiar with the assets,' etc.

"This instruction amounts to a declaration that legal or constructive fraud authorizes a recovery in an action for fraud and deceit, whereas it is an established principle that in such cases legal or constructive fraud will not suffice, and that actual fraud must be proved."

Said instruction reads:

"The court instructs you that it is the duty of a director in a trust company to ascertain the value of its assets and the amount and extent of its liabilities; and the law presumes

that a director is familiar with the surplus and profits and the intrinsic value of the assets and the amount of the liabilities of any trust company of which he is a director, and the law presumes in this case that these four defendants were all familiar with the assets and liabilities, the past earnings, surplus, and profits of the Bankers' Trust Company."

There is no error in this instruction. The statutes of this state (sections 1131 and 1133, R. S. 1909) fix the duties of the directors of trust companies in this state. The performance of those duties, so prescribed by these statutes, forces the directors to know the exact status of their company. The law presumes that such directors performed their duties, and would likewise presume that they possessed the knowledge which would come to them from the performance of such duties, and in this case Franklin, the president, and one of the directors, says he was on the "inside" and did know. Construing section 1099, R. S. 1909, of the Banking Law, which is similar to section 1131, *supra*, of the Trust Company Act, this court said it was the duty of the directors to know the express provisions of the statutes defining their duties and powers. *Lyons v. Corder*, 253 Mo. loc. cit. 558 et seq., 162 S. W. 606. And in *Bank v. Hill*, 148 Mo. loc. cit. 389, 49 S. W. 1014, 71 Am. St. Rep. 615, it is said:

"The board of directors of a bank have a general superintendence over and the management of all its business affairs and transactions which ordinarily vest with it; and it has been said that, 'they are bound to know all that is done, beyond the merest matter of daily routine, and that they are bound to know the system and rules arranged for its doing.' *Morse on Banks and Banking* (3d Ed.) § 116. And what they ought to know as to the general course of the bank's business, they will be presumed to have known, in a contest between the bank and third persons dealing in good faith with it."

[10] But even if this is not the rule, the defendant in this case says he was on the "inside" and did know, and the instruction would be harmless, with this admission of knowledge.

[11] Complaint is also made as to the use of the phrase "intrinsic value of the assets." This clause counsel says should not have been used without being defined to the jury. The words "intrinsic" and "value" are both plain English words of ordinary use. Certainly a jury would not be befogged by the use of the word "value," nor do we think that condition would arise by the addition of the qualifying term "intrinsic."

V. Complaint is also made of the instructions 7, 8, 9, 10, 11, and 22, given for the plaintiff. These are as follows:

"(7) The court instructs you that in determining whether the defendants, or any of them, knew the real value of the stock of the Bankers' Trust Company in 1913, you may

consider the fact that they were then, and had for some time prior thereto been, members of its board of directors, and as such had full opportunity to learn its financial condition and the value of its assets and the extent of its liabilities; and that as directors of the trust company it was the duty of each and every one of the defendants to examine its books and to learn its financial condition and the value of its assets, and the amount of its liabilities.

"(8) The court instructs you that, even though plaintiff was in the office of the Bankers' Trust Company and was a stockholder before he purchased the last 45 shares of stock, and as such stockholder he had the legal right to examine the books and accounts of the Bankers' Trust Company for himself, yet he had a right to rely upon the statements and representations made to him by the officers and directors of the Bankers' Trust Company on or prior to June 1, 1913, if you find that any were so made, without examination, and he was not bound to examine the books for himself before purchasing said stock.

"(9) The court instructs you that if you find from the evidence that printed statements of the financial condition of the Bankers' Trust Company were issued and circulated in pamphlet or card form with the knowledge and consent of the board of directors for the purpose of thereby inducing people to purchase stock in said trust company, then the directors are liable for false representations, if any, contained in such printed statements to the same extent that they would be if the statements therein contained had been made by them directly to such purchaser.

"(10) The court instructs you that if you find that false statements were knowingly made to plaintiff by defendants, or any one of them, for the purpose of inducing him to purchase stock of the Bankers' Trust Company, it is not necessary for you to find that such false statements of any one of the defendants was the cause of plaintiff's purchasing stock in order to enable you to return a verdict against defendant, but it is sufficient to render a defendant liable that such false statements were one of the causes which substantially contributed to induce plaintiff to purchase stock.

"(11) The court instructs you that positive statements in reference to the past or present earnings of a corporation, by its directors or officers, or statements as to the value or soundness of its assets, or the amount of its liabilities, or the present value of the stock, or as to the sale of any of its assets, are all statements of fact upon which a prospective purchaser has a right to rely, and they are not mere expressions of opinion."

"(22) The court instructs the jury that the measure of damages recoverable in an action for deceit in inducing the purchase of shares of stock in a corporation is the difference between the value it would have had if defendant's representations about it had been true and the real value of said shares at the time of their purchase, and the jury may ascertain such value in the light of the subsequent events in the history of the company; and all the facts in evidence relating to the assets, the history, and condition of the company may be considered by you on the question of damages,

for the purpose of determining the actual value of the stock at the time of the purchase; and, if you find a verdict in favor of plaintiff, you should allow him as damages an amount equal to the difference between the actual value of the stock at the time of purchase and the value the stock purchased in reliance on the false representations, if any, of defendants would have had at that time if the false representations, if any, made to plaintiff by defendants on or prior to June 1, 1913, representing the said stock, had been true, less the \$6,000 of dividends plaintiff has received on said stock; and you should then add interest on the remainder, if any, from the date of purchase to the present time; and this total will be your verdict."

[12] We see no error in instructions 7, 8, 9, 10, and 11, supra. They declare sound law in deceit cases. Counsel rely upon *Bank v. Hutton*, 224 Mo. loc. cit. 70 et seq., 123 S. W. 47, but they overlook the fact that the corporation there in question was not a bank or trust company, and that the statutes governing these two classes of corporations make it the duty of the directors to know the condition of their corporation. And in addition Franklin says in his letter that he was on the inside and did know. The foregoing applies to instruction 7.

[13] As to instruction 8 it is urged that, inasmuch as plaintiff was a stockholder, and a man of experience, when he bought the last 45 shares, he had the right to look at the books, and should not have relied upon the statements of the directors whose duty it was to know the condition of his corporation. The evidence shows that plaintiff had confidence in Franklin, and this instruction 8 was not error.

[14] So too instruction 9 is a fair statement of the law. The objection is that some of these circular statements were after June 1, 1913, and therefore after the purchase of the first 500 shares of stock. However, they were before the purchase of the last 45 shares, and the instruction was proper.

[15] The objection to instruction 10 is that it "assumes defendants made false statements and assumes that plaintiff was thereby induced to purchase." The face of the instruction dispels the idea of "assumption." In the very first line, it says, "If you find," which left the matter to the jury. The objection to instruction 11 is just as frivolous.

[16-18] VI. Instruction No. 22 is, as will be seen, the instruction on the measure of damages. No complaint is made that the instruction states the wrong measure of damages. The instruction states the correct measure of damages. Counsel urge that the instruction assumes that defendants made representations, and that they were false. This objection is not tenable from a glance at the instruction.

Next it is urged that it is erroneous, in that the jury are allowed to ascertain the

value of the stock "in the light of subsequent events in the history of the company." We have ruled in a previous paragraph that evidence of this character was admissible as tending to show the value of the stock at the date of purchase, and, if the evidence was proper, the court was not in error in telling the jury that it could be considered in determining value. The other two objections to this instruction are just as meritless.

[19] VII. Lastly it is urged that there was error in refusing to give instructions E and F for defendant, which read:

"You are further instructed that you must disregard the testimony given by the plaintiff, Morrow, to the effect that defendants told him that the Bankers' Trust Company could continue indefinitely to pay a 4 per cent. quarterly dividend; that if plaintiff bought stock in the company he could sell it in six months' time at a profit or advance price; that the stock was going to increase in value; that the stock would be worth \$300 per share by January, 1914; and other statements in his testimony as to the future value of the stock or future earnings of the company. Such assurances, even if they were given, do not in law give plaintiff any right to recover in this case, both because they are not alleged in plaintiff's petition and because they were mere opinions or predilections as to what would occur in the future; and you are therefore instructed not to give the testimony above referred to any consideration in arriving at your verdict.

(F) Plaintiff alleges in his petition that defendants stated and represented to him that the Bankers' Trust Company could be liquidated in 12 months, and the sum of \$200 a share paid to the stockholders. Such a statement or representation, even if made, was a mere matter of opinion, and is no ground in law for a suit for damages; and you must therefore give no consideration to the testimony which the plaintiff, Morrow, gave in support of the above allegation."

The refusal of these instructions was not error. All such statements were made in connection with the representations as to the value of the stock and the condition of the company and its assets, and were made to bolster up the representations as to value and conditions, and were a part and parcel of the representations as to value and conditions. They were parts of the conversations; and whilst, if they stood alone, they might be mere expressions of opinions, and would not be actionable, but in the connection in which they were used, it was not error to refuse to withdraw them. Especially is this true in view of the fact that the court had previously told the jury what statements were statements of fact and not expressions of opinions. Vide instruction 11, supra.

[20] But in addition to this the court had explicitly told the jury in instruction No. 6 just what representations would authorize a recovery, and no mention was made of these opinions as to what would happen in the

future. To say the most, the refusal of these two instructions was mere harmless error.

[21, 22] The record, as between plaintiff and the defendant Franklin presents sharp issues of fact. This was not true, as to the defendants dismissed from the case. The findings of the jury upon these disputed issues of fact is binding here. This is a law case, and the findings of the jury bind, if supported by substantial evidence. The weight of the evidence is not a matter for consideration here. The trial courts alone weigh the evidence for the determination of its weight. Such is the province of trial courts, but not of this court. If the trial court permits the findings of a jury to stand, this court only examines the record to see whether or not there is substantial evidence in support of the findings. In this case the trial court performed the duty placed by the law upon it. Such court weighed the evidence, and found that there was no sufficient evidence to sustain the findings as against Parker and other defendants, but that the findings of the jury were sustained by the evidence as to defendant Franklin. Our review of the evidence convinces us that there is substantial evidence to sustain the verdict as against Franklin, and this is as far as this court can go. We will not array the evidence upon one side as against the evidence upon the other, and determine which preponderates. We have no such duty in a law case. The judgment is affirmed.

All concur, except ELDER, J., not sitting.

# NOOK v. ZUCK et al. (No. 22021.)

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921.)

## 1. Wills §121—Attestation held sufficient.

Will giving names of three persons designated as witnesses to testator's mark held sufficiently attested under Rev. St. 1919, § 507, requiring that will be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator; it being unnecessary that will contain the word "attestation."

## 2. Wills §302(3)—Evidence held to prove that testator knew contents of will.

In contest of a will on the ground that the testator, who it was claimed did not understand English, did not know the contents of the will which had been drawn by a scrivener, who did not understand the language of the testator, pursuant to instructions given him through interpreter, evidence held to prove that the testator fully understood and approved of the contents of the instrument.

## 3. Wills §84—Rule as to validity of will drawn pursuant to instructions and conveyed through an interpreter stated.

Where testator at the time of the execution of the will comprehended the nature of the transaction he was engaged in, knew the nature and extent of his property, and to whom he desired to give it, and knew he was disposing of it to the persons mentioned in the writing, the will is valid, though it was drawn by scrivener after instructions had been conveyed to him through an interpreter.

## 4. Wills §324(3)—Evidence held insufficient for submission of undue influence.

Evidence held insufficient for submission to jury of whether will of 85 year old testator had been procured by undue influence of his daughter and son-in-law with whom he had lived.

## 5. Wills §155(4)—Nature of "undue influence."

Influence to invalidate will must be of such nature and character as amounts to overpersuasion, coercion, or force, destroying the free agency or will power, as contradistinguished from merely the influence of affection or attachment or the desire of gratifying the wishes of one beloved, respected, or trusted by testator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

## 6. Wills §324(2)—Evidence held insufficient for submission of mental capacity of 85 year old testator.

Evidence held insufficient for submission to jury of whether 85 year old testator, who had suffered from paralysis, was mentally incompetent at the time of the execution of the will.

Appeal from Circuit Court, Atchison County; John W. Dawson, Judge.

Action by Gust Nook against J. B. Zuck, administrator, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

R. F. Hickman, of Hamburg, Iowa, and Hunt, Bailey & Hunt, of Rockport, for appellant.

Finley, Mitchell, Pryor, Ross & Mitchell, of Council Bluffs, Iowa, and James F. Gore, of Rockport, for respondents.

ELDER, J. This is a suit to contest the will of Chris Nook, deceased, brought by appellant, a son of the testator. Respondent J. B. Zuck is the administrator with the will annexed, of the estate of said Chris Nook; respondent Lena Speigel, wife of Andrew Speigel, is the daughter of the deceased; respondents Georgie Mattis et al. are minor grandchildren of the deceased.

The will was dated February 12, 1917, and was admitted to probate by the probate court of Atchison county, on February 11, 1919. The testator died August 31, 1918.

The charging part of the petition alleges:

That for several years before his death the testator had been "an invalid, infirm, feeble,

childish and of unsound mind"; that he was a German and could not "understand, speak or write the English language; that one P. L. Van Meter, who drew said will for said Chris Nook, deceased, could not understand, speak or write the German language; that one Charles Winkler and George Winkler dictated said will to P. L. Van Meter, and he wrote the said will as they dictated it, and said Van Meter wrote it down as they dictated it, not knowing whether or not they were giving a true and correct version of said will. It was read over to Chris Nook in English, and he could not understand the English language; and plaintiff alleges that said pretended will is not nor does it bear or contain the true version of said will of said Chris Nook, deceased, and is not his will. \* \* \*

"That at the time the said will was made, the said Chris Nook was not capable of making a will at all; and whatever was done was and is a nullity and absolutely void, and that the said Lena Speigel and her husband, Andrew Speigel, secured said Chris Nook to make said will by fraud, and undue influence, which they practiced upon the said testator, and that the said Chris Nook was not of sound and disposing mind and memory."

The answer of respondent Zuck admits that Chris Nook died leaving as his last will the instrument mentioned in the petition, admits the probate of the said will and the appointment of respondent as administrator, but denies all other allegations of the petition. The answer of respondents Speigel admits the relationship and heirship of the parties; admits the appointment of respondent Zuck as administrator; admits the probate of the will, and that deceased died at the home of respondents Speigel, where he had resided before his death; alleges that the instrument described in the petition is the "valid last will and testament of the said Chris Nook," but denies all other allegations of the petition. The answer of the respondent minors, by their guardian ad litem, was a general denial.

The issues were duly submitted to a jury; and, at the close of the evidence adduced by both the proponents and contestant, the trial court gave a peremptory instruction in the nature of a demurrer to the evidence, as follows:

"The court instructs the jury that under the law and the evidence, your verdict must be that the instrument offered in evidence, marked defendants' Exhibit A, is the last will and testament of Chris Nook, deceased."

Pursuant to such instruction the jury returned a verdict that the paper in evidence was the will of Chris Nook. From a judgment rendered on that verdict, contestant has appealed.

With certain additions thereto (to be considered in the course of the opinion), respondents have agreed to appellant's statement of the facts. We therefore adopt the same in part, as follows:

"At the time of the making of the will in question, the deceased, Chris Nook, was between the age of 85 and 86 years. He was very feeble and practically helpless; unable to walk or use his hands. This condition had existed for more than 5 years prior to the making of said purported will. His knowledge of the English language was exceedingly limited. He could speak a few words such as 'yes' and 'no' and could make a few of his wants known, with difficulty, in making purchases. He could not write or read the English language at all, and could not carry on a general conversation in that tongue. Owing to his inability to understand the English language he never employed hands to work for him who spoke English.

"On the 12th day of February, 1917, Charlie Winkler, George Winkler, J. W. Brown and P. L. Van Meter met at the home of the said Chris Nook, deceased, relative to the will in question. P. L. Van Meter acted as scrivener and the two Winkler boys acted as interpreters.

"George Winkler testified that he could not write the German language at all, but that he could translate German language into the English language and write in English; and that he could translate English into German.

"Charlie Winkler testified that he could talk high German but he could not speak low German at all, and that he understood it just a little; that he could not write German; that he could not readily translate from the German language into the English language. P. L. Van Meter could not write, read, speak or understand the German language. J. W. Brown could not speak or understand the German language.

"On the date aforesaid, February 12, 1917, when said parties went to the home of Chris Nook, deceased, relative to the will in question, the two Winkler boys spoke to the deceased in German concerning his will, and then translated said conversation to Mr. Van Meter in English, and Van Meter reduced said conversation to writing in English. After the completion of the purported will said Van Meter read the same over to the deceased in the English language. Said will was never read to the deceased in the German language. After reading said will to the deceased, Van Meter asked him if that was the way he wanted everything and deceased said, 'Yes.' Neither Van Meter nor Brown knew whether the Winkler brothers correctly translated the language of the deceased from the German language into English.

"Deceased was so badly paralyzed that he had to sign said purported will by making his mark thereto, Van Meter assisting him. The will was signed as follows:

his  
"Chris X Nook.  
mark

"Witness to mark:

"Charles Winkler.

"George Winkler.

"J. W. Brown.

"Subscribed and sworn to by Chris Nook this 12th day of February, 1917, in the presence of each of the above witnesses.

"P. L. Van Meter, Notary Public. [Seal.]"

"The above acknowledgment, which is signed by the notary, was written on the purported will after the other parties signed the same as witnesses to the mark of the deceased.

"Deceased at the time of making the said will, and at the time of his death in August, 1918, lived in Atchison county, Mo., near the Iowa line, a small portion of his land being in Fremont county, Iowa, and the remainder being in Atchison county, Mo. The Winkler brothers above mentioned lived in Fremont county, Iowa, a short distance from the home of deceased, and were farmers by occupation. P. L. Van Meter lived in Hamburg, Fremont county, Iowa, and was a banker by occupation. J. W. Brown lived in Fremont county, Iowa, and was engaged in farming and lived a short distance from the home of deceased.

"Andrew Speigel, husband of Lena Speigel, notified George Winkler, Charles Winkler, J. W. Brown and P. L. Van Meter that their presence was desired at the making of the will in question.

"The evidence disclosed that after the marriage of the children of the deceased, said children, with the exception of Lena, left the home of the deceased and set up homes for themselves. Lena Speigel and her husband, Andrew Speigel, lived at the home of the deceased from the time they were married up to the time of the death of deceased. They promised to keep deceased and his wife as long as they lived, and in return for such care deceased agreed to let them have the land rent free.

"Prior to the making of the will, February 12, 1917, deceased had a conversation with appellant with reference to a will he had made. On that occasion appellant came in the house and noted that deceased was crying very hard. Upon appellant asking him what was the matter, he said, 'They made me change the will'; that Andrew Speigel and George Winkler 'had come down to make me change it.' About two weeks before the death of the deceased, and after making the will in question, deceased had a conversation with Miss Minnie Nook, daughter of Gust Nook, appellant. Speaking with reference to the will in question deceased said to Minnie Nook, 'I was forced to make a will, they made me do it,' and cried like a child.

"During the last 5 years of his life deceased was practically under the sole care and control of his daughter, Lena Speigel, and her husband, Andrew Speigel; and was also under the care and control of his second wife up to the time of her death. During all these years the old man was a helpless invalid suffering from paralysis, dropsy and rheumatism; and he could only make his wants known in the German language. He frequently had crying spells, and spent the latter years of his life sitting in a chair, which caused severe dropsical swelling of his lower limbs."

Other facts necessary to a determination of the questions involved will be adverted to in the course of the opinion.

The writing in contest, omitting signatures of the testator and witnesses and certificate of the notary public, which are set out in the statement of facts, *supra*, is as follows:

"I, Chris Nook, being of sound mind do make this my last will and testament, hereby revoking all former wills having been made by me.

"I hereby give and bequeath to Mrs. Lena Speigel all of my farm land with improvements on and known as my home farm consisting of 64 acres, 16 acres being in Iowa, Fremont Co.,

and the balance in Missouri, Atchison County.

"I further give to Mrs. Martha Mattis' heirs, \$400.00 same to be paid by Lena Speigel on execution of this will.

"I also give to Herman Nook's heirs at law \$400.00 same to be paid by Lena Speigel on execution of this will.

"I further give to the heirs of Robert Nook \$800.00 same to be paid on execution of this will, by Lena Speigel same as above.

"I further give to Gust Nook \$400.00 same to be paid by Lena Speigel on execution of this will.

"I also have \$1000.00 cash out of which I want all funeral expenses paid first and the balance with such accrued interest as may be, divided equally between the five heirs named above.

"I also state further that in case any of my heirs contest this will that they are to lose their share of my estate as above divided."

I. Appellant contends that the trial court erred in admitting in evidence the will of the deceased for the reason that it was not properly attested.

The statute governing the attestation of wills, section 537, Revised Statutes 1909 (section 507, R. S. 1919), provides that—

"Every will shall be in writing signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

As said in *Berberet v. Berberet*, 131 Mo. loc. cit. 408, 33 S. W. loc. cit. 63, 52 Am. St. Rep. 634:

"The statute says the will shall be attested by two or more competent witnesses subscribing their names thereto. It does not say that the word attest shall be written on, or at the conclusion of, the will, or that there shall be written thereon anything whatever other than the names of the attesting witnesses."

And as said by Woodson, J., in the recent case of *Welch et al. v. Wagner*, decided June 6, 1921, our number 21828, 232 S. W. 146, not yet (officially) reported, in commenting upon this section:

"It will be observed that the statute only requires that the will shall be signed by the testator, or by some person at his direction, in his presence, and that it shall be signed by the witnesses in the presence of the testator. That statute nowhere requires the will to state upon its face that any or all of those things were done."

With respect to the circumstances attending his signing of the will as a witness, George Winkler testified:

"Mr. Nook asked me to sign it, as a witness to his will. When I signed it I noticed that Mr. Chris Nook made his mark there at the time. That mark was made prior to the time that I signed it as a witness. J. W. Brown, my brother Charles, Mr. Nook and myself were all present. \* \* \* I saw Charles Winkler and J. W. Brown sign their names there on

defendants' Exhibit A, and I saw Chris Nook make his mark there."

Charles Winkler testified:

"I signed my name there to defendants' Exhibit A. That is my signature. George Winkler, J. W. Brown and P. L. Van Meter and Chris Nook were present.

"Q. How did you come to write your name there and at whose request, if anybody's? A. Mr. Nook's.

"Q. And what for, what purpose? A. For a witness.

"Q. To what? A. To the will.

"\* \* \* I saw the other signatures made there by my brother and J. W. Brown. Mr. Nook made his mark prior to the time I signed my name to the will. \* \* \* Mr. Chris Nook asked me to sign as a witness."

J. W. Brown testified:

"That is my signature to defendants' Exhibit A. Before I signed I saw Mr. Nook make his mark; that mark was there when I signed my name. After Mr. Van Meter read that over in English I asked Mr. Nook if that was his will and if that was the way he wanted it, and he said it was, before I signed it. \* \* \* I signed at Mr. Nook's request."

[1] From the foregoing it is manifest that the statute was fully complied with. Accordingly, and upon authority of the adjudicated cases, we must hold that the will was sufficiently attested. *Berberet v. Berberet*, supra; *Mays v. Mays*, 114 Mo. 536, 21 S. W. 921; *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *Cravens v. Faulconer*, 28 Mo. 19.

II. Appellant next urges that the court erred in holding that the instrument offered in evidence was the last will of Chris Nook, deceased. In support of this insistence learned counsel for appellant argue that it appears affirmatively that Mr. Nook did not read the purported will; that it was not read to him in a language that he could understand; and that the proponents of the will did not show by any testimony that he knew the contents of the same after it was written.

As authority for the contention urged, counsel rely largely upon *Miltenberger v. Miltenberger*, 78 Mo. 27. An examination of that case, however, renders it readily distinguishable from the case at bar. While the will in question was there written in a language which the alleged testatrix could not read, write or speak, it was attested by witnesses not at her request, but at the request of one of the legatees, and neither of the witnesses could testify to any declaration of the deceased, or any act on her part, except that of signing the paper, or any declaration in her presence and hearing indicating that she knew the contents of the paper, or that she signed it as her last will. The evidence here is clear that the deceased knew that he was making a will, that he

knew the disposition he desired to make of his property, and that he requested the attesting witnesses to sign the instrument as his will. Charles Winkler, one of the attesting witnesses, testified:

"Before I signed we talked with him and he told us that this was his last will and testament, and that he wanted me to sign it. \* \* \* I think he understood about his children and grandchildren, and his son and daughter that were living. He knew them. I think that he comprehended the extent of his property and the effect that his will would have upon it."

J. W. Brown, another attesting witness, testified:

"I asked him if that was his will, what he wanted done with his property, and he said it was. That was after Mr. Van Meter read this will so I signed there."

The circumstances surrounding the execution of the paper in question being so entirely dissimilar, the *Miltenberger Case*, supra, cannot therefore be said to be controlling in the instant case.

With respect to the deceased's understanding of the contents of the instrument after it was written, a review of the evidence shows that he could speak, read and write the German language. George Winkler and Charles Winkler, who spoke both German and English, testified that at the time the will was written the deceased directed them in German that \$400.00 be given to the heirs of Martha Mattis, \$400.00 to Gust Nook, \$400.00 to the heirs of Herman Nook, \$800.00 to the heirs of Robert Nook, all to be paid by Lena Spiegel; that Lena Spiegel was to have the land, and that "after the funeral expenses and everything was paid," the \$1-000.00 in cash which Mr. Nook had was "to be divided equally between all of the heirs, those that had been mentioned." These directions, which the writing under review shows were embodied therein, were communicated in English by the Winklers to Mr. Van Meter, the scrivener, who could not write or understand the German language. Mr. Van Meter testified:

"I wrote down all of what I understood of what the Winkler boys told me, and when I didn't, I asked them over, and they would ask him questions as they went along in regard to the different portions. That continued through the entire writing of this instrument. \* \* \* I read the will over to him and asked him if that was the way he wanted everything. I read the will in English. When I asked him the question he said 'Yes.' I asked him if that was like he intended in every way. He said, 'Yes.' He nodded his head, but you couldn't go by that altogether because he was palsied, but he would understand."

As to deceased's understanding of the English language George Winkler testified:

"He could understand and talk some English, quite a good deal. He said he couldn't talk well enough to dictate his will in English."



Dr. E. E. Richards, who had visited the deceased professionally, and who could not speak German, testified:

"Q. Were you able to communicate with Mr. Nook at that time? A. Pretty good; not all that I wanted to ask him but most of it.

"Q. Did you have any particular trouble to get him to understand what you were asking him? A. No, I didn't; but I had a good deal of trouble understanding him."

J. W. Brown, testified:

"I don't know how well he could talk English but he could talk well enough so he could make me understand anything he had to sell, or if he wanted to buy anything he could make me understand. If I had anything to buy or anything to sell he could understand me. \* \* \* When they were making this will, he would dictate to them in German, and then they would translate it into English; I suppose they were translating it correctly. They seemed to be pretty honest people. I knewed them a long time, and I never knewed them to tell anything but the truth."

Charles W. Davey, an implement dealer, testified:

"I transacted business with Mr. Nook in English. I had no general conversation with him, just buying and selling. He didn't always see what he wanted—he would ask for it; as I recollect it he would call it by the right name in English. He could count money in English."

In *Wombacher v. Barthelme*, 194 Ill. 425, 62 N. E. 800, where the testator, a German, had declared his purpose of making a will substantially as it was made, and his statements showed that it was framed in accordance with his intention and purpose, conflicting evidence as to his ability to read the English language, in which the will was written, was held insufficient to show that he did not know the contents of the will, so as to render it invalid.

In *Gerbrich v. Freitag*, 213 Ill. 552, 73 N. E. 338, 104 Am. St. Rep. 234, 2 Ann. Cas. 24, where the makers of a joint will were Germans, but understood English, and where the scrivener read it to them in English, explaining it in German, it was held that the testators understood the contents of the will and executed it in accordance with the law.

In the proceeding, *In re Arneson's Will*, 128 Wis. 112, 107 N. W. 21, where a will written in the English language, which the testator did not understand, was translated to him before execution in Norwegian, which language he did understand, it was held valid, the court saying:

"Of course in such a case it should appear clearly that the testator was otherwise accurately informed of the contents and meaning of the instrument in a language which he did understand, but that being established, as we consider to be the case here, there is no more doubt of his purpose and intention in executing it than if his knowledge of the contents were derived from reading or hearing read a docu-

ment written in a language which he did understand. How otherwise could parties who understood no common language become mutually bound to any written contract?"

In *Rothrock v. Rothrock*, 22 Or. 551, 30 Pac. 453, the will of a speechless paralytic, 74 years of age, whose mind was unimpaired, was held valid where his wishes as to the disposition of his property were communicated by negative and affirmative replies to questions asked him, and, after it was written, it was read to him item by item, and his assent given by nods of his head.

In the proceeding, *In re Estate of Dobals*, 176 Iowa, 479, 157 N. W. 169, where the testatrix, who was a German, told the scrivener in English the disposition she desired to make of her property, and while the scrivener was writing she talked the provisions over in German with a banker who was her business adviser, and the banker told the scrivener in English what the testatrix had told him in German, which the scrivener testified was the same as what he had understood previously from her in English, it was held that the evidence was insufficient to justify submission to the jury of the question whether deceased could sufficiently understand the English language to understand the will and what she was doing at the time of its execution.

In *Hoshauer v. Hoshauer*, 26 Pa. 404, the rule is enunciated that when the execution of a will had been proved by the subscribing witnesses, although the witnesses did not hear it read to the testator, it is to be presumed that he was acquainted with its contents, notwithstanding the fact that he could neither read nor understand the language in which it was written.

[2,3] An analysis of the evidence in the case under review shows that the testator Nook manifestly comprehended the nature of the transaction he was engaged in, knew the nature and extent of his property and to whom he desired to give it, and knew that he was disposing of it to the persons mentioned in the writing. Under the rulings of this court he therefore had sufficient capacity to make a will. *Hahn v. Hammerstein*, 272 Mo. 248, 198 S. W. 833; *Sayre v. Trustees of Princeton University*, 192 Mo. 95, 90 S. W. 787; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129. And when the evidence is measured by the principles laid down in the relevant adjudications of other jurisdictions as above set forth, we are led to conclude that he fully understood and approved of the contents of the instrument in contest. We therefore rule that the trial court properly held the document offered to be the last will of Chris Nook.

III. Appellant assigns as error the action of the trial court in giving the peremptory instruction in the nature of a demurrer to the evidence. In support of this assignment appellant urges that—

"The evidence shows that there was some undue influence brought to bear upon him by his daughter, Lena Speigel, and her husband Andrew Speigel, to make the will in their favor; that the old gentleman was influenced, and that he executed the will under fear and on threats of his said daughter and her husband."

A scrutiny of the record discloses that Andrew Speigel did summon the witnesses to the will to the Nook home for the purpose of witnessing the instrument. The testimony shows however that at the time of the drawing and execution thereof neither Mr. Speigel nor his wife were present in the room. George Winkler testified:

"The morning I went over to make the will, Mr. Speigel phoned me to come over; nobody came after me. \* \* \* When this will was formulated there, I do not know where Mr. Speigel was; he was not in the house. His wife, Mrs. Speigel, might have been in the house, but she wasn't in that room. \* \* \* In my judgment his mental condition at that time was good, strong and vigorous. He knew all that we were doing there. The old gentleman told me what he wanted me to do. And he named over the terms. \* \* \* He said something to me that morning about an old will. He said he wanted to make a different will, and he told me his reasons why. He said that he was a great care, and that Lena, his daughter, was the only one that cared for him and that he wanted to protect her."

Charles Winkler testified:

"I was called there by Andrew Speigel. Lena Speigel was in there just a few minutes, when I came there. Upon my arrival she departed in the other room. She wasn't in the room with us gentlemen after that. Andrew Speigel was not present at any time. After Mr. Van Meter came Mr. Nook said he wanted to make a will. \* \* \* Pretty soon he told us the terms of the will. Lena was not present at the time of that conversation. She went to a different room. My brother closed the door. \* \* \* I think he comprehended the extent of his property and all the persons of his bounty. He named nearly all his grandchildren. He suggested them all himself."

J. W. Brown testified:

"Mrs. Speigel was there at the place, and at the house but not in the room. She was not in the room where Mr. Nook was and the terms of this will was not talked over there between us all, before he commenced dictating to the boys to be translated. \* \* \* I think Mr. Nook understood what he was doing there at that time as well as he did any time I ever saw him, and have known him for 20 years."

Appellant Gust Nook testified that in the summer of 1917 he had a conversation with his father "with reference to a will he had made. My wife was there and I believe my daughter. I came in the house and he commenced crying awful hard and I say, 'Father, what is the matter?' 'Well,' he say, 'they made me change the will.' And I asked him who done it, who was the cause of it, and he said it was Andy Speigel and George

Winkler came down to make him change it." Minnie Nook, daughter of appellant, testified:

"I was at the home of my grandfather about two or three weeks before he died. He was feeble; I was there two or three weeks after he made the will. He told us about making the will; he said, 'I was forced to make a will, they made me do it.' He cried like a child that day."

Frank Nook, a son of the appellant, and John Nook also testified to the effect that the deceased had cried and told about having to change the will.

[4, 5] We have examined in detail all of the testimony as disclosed by the record which was before the trial court when the demurrer was interposed. The foregoing constitutes the most salient features of the evidence bearing upon the question of undue influence. As said by Fox, J., in *Winn v. Grier*, 217 Mo. loc. cit. 459, 117 S. W. 59:

"The influence exercised upon testator sufficient to invalidate his will must be of such a nature and character as amounts to overpersuasion, coercion or force, destroying the free agency or will power, as contradistinguished from merely the influence of affection or attachment or the desire of gratifying the wishes of one beloved, respected, and trusted by the testator."

In the instant case there was no evidence as to any coercion having been exerted at or prior to the time the will was executed, and the only approach to proof of undue influence was the testimony of parties in interest as to statements made by the deceased subsequent to the time the will was made. This evidence, in our judgment, was lacking in substantiality. Such being the case it was the duty of the court to direct a verdict for the respondents, proponents of the will. *Goedecke v. Lindhorst*, 278 Mo. 504, 213 S. W. 43; *Southworth v. Southworth*, 173 Mo. loc. cit. 73, 73 S. W. 129; *Spencer v. Spencer*, 221 S. W. 58; *Defoe v. Defoe*, 144 Mo. 458, 46 S. W. 438.

[6] IV. Appellant finally contends that the court erred in holding that there was no evidence of mental incapacity, insisting that the mind of the deceased was affected. From the testimony hereinbefore reproduced, it is patent that such insistence is wholly devoid of merit, and a close scanning of the record fails to reveal any evidence upon which such claim could successfully be predicated.

Dr. Richards, a practising physician of over 20 years' experience, who had given nervous disorders particular consideration, and who had spent 2 years in a hospital and insane asylum at St. Louis, testified that he had known the deceased for 4 or 5 years and had treated his wife prior to her death; that he often observed Mr. Nook and stopped to talk to him; that he had visited him professionally in April, 1918, and his mental condition was good; that "he always knew

me, knew what I had come for, and he told me what he thought I could do, and so forth. \* \* \* This paralysis that we spoke about does not have any tendency to affect the mind much, until near the end. Of course, his vitality grows low and the mind might be affected some, but as I remember him he was clear up to the last. \* \* \* His digestion and assimilation were pretty good. He couldn't have been as strong and vigorous in that respect and yet be mentally unbalanced, because he was not."

We are constrained to rule the point against appellant.

Having concluded the several questions presented by appellant, and entertaining the views herein expressed, it follows that the judgment of the trial court should be affirmed. It is so ordered.

All concur.

### EGAN v. TRENTON GAS & ELECTRIC CO. (No. 21395.)

(Supreme Court of Missouri, Division No. 2, June 23, 1921. Motion for Rehearing Denied July 19, 1921.)

1. Appeal and error  $\S$ 930(1)—Plaintiff, who secured verdict, entitled to consideration of all affirmative facts adduced in her favor.

Plaintiff, who secured verdict on appeal, is entitled to a consideration of all the affirmative facts adduced in evidence to sustain her action, as well as to all reasonable inferences that may be drawn in her favor from such facts.

2. Master and servant  $\S$ 236(4)—Electrician under duty to exercise ordinary care.

While the character of an electric power company's business was hazardous, and a high degree of care was required in conducting it, the fact did not lessen the duty of an employe working near high-tension wires to exercise ordinary care for his own safety.

3. Master and servant  $\S$ 236(4)—Electrician held guilty of contributory negligence.

Electrician, killed by electric shock when he was working on a tower carrying high-voltage wires because the dead wire which he had in his hand was permitted by him to be too close to high-tension wires, held guilty of contributory negligence, so that his widow could not recover therefor.

Appeal from Circuit Court, Grundy County; L. B. Woods, Judge.

Suit by Ida Egan against the Trenton Gas & Electric Company. From judgment for plaintiff, defendant appeals. Reversed.

Taylor, Chasoff & Willson, of St. Louis, and A. G. Knight, of Trenton, for appellant.

Platt Hubbell and Geo. H. Hubbell, both of Trenton, for respondent.

WALKER, J. The plaintiff brought this suit in the circuit court of Grundy county

to recover damages for the death of her husband, due to the alleged negligence of the defendant. A trial was had in September, 1917, resulting in a verdict for plaintiff in the sum of \$8,000, from which defendant has appealed.

The defendant is a corporation conducting a light and power plant at the city of Trenton. Samuel Egan, the deceased, had been in the employ of the defendant as an electrician for 9 or 10 years prior to his death. He had assisted in the building and construction of defendant's system, by which it distributed electricity to Trenton and the town of Laredo, some 12 or 13 miles distant. At the time of the construction of the line to Laredo and the connection of same with defendant's system, Egan worked on the lightning arresters at defendant's place, his duties requiring his presence at times in or on the metal tower or elevated steel framework erected on the south wall of the building covering and inclosing the machinery which generated the electric current distributed by the defendant. This tower was about 25 feet high, and its purpose was to afford a means by which the wires carrying the electric current to Trenton and Laredo could be connected with the machinery which generated the current in the building. Three wires of very high voltage or power were used to convey the current to Laredo. These wires entered the top of this tower and ran down through current transformers to the motors where the electricity was generated. The surface of these wires was not insulated, the voltage being so high that insulation was deemed useless. At the time of the accident, Egan was acting under orders from the president of the company which directed him to "change leads entering old electric plant to new oil engine house."

This order, without more, is cryptic to the casual reader, but there seems to have been no difficulty in its interpretation by the deceased and his coemployes. Preparatory to a compliance with this order six holes had been drilled through the south wall of the building under the eaves through which certain wires from the tower which stood over that portion of the wall were to be conducted. It was on the roof of the building above which the tower stood and over the holes in the wall that the accident occurred. At about 10 o'clock in the forenoon of the day of his death, Egan came into the engine room and directed another employe to cut out the current on the Laredo line. This was done, and it withdrew the current from all of the wires in the tower. Egan and one Applegate then went up into the tower and disconnected certain wires, on which there was at the time no current, which were to be spliced and connected in compliance with the order given to them. This done, Egan returned to

the engine room, and directed the current be turned on the Laredo wires. He stood and watched the dial of the ammeter, or indicator, until it showed that the current was on at its full power, and then went to his mid-day meal. In the afternoon Egan and Applegate resumed their work in "changing the leads." The latter went to the top of the tower, having in his hands a wire which was a part of a coil lying on the ground. He pulled the wire over the end of the tower, and let it down to Egan, who was on the roof of the building immediately over the holes that had been drilled in the wall. Wire was thus supplied from above by Applegate to Egan, who was passing a sufficient length through each hole to connect one end with the Trenton service wires at the top of the tower and the other end with the motors in the building. The current was on in full force on the Laredo wires, but not on the wires on which they were working. After Egan and Applegate had been thus employed for some time, the latter in splicing the pieces of wire to the Trenton service wires at the top of the tower, and the former in pushing the other end of the wires through the holes in the wall, Egan remarked to Applegate that he would go down and see if the other ends of the wires were long enough to splice to other wires inside of the building. Egan went down to the engine room, looked up at the ceiling where the holes were, and then returned to the roof. When he returned he said to Applegate, "they're all right," and laid down on the roof on his stomach and got ready to poke a wire through one of the holes. While in this position his head was inside the line of the framework of the tower, and he was looking down towards the eaves so that he could poke the wire through the porcelain insulator in the wall. The wire he had hold of carried no current, but it was the nearest one of the loose wires to the high-voltage Laredo wires. While Applegate was scraping the insulation from one of the city service wires preparatory to connecting it with one of the loose wires that had been pushed through a hole in the wall, Egan, as he last saw him alive, was lying on his stomach, trying to put the sixth wire through one of the holes. A moment later there was a flash, and Applegate became momentarily unconscious. An employé in the engine room apprised—in what manner the record does not show—that something had occurred on the tower, ran to the switchboard, and turned off the current from all of the wires in the tower. Egan was found lying on the roof dead, in the same position as when he had last been seen by Applegate; he had the loose end of the wire he had been working with gripped in his hand, which was badly burned, and there was a burned place in the tar roof under his body. The insulation was burned off of the wire Egan held in his hand, and the wire was

found adhering to what had been one of the live Laredo wires. This connection of the loose wire held by Egan with the live wire was the cause of his death.

[1] I. Preliminary to the discussion of any other question that may be presented by this record, we are confronted with two inquiries of primary importance necessary to the determination of this case, viz.: Was the deceased in the exercise of ordinary care for his own safety at the time he received the fatal shock? If not, did his failure to exercise such care directly contribute to the cause of his death? In seeking a solution to these inquiries the well-established rules must be kept in mind, regulating the manner in which the relevant facts are to be considered in a case of this character and the conclusions that are authorized to be drawn therefrom, to the effect that not only is the plaintiff entitled to a consideration of all of the affirmative facts adduced in evidence to sustain her action, but as well to all reasonable inferences that may be drawn in her favor from such facts. The rule having thus been observed, a reversal will not be authorized unless it has been shown in a manner to satisfy the minds of reasonable men that the evidence conclusively establishes the contributory negligence of the deceased. The record thus reviewed, the hazardous nature of the defendant's business and as a consequence its obligation to exercise the highest degree of care to protect its employés from injury must be considered in measuring the negligence of the deceased and the resultant right of the plaintiff to recover for his death.

The deceased had been continuously in the employ of the defendant for about 10 years before his death. He had assisted in the construction of the system of the defendant, by which electricity was generated and distributed. The defendant's engineer said he knew of no one who was a better electrician than the deceased. If wires out on defendant's lines or about the plant got out of repair, the deceased fixed them. In case of any electrical trouble, he was usually called on to right it. He understood how to increase or reduce the voltage of the electrical current, and from all the testimony he seems to have been thoroughly familiar with the plant, and, so far as it is practically known, the power and effect of the electric current. Not only did he possess such knowledge as comes from experience, but is said to have kept himself informed as to the progress in electrical matters by the frequent reading of publications on this subject.

When the Laredo lines were built and the same were connected with the defendant's plant, the deceased assisted in the work, he helped to build the tower over defendant's building into which the Laredo lines ran, and built the lightning arrester at Laredo, said by defendant's witnesses to have been a

complicated electrical mechanism. It will be recalled that the voltage of the Laredo lines was 22,000. The deceased ran the Laredo wires to the switch which controlled these lines; he knew how this switch was manipulated so as to cut out the current and when and how it could be turned on; he was familiar with the device which served to indicate whether or not the Laredo current was on and its voltage; he assisted in the connection of the wires in the Laredo switchboard when the same were installed.

[2] Familiar as the deceased must have been from his long experience in the generation and distribution of electricity, it is not unreasonable to conclude that he knew the result that would follow if one of the dead wires he and Applegate were handling came in contact with one of the high voltage Laredo wires. Having directed that the current be turned on the Laredo wires and having watched the ammeter, or indicator, until the voltage reached its limit, and with full knowledge that this current had not been turned off, it does not accord with reason that the deceased was not cognizant of his danger in attempting to perform the work he was engaged in at the time of his death in such close proximity to the live high-power wires. It is true that the actual knowledge of the deceased as to the effect on the human body of a high-voltage wire is not shown by direct testimony. However, all the facts and circumstances showing his general familiarity with the subject in other respects authorize the conclusion that he must have possessed this knowledge. All of the witnesses who testified in regard to their knowledge of this particular phase of the subject stated that they knew the danger attending the handling of a live wire or of working with a dead wire which might come in contact with one carrying a current. The deceased had been employed in electrical work much longer than either of these witnesses, except perhaps an ex-manager, whose testimony was in full accord with that of the others. Measured by the well-recognized rule of reason that a long connection with a certain line of duty and a varied experience in its performance must afford opportunities for acquiring a thorough knowledge of same, we are justified in the conclusion that the deceased knew all about this plant, not only as to the nature of the duties to be performed, but their hazardous character as well. Thus armed, he must have known that the handling of a dead uninsulated wire within two or three feet of a live wire carrying a current of 22,000 volts was, to say the least, extremely hazardous. The physical facts lend convincing color to this conclusion. There was, says Applegate, 5 or 6 feet of slack in the dead wire he had hooked over the corner of the tower, but did not at the time have hold of, which the deceased was handling. It requires no expert

lineman, but simply one familiar with the facts of everyday experience, to determine that if this wire, as stated, was within 2 or 3 feet of the live wire, the danger of contact between them was great. That this occurred is evident from the fact that after the accident and the current had been turned off, the slack wire was found in contact with one of the wires which had carried the high voltage. Under these circumstances it cannot be said, especially in view of the superior knowledge of the deceased, that the danger was to him in any sense a hidden one. What would occur he must have known, in the observance of that ordinary care which a prudent man is required to exercise under like circumstances, did occur. To this rule he was subject, regardless of the fact that he was working with an electrical appliance instead of being otherwise employed. While the character of the defendant's business was hazardous and a high degree of care was required in conducting it, this did not lessen the duty of the deceased to exercise ordinary care. In thus stating the rule we have not taken into consideration the refinements of same to be found in many legal treatises on the law of electricity, but have deemed it sufficient to state the rule as declared by our own courts. For example, in *Hill v. Union E. L. & P. Co.*, 260 Mo. 43, 169 S. W. 345, we held that an electric lineman is charged with the knowledge of "what he saw or by the exercise of ordinary care could have seen at the time and under the circumstances"; and in *Junior v. Elec. L. & P. Co.*, 127 Mo. 79, 29 S. W. 988, an electric lineman went up on a pole to work in a maze of wires which were charged with electricity and uninsulated. He had been provided with rubber gloves and by the use of them could have protected himself against the current, but he failed to wear them, and the current killed him. In the discussion of his conduct this court said:

"It seems very clear that this misfortune befell him through his neglect to use the rubber gloves provided for this very work. He assumed the risk of handling these wires charged with electricity. The employment was very hazardous and inherently dangerous in its very nature, but he undertook it with the knowledge of its dangers, and he was bound to exercise care to avoid the consequences. The evidence shows most conclusively that by his own neglect of the means furnished him by his employer, he brought his hands in contact with the wires and lost his life. It is greatly to be regretted, but the master is not liable."

The Junior-Electric Company Case, *supra*, was affirmed in *Biddlecom v. Nelson Grain Co.*, 178 S. W. 750, in which this court said:

"If deceased (after he had been warned against touching the switches and had been instructed to use the pole in operating the same) came to his death by touching the switches with his hands in an attempt to adjust or operate them, instead of using the long wooden

pole which had been supplied for the very purpose of operating the switches, it should be held, as a matter of law, that his own negligence contributed to his death, and that a recovery therefor could not be permitted."

And in *Kille v. L. & P. Co.*, 149 Mo. App. 354, 130 S. W. 89, the rule was thus stated:

"If plaintiff's husband, as a lineman whose duty it was to work with defendant's wires, knowing that the wires were uninsulated and charged with a high voltage of electricity, carelessly came in contact with them, then he was guilty of contributory negligence, and the defendant is not liable for his death."

In *Shelton v. L. P. & I. Co.*, 258 Mo. 534, 187 S. W. 544, the deceased, an experienced lineman in the employment of the defendant, was, at the time of his death, engaged in stringing a new wire on a pole of defendant on which there were five cross-arms and many wires, carrying a current of 2,300 volts; he came in contact with one of these wires and was instantly killed. The petition alleged neglect in permitting the insulation on those wires to become and remain defective and insufficient. The answer pleaded contributory negligence, and alleged that the deceased was an experienced lineman, and knew and assumed the risks incident to his employment; it also alleged it was the duty of the deceased to inspect and keep in repair the wires at the point where he came in contact with them. Defendant's superintendent, called by plaintiff, testified in effect as follows:

"There was nothing concealed or hidden from Mr. Shelton [the lineman for whose death the suit had been brought]. Everything was visible; he could have told to a certainty whether the wires were insulated or not; he knew their voltage; he was provided with tools in doing his work, and with insulating tape to use on joints that are bare in such places as that. If he discovered a bare joint on one of the wires he could have gone up the pole, and it would have been good practice to have repaired it. I know of him using tape on poles before, somewhere on the line. I directed him to look after these places; it was a part of his business to do so. I got information as to the condition of the wires, and the linemen would look after these defects and report them to me; that was a part of their business."

The testimony for the plaintiff showed that the insulation was off of the wires in places at or near the pole and cross-arms. This court held on this testimony that the demurrer to plaintiff's evidence should have been sustained; that the employer might impose upon the lineman the duty of inspecting the wires, and that where the lineman failed in the performance of that duty and was injured the master was not liable.

That the work in which Egan, the deceased, was engaged was not being hastily performed or was not required to be so performed is

evident from his conduct immediately preceding the accident, in that just before he attempted to put the last wire through the hole in the wall, and while he knew the current was on, he went down into the plant and was talking with the engineer. It was only necessary for absolute safety that he either turn off the current or request the engineer to do so, which, as the latter testifies, would have been done. Time was afforded, therefore, for a calm and deliberate choice between an absolutely unsafe and a perfectly safe way, and, as is evident from the result, he chose the former.

The rule of human conduct applicable in cases as at bar is well expressed in *Doerr v. St. L. Br. Ass'n*, 176 Mo. 547, 75 S. W. 600, where it is said:

"No man has the moral or legal right to put his life or limb to the hazard of a second, unless duty and the exigencies of his situation imperatively demand it. No man of ordinary prudence will do so."

[3] The deceased knew of his danger, he was not instructed to do the work as he did it, and the inevitable conclusion is he neglected to take a reasonable and sensible precaution for his own safety, and by his neglect he lost his life. This, without more, is sufficient to show that the deceased was guilty of neglect as a matter of law, and hence the case should be reversed. Having reached this conclusion, it is unnecessary to consider the other assignments of error.

All concur.

#### WALDMANN v. SKRAINKA CONST. CO. (No. 22073.)

(Supreme Court of Missouri, Division No. 1. July 11, 1921. Motion for Rehearing and Motion to Transfer to Court in Banc Denied July 23, 1921.)

1. Appeal and error  $\S$ 1068(3, 5)—No reversible error in giving or refusing instructions where defendant not liable.

If defendant construction company was not negligent in excavating for city paving, or if its negligence was not the proximate cause of plaintiff's injury, or if plaintiff was guilty of contributory negligence as a matter of law, plaintiff would have no case to submit to the jury, and therefore, defendant's demurrer to the evidence having been refused, there could not be reversible error in any instructions given or refused for either party, or in any action of the trial court complained of by plaintiff appellant.

2. Municipal corporations  $\S$ 805(1)—Traveler may not go forward relying on presumption that street or sidewalk is in good condition if he knows it is not, but must exercise his faculties to discover dangers.

A traveler on a public street or sidewalk may ordinarily presume that the way is clear

and in good condition, but, if he knows that it is torn up or obstructed by public work, he cannot go forward relying on such presumption, but must exercise his faculties to discover the dangers, and, if he fails to do so, and is injured thereby, he cannot recover, though the public authorities or contractor may have been negligent.

**3. Evidence ¶588—Testimony held contrary to physical facts.**

Physical facts testified to by plaintiff, who was injured while crossing a street excavated for paving, and by her maid, held to nullify plaintiff's evidence to the effect that it was so dark she could not see to step out of the excavation.

**4. Municipal corporations ¶819(7) — Testimony held to show plaintiff's negligence in crossing excavated street.**

Plaintiff's testimony in an action for injuries sustained while crossing a street excavated for paving held to show that she was guilty of such contributory negligence as prevented her having any case for the jury.

**5. Municipal corporations ¶805(3) — Plaintiff held negligent in crossing street excavated for paving.**

Where plaintiff walked across a street excavated for paving without being especially careful, in nearly absolute darkness, and did not feel her way when she came to the other side of the street and attempted to step up onto the sidewalk, as an ordinarily careful person would have done, she was guilty of contributory negligence.

**6. Municipal corporations ¶805(3)—Plaintiff crossing street excavated for paving which she knew was unfinished bound to look out for dangers.**

Where plaintiff in crossing a street excavated for paving, knew that the work was unfinished, and a red light also warned her to look out for dangers, she was put on notice and bound to look out and anticipate dangers connected with the work, which include stumbling or tripping on the exposed edge of the sidewalk, which she knew she would have to encounter and step over in crossing the excavation.

**7. Municipal corporations ¶802 — Plaintiff guilty of negligence in crossing excavated street cannot recover for injuries.**

Where, if plaintiff in crossing a street excavated for paving had exercised anything like the care which with her admitted knowledge of the situation the law demanded of her, she never would have been injured, she cannot recover for the injuries sustained.

Appeal from St. Louis Circuit Court;  
Frahk Landwehr, Judge.

Suit by Carrie Waldmann against the Skrainka Construction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Sale & Frey, of St. Louis, for appellant.

M. U. Hayden and John P. Griffin, both of St. Louis, for respondent.

**SMALL, C. I.** Suit for personal injuries. The substantial facts are: The defendant contracted with the city of St. Louis to pave and for that purpose to take out the necessary subgrade of an alley between Wells and Ridge avenues in said city, and which intersected or opened into Hamilton avenue on the west side of and terminated at said Hamilton avenue. Hamilton avenue ran north and south, and said alley east and west, thus entering Hamilton avenue at right angles. Prior to the commencement of the work by defendant, the granitoid sidewalk on the west side of Hamilton avenue was continuous between Wells and Ridge avenues, and ran across the mouth of the alley. The defendant's work contemplated grading and paving the entrance into the alley from the west side of Hamilton avenue so that teams and vehicles would have egress and ingress to and from the alley into said avenue. This required the cutting away and removal of the sidewalk and curb, where they crossed the mouth of the alley, and the excavating of the subgrade of the approach, which work had been completed at the time plaintiff was injured, to wit, on the night of July 7, 1918. The excavation thus made was 10 inches deep—that is, 10 inches below the surface of the granitoid sidewalk—15 feet wide, the width of the alley, and about 12 to 15 feet long, the distance from the curb to the property line. The granitoid sidewalk was cut across, east and west, along the line of the excavation, and its edges were left exposed and were part of the north and south sides of the excavation. The plaintiff, a married lady of mature years, living in the neighborhood, passed over the excavation in safety without difficulty in walking north on the sidewalk, just before dark, on the evening of her injury, in going to a picture show. After the picture show, she started to return to her home the same route, going south on the same sidewalk, accompanied by her maid, whom she had met at the show. This was about 10 o'clock at night. When they reached the excavation, the maid, walking just in front of plaintiff, crossed over in safety. The plaintiff, following immediately behind, stepped down into the excavation and walked across it to the south side, without any difficulty. But, as she undertook to step up the 10-inch rise on the south side, her foot caught, she says, on a projection from the edge of the granitoid walk, and she was thrown to the sidewalk and injured. There was no fence around or about the work. There was one red light in the center of the excavation near the curb line. The granitoid walk was six feet wide, and there was an unpaved parkway about 4 or 5 feet wide between the north line of the walk and the curb. There was no other light or lantern on the work.

The petition charged that, as plaintiff was stepping up on the south side of said excavation, due to defendant's negligence, as specified in the petition, she fell on the hard granitoid sidewalk and was injured. There were 12 specifications of negligence in the petition: (1) and (2) That in cutting the granitoid sidewalk the defendant left the edge thereof in a rough and jagged condition, which rendered said sidewalk dangerous to pedestrians; (3) and (4) that it was dark at the time plaintiff was injured, and defendant negligently failed to provide adequate light, that the one lantern which defendant had provided was burning very low and had bricks around it, and that thereby plaintiff could not see her way; (5) that said excavation rendered said sidewalk dangerous to pedestrians at night; (6) and (7) that defendant failed to provide an adequate covering for or temporary walk across said excavation; (8), (9), and (10) that defendant failed to warn pedestrians of their danger, failed to provide a watchman at said excavation, and failed to provide a proper step from the base thereof to the granitoid sidewalk, so that pedestrians could step with greater safety to the sidewalk therefrom; (11) and (12) that defendant failed to fence off said excavation with a substantial fence, and that the revised ordinances of said city required it to be fenced with such a fence not less than 3 feet high and two red lights securely and conspicuously posted on or near said excavation.

Besides a general denial, the answer pleaded contributory negligence.

Substantially all of the plaintiff's witnesses testified that there was a red light in the center of the excavation about the curb line. This red light had some bricks around it, which one of plaintiff's witnesses said was usual to keep the lamp from being overturned. There was no other light and no fence or guard around the work.

Touching the condition of the excavation, and especially the edge of the granitoid sidewalk on the south side, two witnesses who were city employees and inspectors on the job, and one civil engineer, testified for plaintiff, in substance, as follows: That one corner of the granitoid walk—the corner nearest the street—was broken off in a semi-circular form, and about 7 inches across; that the edge of the sidewalk was cut off reasonably straight except at this corner where it was broken. One of them said that it was as straight as you could break concrete. It was chipped a little, but not very much. It was cut just as evenly as it was possible to cut out concrete. Unless you hit an expansion joint and have to cut through the center of the slab, you will have a ragged edge. It was a very good job. It was as good as you could get in concrete. It was kind of like a saw tooth. The civil engineer saw the work after it was completed, but he

could see the line where the sidewalk had been cut. It was a saw-tooth edge. The irregularities of projections were from one-eighth to three-eighths of an inch in length; could not say how far apart they were.

A lay witness who saw the work the next morning testified for plaintiff: That the edge of the sidewalk on the south side of the alley was not finished at all, kind of sawed; that a corner of the walk towards the street was broken off; that he ran across the street the night before when plaintiff was injured, and saw her lying on the sidewalk on the south side of the excavation, near this broken piece. He did not describe the extent of the broken piece or size of the projections which made it "kind of sawed."

The plaintiff's maid testified for plaintiff: That she walked in front of plaintiff, crossed the excavation all right herself, but plaintiff did not get up and out of the excavation on the south side; that plaintiff fell while attempting to do so, and the witness turned around, and plaintiff was lying over to the east side of the sidewalk with her legs hanging down in the alley. Her leg was on a broken thing. Witness felt of a piece of broken-off sidewalk. It was kind of pointed; it would stick in your hands when you would touch it. After plaintiff fell, witness felt of this sidewalk, and plaintiff's foot at the time was on top of the projection. Both the maid and the said lay witness marked a point on a photograph in evidence right over the broken-off corner as the place they say plaintiff's foot was when they first saw her after the accident.

Plaintiff testified in her own behalf substantially as follows:

She crossed the alley going to the picture show in safety. She went there alone and came back with her maid; walked back on the same side of Hamilton Avenue. She came to this alley, stepped down into it, and crossed over to the south side. "When I got to the other (south) side, as I wanted to step my foot caught on a piece of sharp point of the concrete, and I fell forward. There was a red light there near the street. There were bricks around it. It was low down in the ground. You couldn't hardly see it; could not see where to step down from the north side into the alley. It was dark. It was awfully dark there. My foot caught, and I fell as I went to step out on the south side of the alley. It was Sunday night, about 10:30. The maid was right in front of me. It was near the street where I fell. Just as I stepped off there was a sharp point sticking out and it threw me over."

On cross-examination she said:

"It was not quite dark when I went to the picture show. I could see that the alley was being constructed when I got there. I stepped down into the alley, walked across it and then stepped up on the sidewalk on the north side going to the theater. Came back the same way. Stepped down from the sidewalk, coming back,



into the alley from the north side. Had no difficulty; stepped down there all right. Q. You could see that you had arrived at that alley? A. No, sir; it was dark; I could hardly see. Of course, I knew the alley was there, and stepped down into it from the north side, without falling or missing my footing at all, and walked safely across to the south side. I fell when I went to step up from the alley to the sidewalk on the south side. My maid was walking in front of me. She stepped up on the sidewalk on the south side of the alley in front of me. She was on the sidewalk on the south side, when I fell. Did not see the lamp. When I fell it was back of me. Don't remember when I first saw the lamp. I know it was there. I believe I saw it when I went over. It was in the middle of the alley. It was dark. It was not light enough to see the light. I don't believe I did see it there. I believe it was about the middle of the alley. I saw the bricks around it when I went. I knew, when I came back, that I would have to step down in the alley to walk across it, and knew I would have to step up at the south side onto the sidewalk. I knew that as I was walking across the alley. As I stepped up at the south side just immediately before I fell, one of these projections struck me about the instep. Q. Did you not strike any part of the sidewalk with your toe? A. It struck me here. I know I struck my foot right here, and I fell over. Q. Is that what you call the instep? A. Yes, sir. I did not see the part of the sidewalk that struck my instep. I felt it. I did not see it. It was dark. Just felt it. It was one sharp-pointed object that struck my instep. I did not see it at all. I couldn't tell anything about how far it extended out from the sidewalk. I fell forward. I never did get my foot up as high as the sidewalk, the top side of the sidewalk. It caught right here on the sharp point, and I couldn't. The light I saw was red. I did not see the sidewalk, as I was about to step up to it on the south side. It was so dark I could not see where the sidewalk was. Could not see any part of the sidewalk, because I fell so quick. It was light and shadow there. Did not put my foot up on the sidewalk at the south side, because my foot got caught on the piece of granitoid sticking out. Did not step up on the granitoid, and then slip off; I couldn't; my foot got caught. There was no part of the sidewalk broke under me. The point stuck in my foot, and I fell over. Don't remember whether any other part of my foot went under the sidewalk. All I know about what happened is this point sticking in my foot, and I fell over. Q. About your instep? A. Yes, sir."

Plaintiff also introduced in evidence section 1139 of the Revised Code of the City of St. Louis, which was as follows:

"*Excavations in Streets—To be Fenced, etc.*  
—*Obstructions—Red Light*—Every person who shall cause to be made any excavation in or adjoining any public street, alley, highway or public place shall cause the same to be fenced in with a substantial fence not less than three feet high, and so placed as to prevent persons, animals or vehicles from falling into said excavations; and every person making or causing to be made any such excavations, and every

person who shall occupy or cause to be occupied any portion of any public street, alley, highway, or public place with building materials or any obstruction shall cause one red light to be securely and conspicuously posted on or near such excavation, building material or obstruction; provided, such obstruction does not extend more than ten feet in length, and if over ten feet and less than fifty feet, two red lights, one at each end, shall be placed, and one additional light for each additional fifty feet or part thereof, and shall keep such lights burning during the entire night."

Defendant's evidence tended to show that the work was done by a subcontractor under the defendant's directions, but this defense was not insisted on or submitted in the instructions given for defendant.

At the close of all the evidence, the defendant offered a demurrer to the testimony, which the court refused. The court gave six instructions for the plaintiff. In her instructions the plaintiff only submitted three grounds of negligence charged in the petition: First, that the defendant negligently left the edge of the granitoid sidewalk with jagged pieces sticking out of the same; second, negligently failed to post a red light on either side of said excavation; third, negligently failed to cover, guard, or fence said excavation.

The court also gave a number of instructions for the defendant, as to some of which the plaintiff assigns error.

The court also permitted the defendant to ask the plaintiff's maid whether she did not testify, in a deposition which she gave, to the effect that the plaintiff fell about the center of the walk. But, in view of the conclusion we have reached, it is not necessary to set out any more of the details of the trial than we have already done.

The jury found a verdict for the defendant. Plaintiff appealed the case to this court.

[1] II. If defendant was not guilty of negligence, or if its negligence was not the proximate cause of the plaintiff's injury, or if the plaintiff herself was guilty of contributory negligence as a matter of law, she would have no case to submit to the jury, and therefore (the defendant having asked a demurrer to the evidence, which was refused) there could be no reversible error in any instructions given or refused for either party, or in any action of the trial court complained of by the appellant. *Bradley v. Forbes Tea Co.*, 213 Mo. 320, 111 S. W. 919; *Trainer v. Mining Co.*, 243 Mo. 359, loc. cit. 371, 148 S. W. 70, *Ann. Cas.* 1913C, 949; *Shinn v. Railroad*, 248 Mo. 173, 154 S. W. 103; *Shelton v. Light Co.*, 258 Mo. loc. cit. 541, 167 S. W. 544; *Boesel v. Wells Fargo Ex. Co.*, 260 Mo. 463, 169 S. W. 110; and other cases cited by learned counsel for respondent.

[2] III. It is the settled law in this state

that, while a traveler on a public street or sidewalk may ordinarily presume that the way is clear and in good condition, still, if the traveler knows that the sidewalk or street being used by him is torn up or obstructed by public work being done therein, he cannot go forward, relying on the presumption that the way is clear, but must exercise his faculties to see and discover the dangers that he may encounter from such obstructing public work, and if he fails to do so, and is injured thereby, he cannot recover, on the ground that he himself is guilty of contributory negligence, although the public authorities or the contractor doing the work may also have been guilty of negligence. *Welch v. McGowan*, 262 Mo. 709, 172 S. W. 18; *Wheat v. City of St. Louis*, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292; *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566, 985; *Craine v. Met. St. Ry. Co.*, 246 Mo. 393, 152 S. W. 24; *Woodson v. Met. St. Ry. Co.*, 224 Mo. 685, 123 S. W. 820, 30 L. R. A. (N. S.) 931, 20 Ann. Cas. 1039; *Kaiser v. St. Louis*, 185 Mo. 366, 84 S. W. 19; *Brady v. St. Joseph*, 167 Mo. App. 425, 151 S. W. 234; *Cohn v. Kansas City*, 108 Mo. 387, 18 S. W. 973.

In *Wheat v. City of St. Louis*, 179 Mo., supra, the plaintiff was injured by driving over a pile of earth surrounding a manhole which projected several feet above the surface of the street. The condition had existed for a year, and he was perfectly familiar with it. Held, although the city was guilty of negligence by permitting the obstruction, plaintiff was guilty of contributory negligence, as a matter of law, in not avoiding it. In that case, it was a dark, foggy morning, but it was light enough to see the obstruction had plaintiff looked with reasonable care. The court said (179 Mo. 579, 78 S. W. 792, 64 L. R. A. 292):

"The plaintiff in this case knew of the obstruction in the street, and knew that by the exercise of ordinary care he could avoid striking it while traveling along the street. His act in striking it was, therefore, *per se* contributory negligence. [Citing many cases.] \* \* \* In *Cowie v. Seattle*, 4 Mun. Corp. Cas. 417, the Supreme Court of Washington held that 'a person who was perfectly familiar with the condition of a sidewalk in which a defect exists has no right, while using it, to act on the ordinary presumption that it is in good condition.' \* \* \*

"While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his God-given senses, and not to run into obstructions that he is familiar with or which by the exercise of ordinary care he could discover and easily avoid." (Italics ours.) 179 Mo. 582, 78 S. W. 792, 64 L. R. A. 292.

In *Welch v. McGowan*, 262 Mo. 709, 172 S. W. 18, the plaintiff was driving on Thirteenth street in Kansas City. The defendant had dug a ditch on the south part of the

roadway, and had laid a string of gas pipe along the ditch, preparatory to laying the pipe therein. The plaintiff's witnesses testified that one of the gas pipes projected out from one to six feet in the portion of the roadway left open for travel north of the general line of the work and the other pipes. The front wheel of the plaintiff's buggy struck this pipe and threw plaintiff out and seriously injured him. This court held that plaintiff was guilty of contributory negligence as a matter of law in failing to discover and avoid the pipe, and could not recover, although defendant may have been guilty of negligence in allowing the pipe to project out into the street. The court said (262 Mo. 719, 172 S. W. 20):

"The accident occurred in daylight, and plaintiff's eyesight was not impaired. The gas pipe which he struck was lying on comparatively level ground, and had he exercised the diligence which the law and ordinary prudence calls for under the circumstances he would have seen the pipe in ample time to have driven around it.

"We have not been able to find any case where the facts were precisely the same as in this one, but the following decisions announce the rule that when one traveling along a public street sees or otherwise receives actual notice, that such street is out of repair or torn up, he must look for obstructions and other dangers and avoid them if he can do so by exercising ordinary care. *Phelan v. Paving Co.*, 227 Mo. 666, loc. cit. 705, 706; *Nessler v. Housewrecking Co.*, 156 App. Div. (N. Y.) 348, 350; *Nolan v. King*, 97 N. Y. 565, loc. cit. 571, 572; *District of Columbia v. Moulton*, 182 U. S. 576. The same rule seems to apply where a person traveling any public highway has actual knowledge of an obstruction therein. *Wheat v. City of St. Louis*, 179 Mo. 572, 64 L. R. A. 292."

In the *Welch Case* the plaintiff testified he did not see the gas pipe he struck, but he admitted that he knew that the street was cut open for the purpose of burying a pipe or making some other change therein. In view of this fact, the court said on page 718 of 262 Mo., on page 20 of 172 S. W.:

"With [this] the actual knowledge on the part of plaintiff, it was his duty to keep a diligent lookout for obstructions which might be temporarily in the street by reason of the work that was being done therein, and to anticipate noises which might frighten a team. \* \* \* If it is true that defendants were negligent in allowing one end of the gas pipe to protrude into that part of the street left open for travel, this did not relieve plaintiff of the duty of keeping a lookout for temporary obstructions after he observed that the street was torn up, or partially torn up; so we find that the plaintiff's injury was the direct result of his own carelessness in failing to look where he was driving."

In *Robinson v. Kansas City*, 181 S. W. 1004, where the plaintiff was injured by falling into an excavation in the street at night, of which she had no previous knowledge,

and it was so dark she could not see, the court in banc, while holding that the above cases did not apply in that case, affirmed the doctrine laid down in said cases, which it announced as follows (181 S. W. 1005-1006):

"The doctrine announced in these cases, about which there is no controversy, except as to its application here, is that, if a pedestrian with knowledge of a defect or obstruction in a street or sidewalk uses same and is thereby injured, he is guilty of such contributory negligence as to preclude recovery.

"The facts in the cases cited by defendants are not parallel with those in the case at bar. There the injuries complained of were received in the daytime. Here they were at night, and so great was the darkness that plaintiff could not see her husband, who preceded her but a few steps on their way homeward. The darkness was due, so far as the city was concerned, to its negligence in not keeping the arc light burning at the intersection of the streets, and, so far as the Parker-Washington Company was concerned, in its failure to erect a barrier and to keep warning lights at the point where the excavation had been made.

"There, in each of the cases cited, evidence of the plaintiff's knowledge of the defect or obstruction was shown. Here the only evidence was that plaintiff could not see the intersection of the streets in question from her home, and, not having been to Lauderdale's store since the grading began until the night of the accident, *did not know the location of the excavation.*" (Italics ours.)

[3] In the case at bar the plaintiff was familiar with the excavation, having seen it before dark in passing over it a few hours before her injury; knew how deep and wide it was, how far she would have to step down and step up to cross it, and that "the alley was being constructed"; that is, she knew the work was unfinished. She must also have seen that the edges of the concrete walk were in the sides of the excavation, and she says she did see the red light on the work when she crossed over going to the theater. The fact that it was dark when she returned made it all the more incumbent on her to look out for dangers and difficulties in passing over this unfinished and temporary crossing, which she knew was not in a completed condition, fitted for ordinary or permanent use by pedestrians. But, while she says it was dark at the time she returned, and was injured, yet her evidence shows that it was not so dark but that she knew when she reached the work and could see well enough to step down and walk across it without any difficulty or assistance from her maid, who immediately preceded her and crossed completely over without injury or trouble. If so, it must have been light enough for the plaintiff to step out of the cut without injury by the exercise of due care, because, if any difference, it required more light for her to discover the excavation and to step down and into and across it

than to step up and out of it after she had discovered it and knew she was in it. The physical facts thus testified to by plaintiff and her maid nullify her evidence to the effect that it was so dark that she could not see to step out of the excavation.

[4] We therefore hold that plaintiff's own testimony shows that she was guilty of such contributory negligence as prevented her having any case for the jury.

IV. But let us assume it was as dark as plaintiff says it was.

In *Diamond v. Kansas City*, 120 Mo. App. 185, 96 S. W. 492, the plaintiff was injured at night by falling into a hole in a plank sidewalk. The walk was elevated some four or five feet above the ground. One of the handrails was missing. Plaintiff was familiar with the walk, and knew that several planks six or eight inches wide were absent, but did not remember the exact location of the opening into which he fell. The night was dark and the street lamps out, and plaintiff's vision was further obscured by smoke from the railroad yards nearby. The walk had been in that condition for a month or more, and the holes had been observed by plaintiff when he went to work that evening. He was injured when returning home about midnight. The court held he was guilty of such contributory negligence as precluded recovery. The court said (120 Mo. App. 189, 190, 96 S. W. 493):

"The facts before us do not warrant the inference that the few openings in the sidewalk in all events necessarily menaced the safety of a pedestrian, particularly that of one who knew of their presence. Except when surrounded by utter darkness, plaintiff by giving ordinary attention to his course easily could have avoided stepping into any of them. But being plunged into what he pictures to be complete darkness, and knowing that the holes were there, his conduct in proceeding at the gait and in the manner he walked in the daytime appears to be palpably negligent. He neither attempted by using the one good handrail to provide himself with the means of recovering his balance should he make a misstep, nor did he feel his way with his feet and thus make sure of the safety of his footing before placing his weight on the advancing foot as people usually do who are compelled to grope in darkness. It is true contributory negligence is an affirmative defense, but plaintiff's own statement of what he did shows that he made not the slightest effort to avoid the dangers, which, from the fact of darkness, were threatening in the highest degree. And there is nothing in the record from which the inference may be drawn that he acted with reasonable care. He trusted entirely to chance to escape, and, assuming that the distance of each of his steps was approximately 30 inches, and that he had to pass over three transverse openings in the sidewalk, he had no more than an even chance of missing a fall. Thus the danger under all the circumstances in the situation was such that it certainly menaced his safety, and, as he utterly

failed to take any measures to avoid it, his own negligence stands forth indisputably as the producing cause of his injury and precludes recovery."

[6] We think the above ruling of the learned appellate court is sound law and applicable to this case. If it was as dark as plaintiff claims it was, she walked into and across the cut without being specially careful in nearly absolute darkness and took no special care and did not feel her way when she came to the south side and attempted to step up onto the granitoid sidewalk, as an ordinarily careful person would have done under the circumstances, if it was as dark, or anything like as dark, as plaintiff says it was.

[6] V. But it is strenuously argued by appellant's learned counsel that, while plaintiff knew of the fact that there was a cut there, and that she would have to first step down, and then up about 10 inches in crossing it, she did not know of the jagged points on the edge of the concrete on which her foot was caught. But her evidence shows she did know that it was incomplete and unfinished public work, and, therefore, under the Welch Case, *supra*, she was put upon notice and was bound to look out and anticipate dangers connected with the work, which included stumbling or tripping on the exposed edge of the concrete walk, which she knew she would have to encounter and step over in again crossing the excavation as she returned home. The red light was also a warning to look out for danger.

[7] It is self-evident that, if plaintiff had exercised anything like the care which, with her admitted knowledge of the situation and circumstances which surrounded her, the law demanded of her, she never would have been injured, and therefore she was not entitled to recover in this case.

Let the judgment be affirmed.

RAGLAND, C., concurs.

BROWN, C., not sitting.

PER CURIAM. The foregoing opinion by SMALL, C., is adopted as the opinion of the court.

All the Judges concur; GRAVES, J., in separate opinion, in which JAMES T. BLAIR, J., concurs.

GRAVES, J. I concur in this opinion except as to the citation of Welch v. McGowan, 262 Mo. 709, 172 S. W. 18. Having heretofore read the record in that case, I do not desire to be in the attitude of endorsing the result there reached. The general principles of the law are properly announced in Welch's Case, but the facts were misapplied to those principles. I mean the record facts. There

is a difference between stated facts and record facts.

JAMES T. BLAIR, J., concurs in these views.

# WILLIAMS v. METROPOLITAN LIFE INS. CO. (No. 16688.)

(St. Louis Court of Appeals. Missouri. June 29, 1921.)

1. Insurance  $\S$ 624(4)—Where insurer failed to act under facility of payment clause, beneficiary's assignee possessing policy and receipt book could sue to maintain action.

Where defendant insurer failed to exercise its option under the facility of payment clause, and the plaintiff was the assignee of the named beneficiary and legally in possession of the policy and receipt book, plaintiff had a legal right to and was the proper party to sue on the policy.

2. Insurance  $\S$ 583(2)—Insurer, not having availed of the facility of payment clause, may not dispute right of recovery of the beneficiary's assignee.

Defendant insurer, not having availed itself of the facility of payment clause by producing a receipt signed by any one of those persons which would have made it conclusive evidence that the policy had been satisfied, is in no position to deny or dispute the right of recovery of the assignee of the beneficiary named in the policy.

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

"Not to be officially published."

Action by Lee S. Williams against the Metropolitan Life Insurance Company. Judgment for plaintiff, and the defendant appeals. Affirmed.

Fordyce, Holliday & White, of St. Louis, for appellant.

James J. O'Donohoe, of St. Louis, for respondent.

NIPPER, C. This is an action to recover on what is commonly called an industrial insurance policy with a "facility of payment" clause. Plaintiff recovered, as the amount due under the policy with interest and damages, \$117.42, and \$100 attorney's fees for vexatious delay. William Crook, father of deceased, was named as beneficiary in the policy. Immediately after the death of the son, the father assigned the policy to the plaintiff, in part payment of funeral expenses of deceased.

The policy provides:

"In consideration of the payment of the premium mentioned in the schedule below, on or

before each Monday, doth hereby agree, subject to the conditions below and on page 2 hereof, each of which is hereby made a part of this contract and contracted by the assured to be a part hereof, and with the privileges and concessions to policy holders on page 2 hereof, which are hereby made part of this contract, to pay as an endowment, to the insured named below, on the anniversary of this policy next after he or she shall have passed the age of 79 years, upon surrender of this policy and all receipt books, the amount stipulated in said schedule; and doth further agree, subject to the conditions aforesaid, if the insured shall die prior to the date of the maturity of the endowment, to pay upon receipt of proofs of the death of the insured made in the manner, to the extent and upon the blanks required herein, and upon surrender of this policy and all receipt books, the amount stipulated in said schedule."

Then follows the facility of payment clause which provides that, in case of such prior death of the insured, the company may pay the amount due to either the beneficiary named, or to the executor or administrator, husband or wife, or to certain relatives, or to any other person appearing to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial. It is also provided that the production of a receipt signed by either of said persons shall be conclusive evidence that all claims under the policy have been satisfied. Then follows: "Name of beneficiary and relationship to the insured, William Crook, father."

The defendant introduced no evidence, but stood upon its demurrer.

The contention of appellant on this appeal is: (1) That under the facility of payment provision of the policy in suit no right of action was vested in plaintiff; (2) error in allowing penalty for vexatious refusal to pay.

It will be noted that, while the policy provides the payment of certain designated amounts, it does not specifically direct that the amount due, or which may become due, shall be paid to the beneficiary, but provides that the company may pay the amount to either of the persons named in the facility of payment clause.

Defendant in its printed argument before this court says:

"The policy in suit does not obligate the insurer to pay its proceeds exclusively to any named person or persons. The named beneficiary occupies precisely the same relation to the insurer as the executor or administrator of the insured, or as any other person falling within the classes designated in the facility of payment clause."

The position of appellant here is entirely inconsistent with the position it took in the court below, for we find among defendant's refused instructions a request that the court instruct the jury:

"That as a matter of law the policy offered in evidence provides that the defendant will pay the amount stipulated therein to William Crook, father, as beneficiary, upon receipt of proofs of death," etc.

Defendant tried the case in the court below upon the theory that William Crook was the regular beneficiary, to whom payment must be made, but that the assignment was void and did not vest any right of action in plaintiff. In its brief in this court it concedes that the rule against assignment of an insurance policy does not apply to a claim arising after loss or maturity of the policy. 14 R. C. L. § 182; *Floyd v. Insurance Co.*, 72 Mo. App. 455.

While, as stated, this policy does not state specifically that the amount due shall be paid to the named beneficiary, it does, however, provide that the amount is to be paid, and names William Crook as beneficiary on the face of the policy.

In *Golden v. Metropolitan Life Insurance Co.*, 35 App. Div. 569, 55 N. Y. Supp. 143, it was held that a beneficiary named in the application which was made a part of the policy, was entitled to the benefit as against insured's executor, even though no beneficiary was named in the body of the policy.

[1] The right granted defendant under the terms of this policy to exercise its option in the matter of payment under certain conditions cannot be used to defeat the purpose of the insurance, or to entirely escape the payment of its obligation. We think that, under a fair and proper construction of the terms of this contract, defendant is required to pay the amount due to the beneficiary named in the policy. The defendant having failed to exercise the option granted it under the facility of payment clause, and the plaintiff being the assignee of the named and designated beneficiary and legally in possession of the policy and the receipt book, had a legal right to, and was the proper person under such circumstances, to maintain this action.

[2] While the policy provides that payment may be made to certain others than the beneficiary, and the production of a receipt signed by any one of these persons shall be conclusive evidence that all claims under the policy have been satisfied, yet defendant has paid no one mentioned in the facility of payment clause, produced no receipt, and is certainly in no position, and never has been, so far as this record discloses, to deny or dispute the right of recovery to the assignee of the beneficiary named in the policy.

We are also of the opinion that the court committed no error in submitting the question of damages and attorney's fees to the jury. *Keller v. Insurance Co.*, 198 Mo. 440, 95 S. W. 903; *Young v. Insurance Co.*, 260 Mo. 1, 187 S. W. 856; *Barber v. Insurance Co.*, 279 Mo. 316, 214 S. W. 207; *Fay v. Insurance Co.*, 268 Mo. 373, 187 S. W. 861.

The Commissioner recommends that the judgment be affirmed.

**PER CURIAM.** The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

ALLEN, P. J., and BECKER and DAUES, JJ., concur.

### BULTRALIK v. METROPOLITAN LIFE INS. CO. (No. 16326.)

(St. Louis Court of Appeals. Missouri. July 20, 1921.)

#### 1. Insurance §550—Admissions in proofs of death not conclusive where evidence shows them erroneously made or tending to explain or contradict.

Admissions in proofs of death furnished by a beneficiary under a policy of insurance are not conclusive against him, where there is evidence they were erroneously made or tending to explain, repel, or contradict them or to impair their force and effect.

#### 2. Insurance §550—Admissions in proofs of death held not conclusive, in view of evidence showing them erroneously made.

Though the proofs of death signed by the beneficiary of a life policy stated that the insured died of diabetes from which she had suffered for a year, whereas the policy had been issued within less than such period on insured's representation that she was in good health, where two physicians' statements accompanying the proofs differed as to whether insured was so afflicted, one of such physicians' testimony at the trial was at variance with his statement as to the period during which he had attended insured, and the report of defendant's medical examiner at the time of her application was that he found her free from disease, such admissions in the proofs of death were not conclusive against the beneficiary; the evidence tending to show they were erroneously made.

#### 3. Insurance §668(7)—Admissions in proofs of death as to insured's ill health at time policy issued not conclusive as to whether such condition contributed to her death.

In view of Rev. St. 1919, § 6142, providing that misrepresentations in an application for life insurance are not to be deemed material or to render the policy void, unless the matter misrepresented actually contributed to the death of the insured, and that whether it so contributed is for the jury, though the proofs of death furnished by the beneficiary of a life policy gave diabetes as the cause of death and stated she had suffered therefrom for a year, whereas the policy had been issued within less than such period on an application representing that she was in good health where statements of physicians who attended insured during her last illness differed as to whether she

was so afflicted, one of such physicians' testimony at the trial differed from his statement as to the length of time during which he attended the insured, and defendant's medical examiner's report at the time of the application was that she was free from disease, such admissions in the proofs were not conclusive as to whether the condition of insured's health at the time the policy was issued contributed to her death; this being a question of fact to be determined by the jury.

#### 4. Witnesses §37(1)—Evidence of existence of other policies and solicitation of one in suit properly excluded unless witness had personal knowledge.

In an action on a life insurance policy, where evidence of the existence of other policies or collections of premiums on them was excluded, and evidence as to how often defendant's agent called at plaintiff's home to collect under another policy, and that defendant solicited the insurance in suit, was objected to on the ground that the witness had no personal knowledge of such facts, the court properly ruled that the witness could answer only if he had such personal knowledge.

Appeal from St. Louis Circuit Court; Fred L. English, Judge.

"Not to be officially published."

Action by Frank Bultralik against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fordyce, Holliday & White, of St. Louis, for appellant.

James J. O'Donohoe, of St. Louis, for respondent.

**BRUERE, C.** This is an action on a policy of life insurance for \$500. The policy was issued by the defendant insurance company, on the 14th day of May, 1915, upon the life of one Frances Bultralik, plaintiff's wife, wherein the plaintiff is named as beneficiary. The insured died on July 1, 1915.

The suit was commenced in a justice of the peace court, in the city of St. Louis, Mo., and transferred on appeal to the circuit court. The cause was tried before the court and jury and resulted in a verdict in favor of the plaintiff. From a judgment entered on the verdict the defendant prosecutes this appeal.

The plaintiff, to sustain his cause of action, introduced the policy sued upon, the admission of defendant that the premium thereunder was paid, and proved the death of the assured and defendant's refusal to pay the policy.

The defendant filed no answer in the case, but disclaimed all liability under said policy, on the ground of misrepresentation in the application concerning the health of the insured. To sustain its defense the defendant put in evidence the proofs of death furnished by the plaintiff to the defendant un-

der the policy. Said proofs of death contained a statement, made by the plaintiff, wherein he stated that the insured died of diabetes and that the duration of her last illness was one year.

Attached to the proofs of death are the statements of Dr. Denison and Dr. Dern, who both treated the insured during her last illness. The statements are made up of questions and answers. The following appears in Dr. Denison's statement:

"Q. Cause of death? A. Diabetes.

"Q. How long had deceased been ill when you were called to attend? A. One year.

"Q. For what disease or diseases have you at any time attended deceased prior to last illness, and what was their duration? A. Nothing.

"Q. Was deceased afflicted with any infirmity, deformity, or chronic disease? If so, please specify. A. No.

"Q. Was deceased ever treated by any other physician or at any hospital or other institution prior to, during or subsequent to your attendance? If so, please specify. A. Don't know."

His statement further contains a certificate reciting that he attended the deceased from June 10, 1914, to July 1, 1915.

Dr. Dern's statement contains the following answers to the following questions:

"Q. Cause of death? A. Diabetes.

"Q. How long had deceased been ill when you were called to attend? A. More than one year.

"Q. For what disease or diseases have you at any time attended deceased prior to last illness, and what was their duration? A. None.

"Q. Was deceased afflicted with any infirmity, deformity, or chronic disease? If so, please specify. A. Yes. Diabetes.

"Q. Was deceased ever treated by any other physician or at any hospital or other institution prior to, during or subsequent to your attendance? If so, please specify. A. Yes, Hanneman 'Dispensary. Dr. Denison, Garfield Blvd."

Dr. Dern further stated therein that he attended deceased from June 30, 1915, to July 1, 1915.

Defendant also introduced in evidence a statement made by the plaintiff and attached to the proofs of death, filed with the defendant insurance company under another policy issued on the life of deceased. In this statement plaintiff also states that the cause of deceased's death was diabetes and that the duration of her last sickness was one year.

Dr. Denison also testified as a witness for the defendant. He testified that he had treated the deceased for diabetes, from September, 1914, up to the time of her death, and that in his opinion the disease was fatal when she first came to him for treatment. Several other witnesses testified for the defendant. Their testimony tended to prove that the deceased was sick and under medical

treatment for about a year prior to her death.

Defendant put in evidence the application, dated May 12, 1915, for the policy in suit. In it the insured stated that she was in sound health and had never suffered from diabetes. In connection with and attached to this application the defendant also introduced the report of Dr. O. H. Donaldson, its examining physician. Said report supports the statements made by the deceased in her application. Dr. Donaldson states therein that he examined the insured, on said 12th day of May, 1915, and found her organs of respiration normal, her heart action uniform, her liver, stomach, intestines, blood vessels, and urinary organs free from disease, and that the insured was in sound health. The report concludes with a recommendation that said life be accepted at first-class rates. The report provides that lives accepted at first-class rates should be unexceptionable lives, and lives accepted at second-class rates should be lives in which the unfavorable circumstances are very slight.

Defendant admitted at the trial that no part of the proofs of death, except the signature, was in the handwriting of the plaintiff. Regarding said proofs of death, the plaintiff testified that he did not tell defendant's agent, who prepared them, that the insured had been ill for the duration of one year. Plaintiff further testified that he did not know what disease the insured died of and denied telling said agent that the insured had died of diabetes.

At the close of all the evidence the defendant asked a peremptory instruction in the nature of a demurrer to the evidence, which the court refused to give. Counsel for defendant earnestly urge that said instruction should have been given. They argue that plaintiff cannot recover in this suit because of the admissions against interest contained in the proofs of death made by plaintiff. They contend that these admissions stand uncontradicted and completely destroy plaintiff's prima facie case.

[1] Admissions contained in the proofs of death, furnished by a beneficiary under a policy of insurance, are not to be regarded as conclusive against him, where there is evidence introduced, tending to show that they were erroneously made, or tending to explain, repel, or contradict them or tending to impair their force and effect.

[2] It cannot be said that the admissions contained in the proofs of death, furnished by the plaintiff, stand wholly unexplained and uncontradicted. The recitals in the proofs of death, made by Dr. Denison and Dr. Dern, differ on the question whether or not the insured was afflicted with an infirmity or chronic disease. Dr. Denison gave it as his opinion that she was not so afflicted. Dr. Dern's opinion was to the contrary.

Again, Dr. Denison's statement, filed with the proofs of death, is at variance with his testimony given on the witness stand. On the former occasion Dr. Denison stated that he had not at any time attended deceased prior to her last illness; on the witness stand he stated that he had treated her from September, 1914, up to the time of her death.

Moreover, the report of defendant's own medical examiner contradicts the truth of said admissions. Said physician stated therein that he made a thorough examination of the insured at the time the insurance was effected and found her absolutely free from disease and in excellent health. If these statements in said report are true, then it follows that the recitals made by plaintiff in the proofs of death, concerning the health of the insured, were erroneously made.

[3] Under the provisions of section 6142, Revised Statutes of Missouri 1919, the misrepresentations complained of are not to be deemed material and are not to render the policy void, unless the matter misrepresented actually contributed to the death of the insured, and whether it so contributed is a question for the jury.

In the case of *Bruck v. Life Ins. Co.*, 194 Mo. App. loc. cit. 538, 185 S. W. 753, loc. cit. 755, this court, in passing on the question under consideration, says:

"In no event can an admission of this character be conclusive against the plaintiff, as a matter of law, thereby in effect taking the case out of the operation of the statute, supra, unless it be in a case where nothing whatsoever appears in evidence tending in any way to explain or contradict the admission or impair the force and effect thereof."

In view of the evidence in this case and the provisions of the statute, supra, the recitals contained in the proofs of death submitted by the plaintiff cannot be regarded as conclusive on the question whether or not the condition of the health of the insured at the time the policy was issued contributed to her death; this was a question of fact to be determined by the jury. *Bruck v. Life Ins. Co.*, supra; *Hicks v. Life Ins. Co.*, 196 Mo. App. 171, 190 S. W. 661; *Clarkston v. Met. Life Ins. Co.*, 190 Mo. App. 624, 176 S. W. 437; *Keller v. Home Life Ins. Co.*, 198 Mo. 440, 95 S. W. 903; *Conner v. Association*, 171 Mo. App. 364, 157 S. W. 814; *Coscarella v. Insurance Co.*, 175 Mo. App. 130, 157 S. W. 873; *Roedel v. Insurance Co.*, 176 Mo. App. 584, 160 S. W. 44; *Tuepker v. Southern Camp*, W. O. W., 226 S. W. loc. cit. 1004; *West v. National Council Knights and Ladies of Security*, 221 S. W. 391.

[4] It is urged that the trial court committed prejudicial error against defendant by admitting, over objection, evidence of the existence of other policies and collections of

premiums on them, and evidence that the defendant solicited the insurance in suit.

Regarding this contention the record shows that evidence of the existence of other policies and collections of premiums on them was excluded by the court. Witness, however, was permitted to answer the following question: "How often would the defendant's agent call at your home to collect under the other policy?" To this question objection was made on the ground that it was not shown that the witness was present or had any means of knowing how often the agent called. The court properly ruled, on the objection as made, that witness could answer if he had personal knowledge of the matter.

Regarding the contention that the trial court committed prejudicial error by admitting, over objection, evidence that the defendant solicited the insurance in suit, the record discloses that either no objection was made to the introduction of this evidence, or that when objection was made it was on the ground that it was not shown that the witness knew of his own knowledge that the defendant solicited the insurance. When this objection was made the trial court admonished the witness not to answer unless he had such personal knowledge.

We decide this contention against appellant.

We find no reversible error in the record. The judgment of the trial court should be affirmed, and the Commissioner so recommends.

**PBB CURIAM.** The opinion of **BRUERE, C.**, is adopted as the opinion of the court.

The judgment of the circuit court of the city of St. Louis is accordingly affirmed.

**ALLEN, P. J.**, and **DAUES, J.**, concur.  
**BECKER, J.**, not sitting.

#### **PRINDLE v. FIDELITY & CASUALTY CO. OF NEW YORK. (No. 17371.)**

(St. Louis Court of Appeals. Missouri. June 29, 1921. Rehearing Denied July 22, 1921.)

**1. Witnesses ¶141—Death of insured does not make agent of insurance company an incompetent witness as to conversation with insured.**

An agent of an insurance company may testify concerning a conversation with a deceased insured person concerning issuing a policy of insurance, since the agent is not a party in interest in the suit between deceased's administrator and the insurance company.

**2. Appeal and error ¶1056(3)—Exclusion of evidence not tending to show conditional delivery not prejudicial.**

Where defendant insurance company offered to show by parol evidence that its agent told



deceased that she could sign an application for an insurance policy when the policy was delivered, the exclusion of such evidence was not prejudicial since the offered proof would not tend to show that the delivery of the policy was conditional upon deceased's signing the application.

**3. Insurance — 136(2)—Policy held to become effective upon acceptance of unsigned application and delivery of policy.**

Where the policy of insurance had no provision requiring the insured to sign an application, and an application was indorsed as accepted by the officers of the company and incorporated in the insurance policy, the contract was completed when the application was accepted by the insurer and the policy was delivered by mail.

**4. Insurance — 646(1)—Burden of proof that delivery of a policy was conditional was on insurer.**

After a prima facie case was made out by the introduction of a policy of insurance and proof of the death of the insured by accidental injuries, the defense that there was no valid contract because the delivery of the policy was conditional is an affirmative defense, and the burden of proof is on the defendant.

**5. Insurance — 136(2)—Facts held to show delivery of policy.**

Where defendant insurance company's agent made an oral agreement to grant a policy of insurance to deceased and later had an application blank prepared and a policy on which the application was indorsed, and the statement appeared in the indorsement that the policy was issued to the insured and the policy was mailed to deceased, this constituted a valid delivery of the policy, although deceased died before receiving the policy.

**6. Insurance — 136(5)—Failure of application to contain all conditions in the policy does not make acceptance of policy by insured necessary.**

An application for an insurance policy is for such insurance as the company sells in view of the facts submitted in the application, and where the policy was issued in response to an oral application, and contained all the terms and conditions of such application, which were made part of the contract by express provision in the policy, and no unusual terms or conditions were embodied therein, the contract was complete when delivered, without the assent of the insured, though it contained provisions not in the application.

**7. Insurance — 668(1)—Evidence of vexatious delay to pay policy held sufficient to go to jury.**

In a suit on an insurance policy where plaintiff attempted to recover damages for vexatious delay and attorneys' fees, and no evidence was introduced by defendant to destroy the prima facie case made out by plaintiff, no new question of law was litigated, and no evidence was introduced in rebuttal as to the reasonable value of attorneys' fees, the evidence of vexatious delay to pay was sufficient to go to the jury.

Appeal from St. Louis Circuit Court; Granville Hogan, Judge.

"Not to be officially published."

Action by Eleanore Prindle against the Fidelity & Casualty Company of New York. From a judgment for plaintiff, defendant appeals. Affirmed.

Jones, Hocker, Sullivan & Angert, of St. Louis, for appellant.

Eagleton & Habenicht and Watts, Gentry & Lee, all of St. Louis, for respondent.

**BRUDER, C.** This an action by respondent against appellant to recover on an accident insurance policy, alleged to have been issued on the life of Arla A. Henshaw, in which the respondent was named as beneficiary.

In the court nisi the appellant contended that section 7068, Revised Statutes of Missouri 1909, was unconstitutional. Wherefore an appeal was allowed to the Supreme Court of this state. That court, on appellant's motion, transferred the case here.

The judgment below was in favor of respondent. From this judgment appellant appealed.

The petition, in addition to the usual allegations, alleges that on the 7th day of February, 1918, the defendant issued and delivered to one Arla A. Henshaw a policy of insurance, whereby it insured the said Arla A. Henshaw in the sum of \$2,000 against bodily injury sustained through accidental means, and resulting directly, independently, and exclusively of all other causes, in death; and names the respondent as being the beneficiary designated in said policy.

The petition further alleges that said Arla A. Henshaw was accidentally killed on the 10th day of February, 1918, and that said policy was in full force and effect on said date. It prays judgment against the defendant for the sum of \$2,000, together with interest thereon, 10 per cent. damages for vexatious refusal to pay, attorney's fees, and costs.

The pith of the allegations in the answer, pertinent to the question raised here, are as follows: The answer admits the death of Arla A. Henshaw on the date alleged, but denies that the appellant issued or delivered to the said Arla A. Henshaw the policy of insurance mentioned in the petition. The answer further alleges:

"That it was contemplated and provided by the terms of said policy and agreed by and between the said Arla A. Henshaw and the defendant that said policy should not go into force and become effective unless and until the said Arla A. Henshaw should make and sign a written application for said policy; that on or about the 9th day of February, 1918, the defendant deposited in the United States mails, addressed to said Arla A. Henshaw, the policy sued on

herein, and also an application for said policy, to be signed by the said Arla A. Henshaw and returned by her to the defendant; that the said Arla A. Henshaw died before said policy was received or accepted by her; and that the application for said policy was not signed by the said Arla A. Henshaw at or prior to the time of her death as aforesaid."

The reply puts in issue the allegation of the answer and alleges that if there was any oral agreement, between the defendant and said assured relating to the signing of any written application for said policy, such oral agreement was merged in the agreement contained in the said policy itself, and that defendant, by issuing said policy, waived the signing of any written application therefor.

The facts are few and uncontradicted and are, in substance, as follows: On February 7, 1918, Henry E. Manker, appellant's agent, called on the deceased and solicited her to take out an accident policy of insurance with appellant. He took a memorandum of Mrs. Henshaw's oral application for the policy on said date and on the following day turned in the same to the company. Concerning this oral application Mr. Manker testified as follows:

"Q. When did you report this business to the company? A. The following morning.

"Q. What did you do then? A. Turned in the application to the company.

"Q. What application? A. The application taken the night before—the information contained in the application taken the night before.

"Q. What was done then? A. We submitted it to the underwriter down there at the office.

"Q. Who is that? A. Mr. Baare.

"Q. You turned this information over to Mr. Baare then? A. Yes, sir.

"Q. What did Mr. Baare do then? A. He wrote the policy—he had the policy written."

Appellant on the same day duly executed the policy in question, and turned it over, together with the application, to its agent, Mr. Manker. Mr. Manker sent a letter to Mrs. Henshaw inclosing therein the policy and the application. The letter reads thus:

"St. Louis, Mo., Feb. 9, 1918.

"Mrs. Arla A. Henshaw, Care Eureka Vacuum Cleaner Company, No. 1214 Olive St., St. Louis, Mo.—Dear Mrs. Henshaw: Inclosed please find disability policy, as per application taken the other evening. Kindly sign inclosed application and semiannual indorsement in duplicate, retaining the original with your policy and returning to me the duplicate indorsement and application. Assuring you of my appreciation of your patronage, I am,

"Yours very respectfully, H. E. Manker."

The deceased was employed in the office of the Eureka Vacuum Cleaner Company, at No. 1214 Olive street, St. Louis, Mo. The letter inclosing the policy and application was addressed to the deceased, directed to said address, and deposited in the United

States mails, at St. Louis, on February 9, 1918. Deceased left her place of business about 1 o'clock on the afternoon of February 9, 1918, and never returned to the office. She was accidentally killed in an automobile accident on Sunday morning, February 10, 1918; this was admitted by appellant. The office of the Eureka Vacuum Cleaner Company was closed on the afternoon of February 9, 1918, after 1 o'clock. On Monday morning, February 11, 1918, there was found on deceased's desk, in the office of her employer, the letter addressed to the deceased by Mr. Manker, inclosing the policy in question.

The policy is dated the 7th day of February, 1918, at noon. It insures Arla A. Henshaw in the sum of \$2,000 against bodily injury sustained during the term of one year, from noon of the 7th day of February, 1918, through accidental means and resulting directly in death. In the policy, under the heading special provisions, there appears the following provision:

"This policy is issued in consideration of the premium charged therefor and of the statements made in the application, a copy of which is indorsed upon and is hereby made a part of this contract."

The application was not signed by the insured. In the policy, under the heading standard provisions, there appears the following provision:

"This policy includes the indorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the company's classification of risks and premium rates in the event that the insured is injured after having changed his occupation, etc."

On the application, indorsed on the policy, is written:

"The policy was issued to the assured on the 7th day of February, 1918. General agent or Res. Mgr. R. A. Hoffmann. Local agent: H. E. Manker."

Demand was made on the insurance company for \$2,000, the amount claimed under the policy. The company refused to pay the policy and denied liability, on the ground that no contract of insurance ever existed between it and the assured, because the assured had not delivered to the company her written application for insurance, prior to her death, as required by it. After some correspondence about the matter, in which the appellant persistently disclaimed liability on the ground heretofore stated, this suit was brought May 17, 1918.

At the trial Henry E. Manker was called as a witness on behalf of the appellant. He was asked the following question: "What did Mrs. Henshaw say was the reason she wanted to get in touch with you?" Respondent's counsel made objection to the question, which was sustained by the court. Appellant then made the following offer of proof:

"Defendant offers to show that Mr. Manker, special agent of the Fidelity & Casualty Company, at the suggestion of a friend of his, a Miss Lydia T. Bresher, who had in the past, on numerous occasions, informed Mr. Manker of prospective risks for insurance, Mr. Manker called during the week of February 3, 1918, at 3700 Humphrey street, to solicit Mrs. Henshaw, who resided at that address, for a policy of insurance in the Fidelity & Casualty Company. Mr. Manker assumed that Mrs. Henshaw, the insured, was a school teacher at the time he went out to solicit her risk, as the friend, who had advised him that Mrs. Henshaw was a prospective applicant for insurance, was also a school teacher. Mr. Manker therefore took with him, at the time of his visit to Mrs. Henshaw, a form of policy known as 'School Teacher's Disability.' The school teacher's disability policy issued by the defendant company doesn't require the insured's signature to the application, and Mr. Manker, therefore, when he called to see Mrs. Henshaw with respect to this insurance, did not take any application with him. When Mr. Manker arrived at the house of Mrs. Henshaw, he found that Mrs. Henshaw was not a school teacher, but was engaged in another business; that policies issued to women engaged in business other than school teachers requires an application to be signed by the applicant. Mr. Manker thereupon told Mrs. Henshaw that, because he thought she was a school teacher, he hadn't brought with him the particular form of application which requires signature, and that Mr. Manker explained to Mrs. Henshaw that he would endeavor to have the policy issued and would have an application blank filled out, which Mrs. Henshaw could sign when the policy was delivered to or received by her."

Objection was made to said offer of proof, and the objection was sustained by the court.

Appellant seeks a reversal of the judgment herein based on the following assignments of error:

[1] 1. Counsel for appellant contend that—

"The death of Arla A. Henshaw did not render the defendant's soliciting agent incompetent to testify to conversations or transactions between himself and deceased."

This contention of counsel is correct. Mr. Manker, as appellant's agent, not being a real party in interest, was not disqualified from testifying to conversation with Mrs. Arla A. Henshaw by reason of her death. *Lafferty v. Kansas City Casualty Co.*, (Sup.) 229 S. W. 753; *Allen v. Jessup* (Sup.) 192 S. W. 720; *Wagner v. Blinder* (Sup.) 187 S. W. 1128; *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616; *Massey v. Butts*, 221 S. W. loc. cit. 156.

[2] 2. Counsel for appellant contend that—

"The rule that parol evidence is inadmissible to vary the terms of a written contract has no application where such evidence is offered for the purpose of showing that no contract was entered into between the parties."

Plaintiff had the right to show verbally, if such was the case, that the policy was delivered conditionally; that the contract

was not to be considered delivered and acquire vitality until the assured signed the application. But the evidence set out in the offer of proof, made by the appellant, did not tend to show that the policy was delivered on the condition that the application was to be signed by the assured. No mention is made, in the offer of proof, that Mr. Manker would testify that he informed Mrs. Henshaw that the appellant required her to sign an application before a policy issued to her would become effective, or that delivery of the policy was conditional upon her doing so. The offer of proof merely was that Mr. Manker told deceased she could sign the application when the policy was delivered to her. The evidence offered did not tend to show that no contract was entered into between the parties; therefore the ruling of the trial court on the offer as made was not prejudicial to defendant.

[3] 3. Counsel for appellant contend that the policy never became effective because the defendant company was not bound by it until the assured had signed the application and accepted the terms thereof. The policy contains no provision requiring the assured to sign an application, as a condition precedent to the delivery of the policy and its taking effect. The application was approved by the officers of the defendant company, their acceptance being indorsed on the application and reading thus: "The policy was issued to the assured on the 7th day of February, 1918." The policy was issued in accordance with the application as made. A verbatim copy of the application was indorsed upon and made a part of the contract of insurance. Said contract was consummated when the application for insurance was accepted by the insurer and the policy corresponding with the terms of the application was delivered. *Trask v. German Insurance Co.*, 53 Mo. App. loc. cit. 629; *Kelm et al. v. Home Mutual Fire & Mar. Ins. Co. of St. Louis*, 42 Mo. 41, 97 Am. Dec. 291; *Edwards v. Business Men's Acc. Ass'n*, 221 S. W. loc. cit. 425; 14 R. C. L. Sec. 70, 894; *Brownfield v. Phoenix Insurance Co.*, 35 Mo. App. 67; *Lingenfelter v. Phoenix Insurance Co.*, 19 Mo. App. loc. cit. 264; *Glem v. German Insurance Co.*, 29 Mo. App. loc. cit. 674; *May on Insurance*, § 43; *Joyce on Insurance*, § 55.

[4] Furthermore, the contention that there was no valid contract of insurance, because there was a conditional delivery of the policy, is an affirmative defense. The introduction of the policy, together with appellant's admission at the trial that the assured, on the 10th day of February, 1918, sustained bodily injuries through accidental means, which resulted directly in her death, made out a prima facie case against the appellant. And the burden rested upon appellant to establish its defense that the delivery of the policy was a conditional delivery. *Lafferty v. Kansas*

City Casualty Co. (Sup.) 229 S. W. 750; Wells v. Hobson, 91 Mo. App. 379. The appellant offered no proof and introduced no testimony tending to show that deceased's signature to the application was required by it as a condition precedent to the delivery of the policy.

[5] The facts in this case establish a delivery of the policy to the insured. *Edwards v. Business Men's Acc. Ass'n*, 221 S. W. 424; *Cooley's Brief on Insurance*, Vol. 1, 447; 25 Cyc. 718; *Triple Link Indemnity Ins. Ass'n. v. Williams*, 121 Ala. 188, 26 South. 19, 77 Am. St. Rep. 34; *Travelers' Fire Ins. Co. v. Globe Soap Co.*, 85 Ark. 169, 107 S. W. 386, 122 Am. St. Rep. 22; *Title Guaranty & Surety Co. v. Bank of Fulton*, 89 Ark. 471, 117 S. W. 537, 33 L. R. A. (N. S.) 676; *Benton v. Insurance Co.*, 102 Mich. 289, 60 N. W. 691, 26 L. R. A. 237. We rule this assignment of error against appellant.

[6] 4. Appellant contends that the policy does not correspond with the terms of the application, in that it contains provisions not included in the application, and that therefore the policy did not become binding until accepted by the assured.

We find this question discussed by Joyce, in his work on Insurance (2d Ed. Vol. 1, § 55B), thus:

"Ordinarily it is not expected that an application for insurance will contain all the terms and conditions which are included in the policy when it is issued. Certain particulars are named, others are not. The application is for such insurance on such terms and conditions, as in view of the particulars submitted, the company sells. It is to be presumed that as in other cases, the purchaser has made himself acquainted with what he is purchasing. On the delivery of the policy therefore the contract becomes complete without any further assent on the part of the insured."

The policy in question was issued in conformity to the oral application; it contains all the terms and conditions of the application. By express provisions, therein contained, all matters embraced in the application are made a part of the contract and no unusual terms or conditions are embodied therein. Therefore the contract in question when delivered was consummated without any further assent on the part of the assured. *Commonwealth, etc., Ins. Co. v. Knabe Co.*, 171 Mass. 285, 50 N. E. 516; *Paquette v. Prudential Ins. Co.*, 193 Mass. 215, 79 N. E. 250, and cases hereinbefore cited.

[7] 5. Appellant's counsel contend that there is no evidence in this case that the refusal of the defendant company to pay the policy in suit was vexatious. No evidence was introduced adverse to or destroying the prima facie case made out by the respondent. No new question of law was litigated. There was no evidence introduced by appellant rebutting the evidence as to the reasonable

value of the attorney fees in the case. The question of vexatious refusal to pay was a fact to be determined by the jury from all the facts and circumstances in the case. In our opinion there was sufficient evidence to submit the question of vexatious refusal to pay the policy to the jury.

Finding no reversible error, the judgment of the trial court should be affirmed, and the Commissioner so recommends.

PER CURIAM. The opinion of BRUER, C., is adopted as the opinion of the court.

The judgment of the circuit court of the city of St. Louis is accordingly affirmed.

ALLEN, P. J., and BECKER, J., concur.  
DAUES, J., not sitting.

### BRUNER et al. v. INGERSOLL-RAND DRILL CO. (No. 16644.)

(St. Louis Court of Appeals. Missouri. June 29, 1921. Rehearing Denied July 22, 1921.)

1. Judgment  $\S$  137 — Courts have inherent power to set aside default judgments during their term.

Courts, independent of statute, have inherent power and control over their own judgments and may, upon motion or without, for good cause set aside a default judgment during the term at which it is rendered, but the rule does not apply where relief is not asked during the term.

2. Judgment  $\S$  140—Statute as to setting aside held inapplicable where defendant personally served does not appear.

Rev. St. 1919, §§ 1532-1535, authorizing the setting aside of final judgments against any defendant who shall not have been summoned as required by that chapter, or who shall not have appeared to the suit, if the defendant, within the time therein limited, appears and shows good cause for setting aside the judgment, does not apply where the defendant was personally served, but did not appear to the suit.

3. Judgment  $\S$  143(3)—Cannot be set aside as for irregularity, where defendant failed to appear in reliance on third person's promise to defend.

Rev. St. 1919, § 1552, authorizing judgments to be set aside for irregularity made within three years after the term at which the judgment was rendered, did not authorize the setting aside of a default judgment, where defendant was personally served, but failed to appear, in reliance upon the promise of another company to defend, as the irregularities complained of must be patent on the record.

4. Judgment  $\S$  335(2)—Defendant, making no effort to defend, not entitled to relief on writ of error coram nobis.

Where one sued as a seller of machinery for delay in delivery and personally served did

not employ counsel and made no effort towards making a defense except to discuss the matter with the representative of another company which it claimed made the sale and whose representative stated that he would have their attorney look after the matter, and no fraud or deceit was practiced by plaintiff, defendant was not entitled to relief against a default judgment on writ of error coram nobis, as it was guilty of negligence.

**On Motion for Rehearing.**

**5. Appeal and error ⇐171(3)—Petition not treated as bill in equity when not so treated below.**

Where a petition to vacate and set aside a default judgment was not tried in the court below on the theory that it was a bill in equity, it cannot be so treated on appeal.

**6. Judgment ⇐335(2)—Defendant not entitled to relief on bill of review when negligent, and plaintiff not guilty of fraud.**

A defendant, personally served, but making no effort to defend, in reliance on the promise of another company to defend the case, was not entitled to relief against a default judgment on a bill in equity for review, in the absence of any fraud or deceit practiced by plaintiff; the alleged mistake or misunderstanding not being unmixed with defendant's negligence.

Appeal from St. Louis Circuit Court; Vital W. Garesche, Judge.

"Not to be officially published."

Action by Andrew Bruner and others against the Ingersoll-Rand Drill Company. From an order denying a petition to set aside a judgment for plaintiffs, defendant appeals. Judgment affirmed.

Welton H. Rozier, of St. Louis, for appellant.

John T. Fitzsimmons and Abraham Lowenhaupt, both of St. Louis, for respondents.

**NIPPER, C.** Plaintiffs sued defendant for damages for delay in delivering a certain gas compressor. The original petition alleges that plaintiffs are the owners of a large number of oil and gas wells situated near Lawrenceville, Ill., which produce large quantities of gas; that it is necessary to compress same with a gas compressor in order to produce a high grade of gasoline; that defendant, knowing said facts, on or about the 9th of March, 1916, sold the plaintiffs a gas compressor f. o. b. Lawrenceville, Ill.; that defendant represented it had the machine in stock, and that shipment would be made immediately, but that defendant failed to ship said compressor or any part thereof until the 13th of April, 1916, and failed to ship all necessary parts until June 13, 1916, and did not ship all parts until November 2d following; that plaintiffs, by reason of the neglect and delay of the defendant, suffered damages in the total sum of \$3,601.01.

The original petition was filed with the clerk of the circuit court of the city of St. Louis on the 28th day of June, 1918, and summons was served upon defendant on the next day returnable to the October term, 1918, of said court. On the 7th day of November, 1918, at the October term, defendant having failed to answer, a default and inquiry of damages was allowed plaintiffs. On the 21st day of November, 1918, at the same term, plaintiffs appeared, waived a jury, and hearing was had before the court, which rendered judgment in favor of plaintiffs and against defendant for the amount prayed for in the petition.

On the 9th day of December, 1918, and during the December term, defendant filed what it termed a petition for review, in which it is alleged that it is a corporation having an office and doing business in the city of St. Louis, and admits that it was duly served with summons and a copy of the petition in the above cause on or about the 29th day of June, 1918, and states as its reason for failing to file an answer or appear to the suit that the machine sold to plaintiffs was sold by a corporation known as the Illinois National Supply Company, located at Lawrenceville, in the state of Illinois; that said machine was sold by said Illinois corporation, and all representations or misrepresentations in reference to the character or quality of the machine were made by the Illinois corporation; that after defendant was served with said summons, D. M. Armstead, general manager of the Ingersoll-Rand Drill Company, conferred with George B. Eyssen, the credit manager of said Illinois National Supply Company, about the middle of July, 1918, and delivered to Eyssen the petition and summons aforesaid, and requested the Illinois National Supply Company in view of the fact that it had sold the machine, to undertake the defense of said suit; that Eyssen gave the defendant assurance that his company would undertake such defense, and that he would take the matter up with their attorney, Mr. Taber, of Toledo, Ohio; that immediately thereafter the Illinois National Supply Company, through Eyssen, on or about July 24, 1918, informed the defendant by letter that he had sent the petition and summons to their attorney, and that the same would have his attention; that relying upon said agreement, it did not appear therein and file an answer; that it had no knowledge of the judgment rendered herein until after the expiration of the October term of court, and not until the 7th day of December, 1918, when it received a letter from attorneys for plaintiffs, advising that such judgment had been obtained.

Defendant further alleges that Attorney Taber did not understand that he was to

undertake the defense, and hence failed to file an answer, that it has a meritorious defense, and that it had no contract with plaintiffs to deliver said machine, and caused plaintiffs no damages of any kind, and asked that the judgment be vacated and set aside. This petition or motion was sworn to by Armstead. Upon a hearing before the court, the petition was denied. From this action, after a timely motion, defendant appeals. The evidence and affidavits contained in the bill of exceptions tend to support the allegations set out in the petition for review.

[1] Courts have inherent power and control over their own judgments, and may, upon motion or without motion, for good cause, set aside a default judgment during the term at which it is rendered, and such right exists independent of any statute. *Harkness v. Jarvis*, 182 Mo. 231, 81 S. W. 446; *Dower v. Conrad*, 232 S. W. 174, decided at this term but not yet officially reported.

The petition or motion in this case, not having been filed during the term at which the judgment was rendered, defendant would not be entitled to relief under this rule.

[2] Defendant here seeks relief under the provisions of sections 1532, 1533, 1534, and 1535, R. S. 1919. Section 1532 provides:

"When such interlocutory judgment shall be made and final judgment entered thereon against any defendant who shall not have been summoned as required by this chapter, or who shall not have appeared to the suit, or has been made a party as the representative of one who shall have been summoned or appeared, such final judgment may be set aside, if the defendant shall, within the time hereinafter limited, appear, and by petition for review, show good cause for setting aside such judgment."

Is defendant entitled to the relief provided for according to the provisions of the sections above mentioned, when it has been personally served but does not appear to the suit? We are of the opinion that the proceedings contemplated by the above-mentioned sections have no application where the defendant is personally served and does not appear to the suit. We think this ruling is supported by the language of the statute above quoted, as well as by the following authorities: *Campbell v. Garton*, 29 Mo. 343; *Tooker v. Leake*, 146 Mo. 419, 48 S. W. 638; *Rumsey Mfg. Co. v. Baker*, 35 Mo. App. 217; *Matlocks v. Van Asmus*, 180 Mo. App. 404, 168 S. W. 233; *Jeude v. Sims*, 258 Mo. 26, 166 S. W. 1048.

The defendant, having been personally served with summons, would not be entitled to relief under the provisions of the above-mentioned sections of our statutes.

[3] Nor could defendant invoke the aid of section 1552, for before defendant would be entitled to relief under the last-named section, the irregularities complained of must be patent on the record. *State ex rel. v.*

*Riley*, 219 Mo. 667, 118 S. W. 647; *Jeude v. Sims*, supra.

[4] If defendant is entitled to relief, it would be on the theory that the petition for review is an application for a writ of error coram nobis.

It is stated in the majority opinion in *Jeude v. Sims*, supra, 258 Mo. loc. cit. 40, 166 S. W. 1052:

"At common law writs of error coram nobis were writs granted by the court rendering the judgment for the purpose of correcting some error of fact. 2 *Tidd's Practice*, p. 1136. The fact must be such a fact that, had it been known at the time of the rendition of the judgment, such judgment would not have been entered. It must be a fact directly connected with the case in which the judgment was entered, and a fact wrongly considered in the entry of the judgment which is sought to be corrected by the writ of error coram nobis. \* \* \* And the real fact sought to be established upon the hearing of the writ must be one which would have prevented the entry of the judgment had it been known to the court."

It is further stated in quoting from *State v. Stanley*, 225 Mo. loc. cit. 534, 125 S. W. 475, that the failure of such fact to be before the court at the time such judgment was rendered must be without fault or negligence of the party who seeks to invoke the aid of the writ.

We are of the opinion that the trial court did not abuse its discretion in overruling this petition, even though it be treated as an application for a writ of error coram nobis. Defendant was personally served several months before the case was called for trial. It maintained an office in the city of St. Louis, where suit was filed. It did not even employ counsel, and made no effort or pretensions toward making any defense to this action, of which it was fully advised, except to discuss the matter with Mr. Eysen of the Illinois National Supply Company, who merely stated he would have their attorney look after the matter. It is not even contended that plaintiffs practiced any fraud or deceit in any way in obtaining this judgment. Defendant, whether with or without good cause, contends that it relied upon the attorney for the Illinois National Supply Company, but defendant's action in such matter constitutes such negligence on its part that it would not be entitled to invoke the aid of a writ of error coram nobis.

As stated in *Colter v. Luke*, 129 Mo. App. 702, loc. cit. 707, 108 S. W. 608, 610:

"Plaintiff who had been diligent has some rights which must be respected. He went to the trouble and expense of preparing for trial and appearing at the appointed time and place with his witnesses and obtained his judgment as a result of the orderly pursuit of the course of procedure prescribed by law. To set aside the judgment would be to punish him for the inexcusable neglect of his adversary."

Courts should exercise their discretion in favor of a trial on the merits, where a reasonable excuse is shown on the part of the defendant, and a meritorious defense appears. However, we entertain serious doubts that defendant here offered a reasonable excuse for its failure to appear under the circumstances and would therefore not be justified in convicting the trial court of error.

The Commissioner recommends that the judgment be affirmed.

**PER CURIAM.** The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

ALLEN, P. J., and BECKER and DAUES, JJ., concur.

#### On Motion for Rehearing.

**NIPPER, C.** [5, 6] Defendant in its motion for rehearing complains because the court did not treat its petition for review as a bill in equity, and grant the relief prayed for. We considered this matter at the time the original opinion was written, and were of the opinion then, and are now, that the petition could not be so treated, or if so treated, the relief could not be granted, because defendant did not try the case upon this theory in the court below, and because of the further fact that, as stated in the original opinion, defendant does not contend that plaintiff practiced any fraud or deceit in any manner in obtaining this judgment, and the alleged mistake or misunderstanding relied upon was not unmixed with defendant's negligence. Under the ruling in *Jeude v. Sims*, supra, it appears that relief cannot be granted defendant by considering this motion as a bill in equity.

The Commissioner recommends that the motion for rehearing be overruled.

**PER CURIAM.** The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

Appellant's motion for rehearing is accordingly overruled.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., absent.

#### JEFFRIES et al. v. WALSH FIRE CLAY PRODUCTS CO. (No. 16521.)

(St. Louis Court of Appeals, Missouri.  
July 6, 1921. Rehearing Denied  
July 11, 1921.)

1. Master and servant §179—Fire clay works held a "mine" within fellow-servant law.

A fire clay company which secured its clay from a mine shaft 70 or 80 feet deep is en-

gaged in operating a "mine," within the meaning of Rev. St. 1919, § 4233, and hence liable for injuries sustained by a servant by reason of negligence of another of its servants.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mine.]

2. Master and servant §286(28)—Mine engineer's negligence in lowering cage held question for jury.

Evidence that a mine engineer lowered a cage while plaintiff was leaning over the shaft under the cage to deliver message to the cager at the request of the engineer held sufficient to take to the jury the question of the engineer's negligence in lowering the cage without looking to see that the plaintiff was in a place of safety.

3. Master and servant §289(34)—Contributory negligence in going under mine cage held for jury.

Evidence that an injured servant, in complying with the request of the hoisting engineer to deliver a message to the cager at the bottom of the shaft, leaned over the shaft under a cage when he might have gone to another shaft, the cage of which was at the bottom, does not establish contributory negligence as matter of law, since the method attempted was not dangerous until the engineer started to lower the cage.

4. Trial §191(7)—Instruction authorizing verdict if jury found "the following facts" held not misleading.

An instruction authorizing the jury to return a verdict for plaintiff if they found plaintiff had established by the evidence the following facts, could not mislead the jury to believe that the court, by the use of the term "facts," intended to indicate they were established.

5. Appeal and error §1066—Instruction on issue of engineer's knowledge not prejudicial where evidence shows he should have known.

In an action for injuries to a servant, an instruction submitting the issue of the hoisting engineer's knowledge of the servant's danger in the alternative with the issue whether he should have known such danger was not prejudicial error, though there was no evidence the engineer had actual knowledge of such danger, but there was evidence he should have known thereof, since actual knowledge and duty to know have the same legal effect.

6. Trial §258(2)—Court could refuse all of 22 instructions requested by defendant.

Where defendant, in an action for personal injuries to a servant, requested 22 instructions, which covered 9½ pages of the printed abstract, the trial court would have been warranted in refusing all of the requested instructions on that ground alone.

7. Appeal and error §1067—That instruction might appropriately have been given does not make its refusal prejudicial error.

The fact that a requested instruction was one which the court might appropriately have given does not of itself establish that it was prejudicial error to refuse such instruction.

**8. Negligence** ¶138(2)—Instruction burden of proving contributory negligence held not reversible error.

The giving of an instruction that the burden rests on defendant to prove contributory negligence by a preponderance of the evidence, over the objection that it indicated contributory negligence could only be established by testimony from defendant's witnesses, was not reversible error.

**9. Damages** ¶132(7)—\$6,000 for permanent injuries to hip and other severe injuries held not excessive.

Where plaintiff's evidence showed that a large part of the skin was torn off from his body, and that his hip was injured either by a fracture or dislocation, so that it was still weak at the trial, and prevented plaintiff from performing any work, a verdict awarding \$6,000 damages will not be set aside as excessive.

Appeal from Circuit Court, Audrain County; E. S. Gantt, Judge.

"Not to be officially published."

Action by Everett Jeffries, by David M. Jeffries, next friend, against the Walsh Fire Clay Products Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. O. Barrow, of Vandalia, and R. D. Rodgers, of Mexico, Mo., for appellant.

J. W. Buffington, of Mexico, Mo., and J. R. Baker, of Fulton, for respondent.

ALLEN, P. J. This is an action for personal injuries sustained by plaintiff, a young man then about 19 years of age, while in the employ of the defendant corporation as its servant, alleged to have been occasioned by defendant's negligence. The trial below, before the court and a jury, resulted in a verdict and judgment for plaintiff in the sum of \$6,000, from which the defendant appeals.

At the time of his injury plaintiff was working for the defendant in a building or structure used by defendant in the manufacture of fire clay products at Vandalia, Mo., situated at the top of a shaft which extended perhaps 75 or 80 feet below the surface of the ground to defendant's mine, from which it obtained fire clay, used in its manufacturing operations. This shaft was a large, timbered shaft, divided by a partition, containing two compartments, and each is referred to in the evidence as a separate shaft. One is termed the east shaft, and the other the west shaft. Elevators or cages were operated in these shafts by means of a hoisting engine, situated in defendant's engine room, and a cable wound about a drum. The cage in one shaft would descend as that in the other shaft was raised. Defendant's said structure at the top of these shafts had two floors or stories. Upon the ground floor thereof was located the engine room, which was a short distance west of the shafts; and evidently the press room was also upon that floor. On that floor

there was a "landing" at the shafts, the entrance to each shaft being protected by a gate made of slats. On the second floor, where plaintiff worked, clay was weighed and dumped. Plaintiff was the "general weighman," and assisted in unloading clay which was brought from the mine by these cages in boxes. A stairway led from this floor to the ground floor.

Cue Ralston, defendant's engineer, was in charge of the engines in its engine room, and operated the hoisting engine used for raising and lowering cages in the shaft. One Smith, familiarly known at the plant as "Peaches," was the "cager" at the bottom of the shaft. When plaintiff and his co-workers would unload a box of clay, and the cage was ready to descend, one of them would give a signal to the engineer by pulling a wire which sounded a whistle in the engine room. Defendant maintained an electric bell in the engine room, with wires leading therefrom to the bottom of the shafts; and when a box was filled with clay and placed upon the cage, ready to be raised, the cager would push a button, causing this bell to ring. And when the engineer received both signals, he would put the cages in motion.

It appears that on the day of plaintiff's injury plaintiff and his co-workers on the second floor unloaded a box of clay and gave the engineer the customary signal that the cage was ready to descend; that the engineer did not start the hoisting engine, as usual, and after waiting for some time plaintiff went over to a skylight above the engine room, and, through an opening, called to the engineer asking him if he had received a signal from below, and learned that he had not. Thereupon plaintiff descended the steps mentioned above, to the "ground floor," and entered the engine room, where he and the engineer began to examine the bell, wire, and batteries used for signaling to the mine. After a few minutes had elapsed, plaintiff left the engine room, and as he was in the act of leaving the engineer told him to go by the "hole" and call to "Peaches," the cager below, telling him to signal by striking on a steam pipe that ran from the engine room to the mine. Plaintiff thereupon went out of the engine room, situated a short distance west of the shafts, went to the first or west shaft, opened the gate, put his head into the shaft, and called to the cager below. The cage in this shaft was then at the second floor, perhaps 12 or 13 feet above plaintiff. According to his testimony he stood almost erect, with his head protruding a short distance into the shaft, for the purpose, not only of calling to the cager below, but so that he might see the light from the cager's lamp when the latter came to the bottom of the shaft. Plaintiff says that he called twice,



and that, while he was standing in that position, and when a very brief interval had elapsed, the cages were put in motion by the engineer, causing the cage in the west shaft to descend upon plaintiff's head, whereby he was injured. There was a window on the east side of the engine room about opposite the landing at the shafts on this first floor, and plaintiff testified that after he had opened the gate to the west shaft he looked through this window and saw the engineer "with his face to the north wall, facing the bell, as though he was examining the bell."

The engineer admits that he told plaintiff, as the latter left the engine room, "to go by and tell Peaches to give the pipe signal" until the bell could be repaired. He testified that plaintiff thereupon left the engine room, and that after the lapse of two or three minutes he received a signal from the cager by means of the pipe, and in response thereto (having previously received the signal from the upper floor) he started the cages in motion.

Plaintiff, when asked what he did after he opened the gate to the west shaft at the landing on the first floor, said:

"I just stood up, you might say, in an erect position, and just laid my head over, just so I could barely see down the edge of the pit, and was holding with my right arm to the middle post, or the foremost post on the side this way, and hollered down to Peaches."

On cross-examination plaintiff said that he did not lean further into the shaft because he was trying to be careful, and not get himself in the line of danger; that he knew that the elevator in the west shaft was above him, while the elevator in the east shaft was at the bottom of that shaft; that he could have called to the cager as effectually down the east shaft as down the west shaft, and if the engineer had started the machinery while he was looking down the east shaft he could have seen the ascending elevator in time to avoid being struck thereby. He explained that he "had no idea" that the engineer would put the cages in motion, but this was stricken out. He said that he did not remember having seen any one call down the shaft when the elevator was above the landing. When asked if it were not a fact that one could stand at the edge of the shaft on the ground floor in a position to see to the bottom of the shaft and be where the elevator would miss him if it descended, he said: "Well, I guess it is."

Defendant's testimony makes it appear that one could communicate with the cager at the bottom of the shaft without opening the gate. As to this plaintiff said that he might have made the cager hear him, had he stood without the gate, but did not know that the cager would have understood what was said. And there is considerable testimony tending to show that the usual way to communicate with the cager below was to open the gate and call down the shaft.

[1] Error is assigned to the ruling of the trial court in refusing to peremptorily direct a verdict for the defendant. In this connection it is said that the engineer, Ralston, was plaintiff's fellow servant, and, if there was any evidence of negligence on the part of Ralston, it did not cast liability upon the defendant. In this appellant is in error. The defendant corporation was engaged in operating a mine, within the meaning of section 4233, Rev. St. 1919, and hence was liable for damages sustained by a servant by reason of the negligence of another of its servants. Consequently, if the engineer is to be regarded as a fellow servant of plaintiff, which we do not decide, defendant was nevertheless liable for injuries occasioned to plaintiff by reason of the engineer's negligence.

[2] It is insisted, however, that there was no substantial evidence of any negligence on the part of defendant's engineer. It is said that, when Ralston told plaintiff to go by the shaft and tell the cager, "Peaches," to signal by striking on the pipes, he had no reason to suppose that while communicating with the cager plaintiff would put himself in a dangerous position; and that Ralston could not be held negligent in failing to anticipate that plaintiff would needlessly place himself in a position where he was likely to be struck by the elevator in descending, when there were safe ways in which plaintiff could have communicated with the cager. But we are of the opinion that the question as to Ralston's negligence was one for the jury. As to the contention that plaintiff might have called to the cager below without opening the gate at all, and that the engineer might expect him to do this, the evidence, when viewed in the light most favorable to plaintiff, does not sustain the view that plaintiff would well have carried out the engineer's instructions in such manner, or that this was contemplated. It is argued, in effect, that the engineer could not reasonably anticipate that plaintiff would go to the west shaft, where the cage was above him, rather than to the east shaft, where the cage was below him, or, in any event, that he would put his head into the shaft far enough to be struck by a descending cage. But, in view of the fact that the circumstances were such as to lead plaintiff to believe that the machinery would not be started, at least without warning, until he had fully carried out the engineer's direction, and that either shaft would be safe to use for this purpose, we think that reasonable prudence required that the engineer ascertain plaintiff's position before starting the hoisting engine, which, according to the evidence, he could have done by merely glancing through the window in the engine room, mentioned above; and that, if the cages were put in motion almost immediately after plaintiff went to the west shaft, without notice to him, as plaintiff's evidence tends to show, the

jury could with propriety find that this constituted negligence on the part of the engineer. While the engineer's testimony is that some minutes elapsed after plaintiff left the engine room and before the cages were put in motion, plaintiff's testimony makes it appear that it was a matter of seconds.

[3] It is further contended that the ruling on the demurrer below was erroneous, for the reason that the evidence conclusively convicts plaintiff of contributory negligence as a matter of law. To this we do not assent. It is doubtless true that plaintiff would not have been injured had he gone to the east shaft rather than to the nearer, or west, shaft, or if he had managed to keep his head from protruding into the west shaft far enough to be struck by the descending elevator. But, since the circumstances were such as to lead a reasonable man in plaintiff's position to believe that he could safely act upon the assumption that the cages would not be started into motion at all until he had had time to carry out the directions of the engineer, we think that plaintiff cannot be declared negligent as a matter of law, but that the question of his negligence in the premises was one to be submitted to the jury. We consequently rule this assignment of error against the appellant.

Complaint is made of plaintiff's first instruction, plaintiff's main instruction, covering the case and directing a verdict. This instruction is as follows:

"The court instructs the jury that, if you find and believe that the plaintiff has shown by the evidence in this case all of the following facts: That the Walsh Fire Clay Products Company was, on the 9th day of October, 1917, operating a mine at Vandalia, Mo., producing fire clay, and that fire clay is a valuable mineral, and that on said date the plaintiff, Everett Jeffries, was in the employ of the defendant, and that one Clem Ralston was then and there also an employee of the said defendant, and that while the plaintiff was working in the line or scope of his employment, and while plaintiff was exercising ordinary care for his own safety, and that while in the line or scope of his employment Clem Ralston, at a time when he, the said Clem Ralston, knew, or by the exercise of ordinary care could and should have known, that the lowering of one of the cages or elevators used by the defendant in hoisting clay from its said mine would injure the life and limb of the plaintiff, carelessly and negligently dropped or lowered such cage or elevator upon and against the plaintiff, and that he was thereby injured—then your verdict will be for the plaintiff."

[4] One complaint as to this instruction is that in the early part thereof reference is made to the "following facts." And it is said that this was error, since it amounted to a pronouncement by the court that the matters which followed were established facts in the case. But it seems quite clear that the jury were, in fact, required to find the matters

hypothesized in the instruction as being true, and could not have been misled in this respect by the form of the instruction.

[5] The instruction is further assailed on the ground that there was no evidence that Ralston knew that the lowering of one of the cages or elevators "would injure the life and limb of the plaintiff," and that it was therefore error to authorize the jury to so find. While it cannot be said that the evidence supports the view that the engineer actually knew that the lowering of one of the cages would injure plaintiff—and the instruction, in this respect, followed too literally the language of the petition—we do not regard the instruction as prejudicially erroneous on this account. A finding that the engineer, by the exercise of ordinary care, could have known that plaintiff would be injured by the lowering of the cage is equivalent, in legal effect, to finding that he did so know.

"It is axiomatic that what one knows and what he ought to know are regarded in law as equivalent." *Ellis v. Metropolitan Street Railway Co.*, 234 Mo. 657, loc. cit. 673, 138 S. W. 23, 28.

And since the two are, in legal effect, the same, we think that the defendant could not have been prejudiced by the fact that this instruction, which properly submitted the case upon the theory that the engineer ought to have known of plaintiff's peril, also permitted a finding, in the alternative, that the engineer had knowledge thereof, though the evidence did not show actual knowledge on his part. Error without injury is not reversible error.

[6, 7] In this connection it may be noted that the court refused to give an instruction offered by defendant, No. A, whereby it was sought to tell the jury that there was no evidence showing or tending to show that the engineer had any knowledge that plaintiff had opened the gate and was leaning over and looking down into the shaft, in a position where he would be hit if the elevator should descend. This was one of 22 instructions offered by the defendant. Ten thereof were given, and 12 were refused. The instructions offered by defendant occupy 9½ printed pages of the abstract before us. The trial court would doubtless have been warranted in refusing all of defendant's instructions on this ground. *Sidway v. Missouri Land & Live Stock Co.*, 163 Mo. 342, 63 S. W. 705. In any event, under the circumstances, we think that the refusal of defendant's instruction No. A could not have been prejudicial to it. There was evidence, in our opinion, from which the jury could find that the engineer ought to have known of plaintiff's peril, and, as said, such a finding would be tantamount to finding that he had knowledge thereof. Though an instruction be one that may appropriately be given, it does not al-

ways follow that its refusal will be prejudicial error. *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265; *Brown v. Transit Co.*, 108 Mo. App. 810, 88 S. W. 310.

The court gave, at plaintiff's request, two instructions touching the matter of plaintiff's contributory negligence. One of these, plaintiff's instruction No. 5, told the jury that, if they found and believed from the evidence that plaintiff, at the time he was injured, if he was injured, was conducting himself as an ordinarily prudent person would under similar circumstances, then to find that he was exercising ordinary care, and was not guilty of contributory negligence. No fault is found with this instruction. Plaintiff's instruction No. 6 is as follows:

"The court instructs the jury that, with reference to the allegation of contributory negligence set up in the defendant's answer, the burden of proof rests upon the defendant; that is, the defendant must prove to your satisfaction by a preponderance of the evidence that the plaintiff did not exercise ordinary care for his own protection."

[8] The giving of this instruction is assigned as error, upon the ground that its effect is to lead the jury to believe that plaintiff's contributory negligence could only be established by testimony coming from the lips of defendant's witnesses. But we do not think that it was reversible error to give the instruction in this form. And this view is upheld in the following cases: *Gibbs v. Light & Power Co.*, 142 Mo. App. 19, 125 S. W. 840; *Porter v. Hetherington*, 172 Mo. App. 502, 158 S. W. 469; *Cool v. Petersen*, 189 Mo. App. 717, 175 S. W. 244.

[9] It is urged that the verdict of \$6,000 is excessive. The evidence shows that plaintiff was seriously injured. It appears that he was knocked down, and that his body was caught between the side of the elevator and the south wall of the shaft. The evidence in his behalf tends to show that the skin was almost entirely torn from his back, and partly from one arm; that he had bruises and cuts about his limbs and body; and that he sustained an injury to his left hip and to his spine. He was confined to his bed for many weeks, and went upon crutches for some weeks thereafter. He testified:

"Well, I walk with a swing, and the reason I walk with a swing is to get the weight off of my left hip as much as I can. I haven't enough strength in my left hip to walk and straighten up the usual way of walking."

He was not employed at the time of the trial, though the evidence shows that several months after the casualty he began operating an automobile, and that for a time he worked in a pool room. He testified, however, that he was unable to continue in work of either character, and that prior to his injury he was

strong and healthy, with no physical ailment of any sort.

The physician who treated plaintiff's injuries did not testify. A physician who had examined him prior to the trial testified that "the left leg was shortened"; that "the shortening was in the pelvis"; that there had been "either a fracture of the pelvis or a dislocation of the sacro-iliac joint of the pelvis." The record shows that plaintiff offered the deposition of a physician, Dr. Tethering, taken in the city of St. Louis, but on objection of defendant the deposition was excluded for the reason that certain X-ray photographs referred to therein by the witness, and which had been marked as exhibits, were not attached to the deposition.

Under the circumstances we could not well hold that the verdict is excessive, warranting interference at our hands.

We perceive no reversible error in the record, and it follows that the judgment should be affirmed.

It is so ordered.

DAUES, J., concurs.

BECKER, J., not sitting.

#### MASON v. MASON. (No. 2793.)

(Springfield Court of Appeals, Missouri, June 18, 1921. Rehearing Denied Aug. 9, 1921.)

1. Divorce  $\Leftrightarrow$  184(10)—Finding on conflicting evidence not disturbed.

Where the trial court has the witnesses before him and has a much better opportunity to judge of the real merits of the controversy than the appellate court, the latter will defer largely to the trial court's judgment, and where there was much conflict in the testimony in a divorce case, the trial court's finding in defendant's favor will not be disturbed.

2. Divorce  $\Leftrightarrow$  240(2)—Court should be careful in fixing amount of alimony.

While the wife, on being awarded a decree of divorce, is entitled to a fair allowance for alimony, considering her husband's ability and the station in life of the parties, the court should be careful, in fixing the amount of alimony, to leave no ground for encouragement to an adventuress.

3. Divorce  $\Leftrightarrow$  240(5)—Allowance of \$750 alimony held excessive.

In a divorce case, where the husband was shown to have had property worth about \$10,000, and the wife had lived with him less than five months and had not helped him to accumulate any of such property, held, that an allowance of \$750 alimony was excessive, and would be reduced to \$500.

Appeal from Circuit Court, Greene County; Orin Patterson, Judge.

Action by John M. Mason against Mary B. Mason for divorce, with cross-bill by defendant. Judgment for defendant, and plaintiff appeals. Affirmed, on condition that defendant remit a portion of the alimony granted; otherwise reversed and remanded.

G. G. Lydy, of Springfield, for appellant.  
F. T. Stockard, of Springfield, for respondent.

COX, P. J. Action for divorce on account of indignities. Defendant filed answer and cross-bill alleging indignities and asked for decree of divorce in her favor and for alimony. The court found in defendant's favor and rendered judgment awarding her a decree of divorce and alimony in the sum of \$750 and \$50 additional as attorney's fees. Plaintiff has appealed.

Plaintiff had been three times previously married. He had four children, one boy and three girls, by his first marriage. His first wife had died and his other two wives had secured divorces. Defendant had been once previously married and had two boys by this marriage. She had been divorced from her former husband and seems to have had the children in her custody when she and plaintiff were married. These two boys, aged 13 and 15 at the time of the trial, had lived with their mother and were taken to the home of plaintiff and lived there as members of his family while their mother and plaintiff lived together. Plaintiff's son lived at home and for a short time before the separation two of plaintiff's daughters were living at home. Plaintiff and defendant were married on April 5, 1919, and separated August 26, 1919.

The evidence shows that these parties lived together harmoniously for a short time only. Their most serious trouble seems to have arisen from plaintiff whipping one of defendant's boys. Finally on August 25, 1919, defendant claims her husband whipped her son without any reasonable cause, and she attempted to prevent it and he then caught her by the wrists and threw her around on the porch and bruised her, and also struck her with the stick with which he had attempted to whip the boy. She left plaintiff the next morning. As to her bruises, she was corroborated by other witnesses who saw her soon afterward. She also claimed he had asked her to give her children away and some other

indignities were claimed, but those mentioned are the most serious.

[1] It is often difficult in a case of this kind for any court to ascertain the real facts and determine with any degree of certainty which of the parties is responsible for the trouble. This is especially true as applied to the review of the case by the appellate court. The trial court has the witnesses before him and has a much better opportunity than has the appellate court to judge of the real merits of the controversy, and for that reason the appellate court will defer largely to his judgment, especially when the facts are controverted and the evidence conflicting. There was much conflict in the testimony in this case on the facts as to the various indignities charged by the parties to the suit, and, the trial court having found in defendant's favor on those issues, we are not disposed to disturb that finding.

[2, 3] The facts on which the court based the judgment for alimony in gross are not disputed, and we are of the opinion that \$750 allowed is excessive under the facts in this case. While plaintiff is shown to have had property of the net worth of about \$10,000, defendant had lived with him less than five months and had not helped him to accumulate any of this property. Defendant had supported her two sons for the time she had lived with plaintiff and had paid about \$100 debts which she owed prior to their marriage. While the wife, on being awarded a decree of divorce, is entitled to a fair allowance for alimony, considering the ability of her husband to pay and the station in life of the parties, yet the court should be careful in fixing the amount of alimony to leave no ground for encouragement to the adventurers who might seek to use the divorce courts as a means by which to enrich herself. We do not say that was attempted in this case, but we are of the opinion that, taking all the circumstances and the financial condition of the parties into consideration, alimony in gross in the sum of \$500 would fully meet the ends of justice in this case.

If defendant will within ten days remit \$250 of the alimony in gross, the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

FARRINGTON and BRADLEY, JJ., concur.

**GORDON v. BLEECK AUTOMOBILE CO.**  
(No. 16649.)

(St. Louis Court of Appeals. Missouri. July 11, 1921. Rehearing Denied July 22, 1921.)

**1. Master and servant §330(1) — Employé driving employer's car presumed acting in scope of employment.**

Proof that the driver of defendant's automobile, which collided with plaintiff, was in defendant's employ, raises a presumption that he, at the time of the accident, was acting within the scope of his employment, making out a prima facie case; whereupon defendant has the burden of showing that the driver was then acting without the scope of his employment.

**2. Master and servant §302(2)—Employé not acting outside employment while driving to make delivery for employer because thereafter he was to drive himself home.**

Where defendant's employé driving its car at the time of its collision with plaintiff was then delivering an article for defendant, he was not, at the time, as a matter of law, acting without the scope of his employment because from the place of delivery he was to drive himself and another employé home.

**3. Pleading §10—Act of employé may be pleaded as that of employer.**

It is enough to plead, according to its legal effect, the act of an employé as the act of the employer.

**4. Damages §132(3)—\$3,000 held not excessive for injuries in neck and back from auto collision.**

Under the evidence that from time of accident to trial, more than a year, plaintiff had been unable to do a full day's work, and would never entirely recover, \$3,000 for injuries in neck and back from an automobile collision held not excessive.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

"Not to be officially published."

Action by James Gordon against the Bleeck Automobile Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. U. Hayden and John P. Griffin, both of St. Louis, for appellant.

P. V. Wilson and Earl M. Pirkey, both of St. Louis, for respondent.

**BRUERE, C.** Plaintiff sued the defendant to recover for personal injuries sustained by him by being run down by an automobile belonging to the defendant and driven by one August M. Bleeck. The cause was tried before the court and a jury and resulted in a verdict and judgment in favor of plaintiff in the sum of \$3,000. Unsuccessful in obtaining a new trial in the court below, defendant prosecutes this appeal.

It is undisputed that the plaintiff was injured through the negligence of August M. Bleeck whilst driving defendant's automobile.

Inasmuch as appellant does not controvert the question of negligence of August M. Bleeck in the operation of said car, the evidence introduced at the trial tending to establish that negligence need not be stated.

Appellant contends that the judgment should be reversed on the ground that there is no evidence in the record tending to establish liability on the part of appellant for respondent's injury; that there was a failure of proof that August M. Bleeck, at the time of respondent's injuries, was operating the automobile on any business for appellant or acting within the scope of his employment.

The facts, as disclosed by the record, touching defendant's liability for the negligent act which resulted in plaintiff's injury, are these: The plaintiff at the time of the accident, to wit, October 22, 1917, was a traffic policeman directing the traffic on Grand avenue and Washington boulevard, in the city of St. Louis, Mo. August M. Bleeck was the secretary and treasurer of the defendant corporation, and one Anna Kegel was employed by the Bleeck Automobile Company as its bookkeeper and cashier. Between 5 and 5:30 o'clock in the evening, on the day of the accident, one of appellant's employés was leaving appellant's place of business to deliver an inner tube, for one of defendant's cars, to another employé in charge of said car in the vicinity of Grand avenue and Lafayette avenue. At this time August M. Bleeck and Anna Kegel, Mr. Bleeck's sister, were about to leave defendant's place of business, in defendant's automobile for their respective homes. Both Mr. Bleeck and Mrs. Kegel lived north of Grand and Lafayette avenue and had to pass this point on their way home. As the employé was leaving defendant's office to deliver the inner tube Mr. Bleeck appeared and told him to stay at his work and that he would deliver the tube on his way home. Thereupon the tube was placed in defendant's automobile, Mr. Bleeck and Mrs. Kegel got in the car, and while Mr. Bleeck was driving the car south on Grand avenue, and before they reached the place at which the tube was to be delivered, the plaintiff was run down.

The evidence shows that August M. Bleeck was the person in general authority at appellant's place of business; the testimony being that any one having business to transact with appellant dealt with him. Furthermore, the evidence shows that it was the duty of any employé of the said company to take the tube to appellant's employé in charge of defendant's disabled car. The evidence therefore established that in taking the inner tube to Grand and Lafayette avenue Mr. Bleeck was engaged upon his employé's business and acting within the scope of his employment.

There was evidence tending to show that Mr. Bleeck was acting within the scope of his employment in carrying appellant's book-keeper and cashier to her home, and that in so doing the automobile was being used in the service of the said company. On this matter Mr. August M. Bleeck testified on cross-examination as follows:

"Q. Now, you were going then to deliver this tube first, to one of your men—one of the company's men, down at Grand and Park? A. Grand and Lafayette.

"Q. Grand and Lafayette; that was the purpose of your trip first? A. Yes, sir.

"Q. After that was done then you intended to go home? A. I took my sister home and went home myself.

"Q. Employés are taken home sometimes in the automobiles of the company? A. Sometimes.

"Q. And you were an officer of the company and were working for the company, too? A. Yes.

"Q. And that was a part of your duty to do this, wasn't it? A. Yes, sir.

"Q. And at this time you were engaged in the discharge of your duty as an employé of the company, weren't you? A. Yes, sir."

No attempt was made to contradict the above testimony.

[1] Proof that the automobile in question was owned by the appellant and that August M. Bleeck, the driver of the machine, was in appellant's employ raised a presumption of fact that August M. Bleeck, at the time of the accident, was acting within the scope of his employment, and made out a prima facie case against appellant; that burden was then placed upon the appellant to show that, at the time of the injury, August M. Bleeck was acting outside the scope of his employment. *O'Malley v. Construction Co.*, 255 Mo. 391, 164 S. W. 565; *Kilroy v. Charles L. Crane Agency Co.*, 203 Mo. App. 302, 218 S. W. 425; *Guthrie v. Holmes*, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123; *Kazee v. Kansas City Life Insurance Co.*, 217 S. W. 340; *Lafferty v. Kansas City Casualty Co.* (Sup.) 229 S. W. 751; *Long v. Nute*, 123 Mo. App. 209, 100 S. W. 511; *Shamp v. Lambert*, 142 Mo. App. 573, 121 S. W. 770.

Plaintiff's prima facie case was not destroyed or discredited. No evidence was introduced to overcome or contradict, by positive proof, the prima facie case made against the appellant. The presumption was, as hereinbefore stated, that Bleeck was running the automobile in his master's service. If he was not so running it, this fact was peculiarly within the knowledge of his master, but no evidence was introduced tending to show that Bleeck was using the automobile without authority, or was acting, at the time of the accident, outside the scope of his employment or outside his master's service. On the contrary, affirmative evidence was introduced supporting the prima facie case and showing that the negligence complained of oc-

curred while Bleeck was engaged in the prosecution of the business which he was employed to do.

[2] Appellant contends that the main purpose for which Bleeck was using the automobile, at the time of the accident, was for his own pleasure, to wit, to carry himself and Anna Kegel to their respective homes; and that the matter relating to the inner tube was merely incidental to said purpose, and therefore appellant was not liable for the negligence of Bleeck. In view of the fact that the uncontradicted evidence shows that August M. Bleeck was acting throughout within the line of his employment and for the appellant, the legal question raised need not be discussed in the instant case; suffice it to say that it is immaterial whether or not the taking of the inner tube to appellant's employé was incidental to the main purpose of the use of the automobile, because the evidence shows that, at the time the injury took place, Bleeck was engaged not on his own but on appellant's business and within the scope of his employment. We cannot pass upon the weight of the testimony; that is the province of the jury. There is evidence in the record tending to establish liability on the part of appellant for plaintiff's injury.

What we have heretofore said disposes of appellant's contention that the trial court erred in the matter of instructions given and refused. The jury were properly instructed as to the law of the case.

[3] Appellant contends that the petition fails to state a cause of action for the reason that the petition fails to allege that August M. Bleeck was an employé of appellant, and that at the time of the accident he was acting within the scope of his employment in the operation of the automobile.

The petition alleges that the appellant and August M. Bleeck were the owners of and in charge and control of and operating the automobile which struck plaintiff. The fact is pleaded according to its legal effect. Where the allegation, as here, is that the act was committed by the master, the fact that the act was committed by the agent or servant supports the allegation and does not affect the right of recovery. *McCoy v. K. C., St. J. & C. B. Ry. Co.*, 36 Mo. App. loc. cit. 452; *Price v. Barnard*, 70 Mo. App. loc. cit. 180; *McNees v. Mo. Pac. Ry. Co.*, 22 Mo. App. loc. cit. 233; *Bliss on Code Pleading*, § 158.

[4] Appellant further contends that the verdict is excessive. Plaintiff was struck by the automobile, knocked down, and rendered unconscious. He saved himself from death or more serious injury by holding onto the front springs of the automobile. The front axle of the car was resting on the small of his back, his left leg was doubled under him, and his right leg was stretched forward; in

this position he was dragged about sixty feet. He was injured in the neck and in the small of his back. The accident occurred on the 22d day of October, 1917. This cause was tried on the 18th day of February, 1919. At the trial there was evidence tending to show that plaintiff was still suffering from the injuries received and was still under medical treatment. The evidence shows that he suffered from backaches and pains in the back of his neck, was troubled with headaches, nervousness, and insomnia, all due to the accident. The evidence further shows that plaintiff is unable, since the accident, to do a full day's work. There was testimony tending to show that plaintiff would never entirely recover from his injuries. In the face of this testimony we cannot say that the verdict is excessive.

Finding no reversible error, the judgment of the trial court should be affirmed, and the Commissioner so recommends.

PER CURIAM. The opinion of BRUERER, C., is adopted as the opinion of the court.

The judgment of the circuit court of the city of St. Louis is accordingly affirmed.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., not sitting.

# FORD-DAVIS MFG. CO. v. MAGGEE. (No. 16531.)

(St. Louis Court of Appeals. Missouri. July 6, 1921. Rehearing Denied July 18, 1921.)

## 1. Money received $\S$ 1 — Purpose of action stated.

The purpose of an action for money had and received is to afford relief when it is shown that money or its equivalent has been received under circumstances such that the person receiving it should not retain it, and that it should, according to equity and conscience, be returned to the party to whom it belongs.

## 2. Money received $\S$ 1—What must be shown by plaintiff to recover in action for money had and received.

For plaintiff to recover in an action for money had and received, it must be shown that defendant obtained the money sued for knowing that it belonged to plaintiff, or under circumstances which suggested or in the exercise of reasonable diligence would have suggested to him that it was plaintiff's money; that he obtained it without consideration; that at the time of the filing of the suit he was either in possession of the money or had given it to another as the result of some sort of collusion; that it belonged to plaintiff; and that in equity and good conscience plaintiff is entitled to the money.

## 3. Corporations $\S$ 414(1) — Secretary and treasurer authorized to sign checks held authorized to indorse checks payable to corporation.

The secretary and treasurer of a manufacturing company, authorized to draw and sign checks on its funds, was also authorized to indorse its name on checks payable to its order.

## 4. Corporations $\S$ 519(1)—Not entitled to recover proceeds of check from one repaying to officer without showing conversion by officer or its own title.

Where defendant, to accommodate plaintiff's secretary and treasurer, received from him, and deposited, a check payable to plaintiff, and subsequently repaid the amount to the secretary and treasurer by a check payable to him personally, plaintiff could not recover the money from defendant in an action for money had and received on a mere showing that the check was drawn in its favor, without showing that the secretary and treasurer converted the money, or that plaintiff, and not such officer, was entitled to the money.

## 5. Trial $\S$ 377(2)—Refusal to permit reopening of case to admit evidence which party had opportunity to present held not an abuse of discretion.

In an action to recover the amount of a check payable to plaintiff and cashed by defendant at the request of its secretary and treasurer to whom defendant repaid the proceeds by a check payable to him personally, where plaintiff was afforded every opportunity to show that the money represented by the check rightfully belonged to it, but failed to do so, and asked and was granted declarations of law that defendant's evidence tending to show plaintiff's indebtedness to the secretary and treasurer was immaterial and incompetent, the denial of plaintiff's motion, filed some days after the case was closed, to reopen the case for further evidence on the question of such indebtedness was not an abuse of discretion.

## 6. Money received $\S$ 17(1) — Pleadings held sufficient.

In an action for money had and received to recover the amount of a check drawn to plaintiff's order and cashed by defendant, who repaid the proceeds to plaintiff's secretary and treasurer by a check payable to him personally, the petition held to state a cause of action, and the answer to put in issue the averments of the petition.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Action by the Ford-Davis Manufacturing Company against Charles L. Maggee. From a judgment for defendant, plaintiff appeals. Affirmed.

Perry Post Taylor, Emil Mayer, and Ben L. Shifrin, all of St. Louis, for appellant.

M. U. Hayden, of St. Louis, for respondent.

DAUES, J. This is an action for money had and received. Petition alleges that one

E. W. Oelfcken, secretary and treasurer of the plaintiff corporation, obtained a cashier's check for \$1,027, issued February 27, 1917, to the order of the plaintiff by the Third National Bank of St. Louis, and indorsed same as such secretary and treasurer over to defendant, and that defendant two days later returned same in the form of his (defendant's) own check, made payable to Oelfcken personally; that the check, passed to the defendant without consideration; that plaintiff received no consideration therefor; that defendant, being so indebted to plaintiff, promised and agreed to pay same to plaintiff; that the plaintiff was at the time the owner of and entitled to the possession of said check.

The answer was a general denial, and, answering further, averred that defendant received the check, but only for and as the agent of Oelfcken, and that at the time of the transaction plaintiff was indebted to Oelfcken in a sum greater in amount than the face of the check. The reply denies all new matters in the answer, except that defendant collected the proceeds of this check. The case was tried before the circuit court without a jury. Judgment was for the defendant. Plaintiff appeals.

The suit was instituted originally by appellant and its assignee for benefit of creditors jointly. The assignee being eliminated, the appellant and respondent alone are now here face to face on appeal.

The facts are few and undisputed. E. W. Oelfcken, a physician, with offices at Olive street and Compton avenue, St. Louis, was secretary and treasurer of the Ford-Davis Manufacturing Company, and Oelfcken's office was diagonally across the street from the defendant's drug store. Dr. Oelfcken had been cashing checks at this drug store, and, in some instances at least, checks drawn by the Ford-Davis Manufacturing Company were there cashed. Oelfcken secured a cashier's check from the Third National Bank for the amount named, made payable to the order of the Ford-Davis Manufacturing Company. He testified that he was leaving town that day, and, his bank having closed, he sent the cashier's check to the defendant's drug store for safe-keeping. Same was indorsed, "Pay to the order of C. L. Maggee, Ford-Davis Mfg. Co., E. W. Oelfcken, Secy. & Treas." Defendant took the check and deposited same to his credit in the Cass Avenue Bank, through which same was cleared and paid. Two days later Dr. Oelfcken returned to the city, and defendant returned the money by another check drawn by Maggee on his own account to Oelfcken personally. The defendant testified there was no special reason for drawing the check in this manner, and that it had not occurred to him to draw it otherwise.

No conversation passed between Oelfcken

and the defendant concerning the check, as the defendant understood that he was to hold or deposit the check as an accommodation to Dr. Oelfcken, and give it back to him when he called for it. Defendant did return the exact amount to Dr. Oelfcken after two days, when Oelfcken returned to the city. There was no demand for the money made of the defendant until March 23, 1917, nearly a month afterwards.

The court refused the first declaration of law requested by plaintiff, but gave its declarations No. 2 and No. 3. Declaration of law No. 1 was to the effect that if the check was payable to plaintiff's order and was its property, but was indorsed by Oelfcken to his own order, and that defendant received the proceeds thereof, but gave no consideration therefor to the plaintiff, and that plaintiff was not indebted to the defendant at the time, then the finding of the court must be for the plaintiff. Declaration of Law No. 2, given at the request of plaintiff, declared that the evidence whether the Ford-Davis Manufacturing Company, plaintiff, was indebted to Oelfcken at the times mentioned in the pleadings and evidence was immaterial, and should be disregarded, and to like effect declaration No. 3 excluded such evidence as being incompetent.

Appellant's complaint as addressed to this court is that the court erred in refusing the first declaration of law requested by it, and, again, that it was error for the court "on the facts undisputed to find for the defendant and fail to find for the appellant."

An action of this character, being one for money had and received, has been specially treated by our courts. As is said in *Richardson v. Drug Co.*, 92 Mo. App. loc. cit. 521, 69 S. W. loc. cit. 399:

"The simplicity of the action is indeed what commends it to the favor of the courts. A plaintiff is exonerated from the necessity of stating the special circumstances of his case, and therefore, from the danger of a nonsuit by a variance between his allegations and the proof, while as to the defendant: 'It is the most favorable way in which he can be sued; he can be liable no further than the money he has received, and against that may go into every equitable defense upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff *ex aequo et bono* is not entitled to the whole of his demand.' *Moses v. Macferlan*, 2 Burr. 1005."

See, also, *York v. Bank*, 105 Mo. App. 127, 79 S. W. 968; *Crigler v. Duncan*, 121 Mo. App. 381, 99 S. W. 61; *Johnson-Brinkman Co. v. Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615.

[1] These adjudications bespeak a flexibility of the action, the purpose being to afford relief when it is shown that money or its equivalent has been received under cir-



cumstances under which such person receiving same should not retain it, and should, according to equity and conscience, be returned to the party to whom it belongs.

The court, a jury being waived, found from the evidence as presented that plaintiff failed to sustain the petition, and was therefore not entitled to recover.

We may well consider, first, whether plaintiff made a proper showing to make a prima facie case, and then whether the court correctly ruled on the other matters complained of.

[2] In order for plaintiff to recover, there must be a showing in the record before us that the defendant obtained this money knowing that it belonged to the plaintiff, or under circumstances which suggested, or in the exercise of reasonable diligence would have suggested, to him that it was plaintiff's money; that he obtained it without consideration, and that the defendant at the time of the filing of the suit was either in possession of the money or had given same to another as the result of some sort of collusion, and that same belonged to plaintiff, and that in equity and good conscience the plaintiff company is entitled to this sum of money from this defendant.

[3] Dr. Oelfcken was secretary and treasurer of the Ford-Davis Manufacturing Company. He was undoubtedly authorized to draw and sign checks upon the funds of such company, for it appears that the bank recognized such authority in its transactions with the plaintiff, and the conduct of plaintiff in the case clearly establishes this. If Oelfcken was authorized to draw and sign checks on the company's funds, it follows that he was also authorized to indorse its name on checks payable to its order. Defendant received the check from Oelfcken and gave it back to the same person from whom he had received it without any interest in the transaction, for aught that appears, except to accommodate the doctor.

Let us now consider what is plaintiff's evidence in the case. First, there was a deed of assignment of plaintiff to one Wiehe for benefit of creditors; discharge of assignee; then deposition of defendant was offered, showing defendant's indorsement on cashier's check; also that he had cashed checks of plaintiff before; that he was not a creditor of plaintiff.

Wiehe testified that as assignee he had made demand on defendant on March 23, 1917, for amount of check; that he paid creditors of company in full, and returned the assets back to the corporation; that he did not find that there was a claim against the company by Maggee; that he "never ascertained" whether the company owed Oelfcken any money. He admitted company's deposit book entry of \$1,008.25 on December 10, 1916, but could not tell whether this amount was

contributed by Oelfcken or not. This covers, in substance, the entire proof offered by plaintiff. Defendant's evidence adds nothing to plaintiff's case.

[4] The defendant attempted to show by Oelfcken that on December 10, 1916, Oelfcken had placed \$1,008.25 of his own money, drawn by check on the St. Louis Union Bank, to the credit of plaintiff, for which he received no consideration and which he withdrew by his cashier's check. This evidence was disregarded by appellant's declaration of law, and upon appellant's insistence the court disregarded all questions relating to matters as to whether the money in controversy belonged to Oelfcken or to plaintiff. There is no evidence in the case that the corporation was rightly entitled to the money, or that Oelfcken was not entitled to it, except that the cashier's check was drawn in favor of plaintiff, and under the circumstances of this case this does not suffice. The exclusion of the testimony of Oelfcken as to whom the money belonged was at appellant's request and upon its declaration of law. Plaintiff, as said, made no showing whatever that it and not Oelfcken was entitled to this money. It was imperative upon plaintiff before recovery could be had that there be a showing that Oelfcken converted this money, or that plaintiff, and not Oelfcken, was entitled to it.

[5] Some days after the case was closed, plaintiff filed a motion before the court to reopen the case for further cross-examination of Oelfcken on the question of indebtedness between Oelfcken and the corporation. This the court disallowed, and we cannot now say that the court abused its discretion in doing so. Plaintiff was afforded every opportunity to show that the money represented by the check rightfully belonged to plaintiff. Defendant produced evidence tending to show that the money belonged, in fact, to Oelfcken, and this testimony was excluded as immaterial and incompetent by declarations asked by and given in behalf of the plaintiff. While we think it went to the very vitals of the case, it was nevertheless disregarded upon appellant's request and upon its declarations of law. Before us we have a record absent of a showing justifying a judgment against defendant in favor of plaintiff for the recovery of the proceeds of this check; there was afforded plaintiff every opportunity to make a proper showing if, in fact, such facts existed, and no ruling of the court below suffered any advantage against plaintiff or in favor of defendant.

[6] We have examined the counter objections to the pleadings. The petition, with interdemands, states a cause of action, and the answer contains enough to put in issue the averments of the petition. Sanitary Co. v. Reed, 179 Mo. App. 164, 161 S. W. 315.

It is unnecessary, in view of our conclu-

sions above set out, to discuss the insistence of appellant on the refusal of the declaration of law No. 1. Upon the showing made by the plaintiff, and under the evidence in the whole case, the judgment rendered in favor of the defendant is amply supported.

Accordingly the judgment is affirmed.

ALLEN, P. J., concura.

BECKER, J., absent.

### ROGERS v. CROSS et al. (No. 16656.)

(St. Louis Court of Appeals. Missouri. June 29, 1921.)

Justices of the peace §=174(26) — Whether joint makers of note liable for full amount held for jury, though no payment pleaded in justice court.

In an action on a promissory note executed by two of three partners to the third where it was contended by defendants that, in consideration of one of them surrendering his interest in the partnership, he was released from his obligation on the note, whereupon the other paid plaintiff one-half the note and interest, the question whether defendants were liable for the full amount of the note should have been submitted to the jury by circuit court, though no payment was pleaded by them, the suit having originated in a justice court, where defendants filed no pleadings.

Appeal from St. Louis Circuit Court; Moses Hartmann, Judge.

"Not to be officially published."

Action by Lizzie Rogers against James Cross and brother. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

E. J. Brennan and C. M. Sandoval, both of St. Louis, for appellants.

William T. Kell, of St. Louis, for respondent.

NIPPER, C. On July 25, 1917, plaintiff instituted suit on a note before a justice of the peace in the city of St. Louis. The note was dated May 11, 1911, made payable six months after date, in the sum of \$250, with interest at 8 per cent. from maturity. Plaintiff recovered, and defendants appealed to the circuit court, where, upon a trial, the court gave the jury a peremptory instruction to find for the plaintiff against both defendants for the full amount of the note and interest at 8 per cent. Plaintiff offered the note in evidence, and rested.

It appears that defendants owned a saloon, and also operated an ice cream parlor and candy store next door to the saloon. They formed a partnership with plaintiff, whereby plaintiff put into this partnership \$250 in

cash, and defendants executed the note in question, payable to the plaintiff, for their half of the partnership. This continued about three years.

From the evidence of James Cross, it appears that about November, 1918, the brother, William Cross, desired to get out of the business and go into business for himself. James Cross testified that he told Mrs. Rogers that his brother William wanted to buy the place, and if she wanted to buy it she could have it, and at that time he offered her \$500, to which she replied:

"No; we will run the place, you and I; \* \* \* we will split the profits, and we will get along all right."

She then asked him what his brother wanted for his part. He brought the books in, and they examined them and found that the business was in debt about \$145. Defendant James Cross then proposed to her that they would run the business, he agreeing to pay the debts against the place, and they would start out anew and not owe anybody anything. She replied that this was satisfactory to her, at which time he offered to pay her his half of the \$250 note, and informed her that his brother wanted to be released from his obligation on the note, and she agreed to that proposition. He says that he would have paid the note sooner, but she always told him that any time would do for that. The partnership between plaintiff and James Cross was dissolved about six months prior to the trial of this case in the circuit court.

On cross-examination, he says that they had a—

"Verbal agreement, and it was understood that my brother was to be released from the note and nothing else, and I was to pay the debts against the place, which amounted to \$140 at that time. Then I was still to owe her the \$125."

William Cross testified that he and his brother borrowed \$250 from plaintiff to put into this business, and executed their note therefor at the time. He says that he had an agreement with plaintiff whereby it was agreed that he was to leave the business and surrender his interest entirely, in consideration of which he was to be released from his obligation on the note; that plaintiff would not sell to him, and therefore he made the above-mentioned agreement with her, at which time it was also agreed that James Cross was to pay the indebtedness against the place.

Plaintiff, in rebuttal, testified that William Cross told her that he wanted to get out of the business, as he and his brother did not get along, and therefore he wanted to get away from the whole thing; that he just simply left the place and never mentioned the note. She denied releasing him.

The court then gave the peremptory instruction to find for plaintiff, as heretofore stated, and defendants urge this as grounds for reversal.

If, as defendants contend, they had an agreement with plaintiff whereby the defendant William Cross was to be released from his obligation on the note in consideration of his surrendering all claim to his interest in the partnership, and the other defendant paying \$140 as payment of one-half of the note and interest, then we think it was a question which should have been submitted to the jury, as to whether or not defendants were liable for the full amount of the note. It is true no payment was pleaded on behalf of the defendants, but this suit originated in a justice court, and defendants did not file any pleadings. But they had a right to show payment in this manner if they were able to do so. *Rider v. Culp*, 68 Mo. App. 527, loc. cit. 531; *Buxton v. Debrecht*, 95 Mo. App. 599, 69 S. W. 816; *Yount v. Spain*, 180 S. W. 17, and cases cited.

The case should have been submitted to the jury, and, if the trial judge felt that injustice had been done, it was his duty to grant plaintiff a new trial, if such had been asked, on the ground that the verdict was against the weight of the evidence. *Lafferty v. Kansas City Casualty Co.*, 229 S. W. 750, loc. cit. 753.

The commissioner recommends that the judgment be reversed and the cause remanded.

**PER CURIAM.** The foregoing opinion of NIPPER, C., is adopted as the opinion of the court. The judgment of the circuit court is accordingly reversed, and the cause remanded.

ALLEN, P. J., and BECKER and DAUES, JJ., concur.

#### GLADNEY et al. v. GIBSON et al. (No. 17557.)

(St. Louis Court of Appeals. Missouri. July 11, 1921. Rehearing Denied July 18, 1921.)

**Schools and school districts** §69—Board of education of town school district can select and change site for high school; "establish."

Under Rev. St. 1919, § 11241, as to city, town, and consolidated school districts, giving authority to the board of education to "establish" schools of a higher grade, considered with sections 11143, 11210, 11236, 11238, 11314, and other sections relative to such districts, other districts, and districts in general, held that the board of education of a town district, and that though it has less than 5,000 population, has authority to select and acquire a site for high school purposes, and to change a site previously

selected for such purpose, without submission of the matter to the voters.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Establish.]

Appeal from Circuit Court, Lincoln County; Edgar B. Woolfolk, Judge.

Suit for injunction by W. E. Gladney and others against John M. Gibson and others. From an adverse judgment, plaintiffs appeal. Affirmed.

John L. Burns, of Troy, and Abbott, Fauntleroy, Cullen & Edwards, of St. Louis, for appellants.

Joseph R. Palmer, of Elsberry, and Avery & Killam and Sutton & Huston, all of Troy, for respondents.

ALLEN, P. J. This is a suit in equity whereby the plaintiffs seek to enjoin the defendants from selecting a schoolhouse site in the school district of Elsberry, Mo., and from changing the location of a school site theretofore established in said district. Plaintiffs are assessed tax-paying citizens, and owners of real and personal property in the city of Elsberry, in said school district, a town school district organized and existing under the laws of this state. The school district is made a defendant, and the personal defendants are the six directors of the district.

The petition, filed on April 20, 1921, alleges that there is located within the district of Elsberry the city of Elsberry, a city of the fourth class, and that there has been in said city and in said district a public school building; that on the ——— day of ———, 1919, the school district voted bonds in the sum of \$28,000, for the purpose of purchasing a school site, erecting schoolhouses, and other purposes specified in section 11127, Rev. St. 1909; that at the time of the issuance of said bonds the school district owned one school site upon which was erected a public school building used as such; that shortly after the issuance of the bonds the school district purchased a site for another public school building, known as the W. A. Cannon tract, in the city of Elsberry, which was conveyed by W. A. Cannon to the school district for a consideration of \$1,600 paid for out of money of the district arising from the sale of the above-mentioned bonds; and that is the school district site upon which is situated the present school building of said district.

The petition then alleges that, notwithstanding the above-mentioned facts, the defendants are about to abandon the site mentioned above, known as the W. A. Cannon tract, and change the site of the proposed new school building to a point about one-half mile distant therefrom, and locate a new school site, popularly known as "school site No. 2, Cannon Heights," in a subdivision

known as Cannon Heights, outside of the corporate limits of the city of Elsberry, and to thereby change the location of said school site and remove it farther from the center of said district. And it is alleged that the said action of the defendant directors is illegal and contrary to law, for the reason that no election was held for the purpose of determining whether or not the location of said schoolhouse should be changed; that no election has been held whereby a majority of the voters who are resident taxpayers of said district have voted to change the location of said school site, and that no notice of any kind was given to the voters of said district of any such proposition as the selection of a school site, or the change of the school site, to be voted on at the annual school election, or at any special election; and that the action of the defendant directors in changing such location and in selecting the schoolhouse site is wholly without authority, no vote having been taken thereon, of any kind or character, either by the resident taxpayers or the qualified voters of said district.

Alleging that the contemplated action of the defendants would cause great loss and damage to the district, and that these plaintiffs are without remedy at law, plaintiffs pray that the defendants and each of them be enjoined from selecting any schoolhouse site in said district, and from changing the location of said schoolhouse site now existing, and for general relief. This is followed also by a prayer for an order to show cause why a temporary injunction should not be granted.

The record does not show the issuance of an order to show cause, but recites that on April 30, 1921, 10 days after the filing of the petition, the defendants, having been served with process, appeared and filed a demurrer to the petition. This demurrer was overruled, and thereupon, upon the same day, the court issued a temporary injunction, upon the giving by plaintiffs of a bond in the sum of \$3,000. Thereafter, on May 6, 1921, defendants filed their answer, consisting of a general denial, and on the same day filed a motion to dissolve the temporary injunction.

The motion to dissolve the temporary injunction was heard upon an agreed statement of facts, together with certain testimony of defendant Joseph R. Palmer, one of the members of the school board, which need not be noticed. By the agreed statement, the facts alleged in the petition are admitted to be true; and the agreed statement of facts recites that, after the issuance of the bonds, supra, adjoining districts were annexed to the school district of Elsberry, and an additional bond issue of \$20,000 was voted; that the schoolhouse which the district intends to erect is a high school building; that there is now in the district a school building and site which is used for both grade and high school purposes, and that after the new building is

completed the present building will be used for school purposes other than high school work; that it is the plan and intention of the defendants to change the schoolhouse site described in the petition as the W. A. Cannon site to another site within the school district but outside the corporate limits of the city of Elsberry, and to erect a high school building on the site so selected; and that no building has been erected on the W. A. Cannon site.

The court sustained this motion and dissolved the temporary injunction theretofore issued. Thereupon plaintiffs, after interposing a motion for a new trial, which was overruled, appealed to this court.

The question involved in the appeal is whether the board of education of a town school district has authority to select and acquire a schoolhouse site for high school purposes, or to change a site previously selected for such purpose, or whether the matter is one to be submitted to a vote of the qualified voters who are resident taxpayers of the district. Our school laws, or statutes relating to public schools, are now to be found in chapter 102 of the Revised Statutes of 1919. Article I of that chapter, consisting of section 11123, classifies public schools of this state as follows:

"First, all districts having only three directors shall be known as common school districts; second, all districts outside of incorporated cities, towns and villages, which are governed by six directors, shall be known as consolidated school districts; third, all districts governed by six directors and in which is located any city of the fourth class, or any incorporated town or village, shall be known as town school districts, and fourth, all districts in which is located any city of the first, second or third class shall be known as city school districts."

Article II of said chapter contains "laws applicable to all classes of schools." Article III contains "laws applicable to common schools." Article IV contains "laws applicable to city, town and consolidated districts." The remaining 19 articles of this chapter need not be noticed, with the exception of one section contained in article VIII, to which we shall later refer. In said article IV is section 11241, providing as follows:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade, in which studies not enumerated in section 11360 may be pursued; and whenever there is within the district any school property that

is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district." (Italics ours.)

The district here in question is a town district, subject to the provisions of this section. There can be no doubt that this section authorizes the board to establish an adequate number of primary or ward schools, and for this purpose to divide the school district into school wards, and to select and procure a site in each ward and erect a suitable school building thereon. Following this is the provision that "the board may also establish schools of a higher grade." It is the contention of the appellants that the words last quoted do not confer upon the school board in such districts the authority to select and procure a site for a high school; and that, consequently, the matter is one governed by the "general school laws." It is argued that city, town, or consolidated school districts are governed by the "general school laws" of the state in all cases where the act creating such districts does not make a contrary provision. In support of this it is pointed out that section 11236 of article IV, supra, provides that a town or city school district, when organized, shall be a body corporate and possess the same corporate powers "and be governed the same as other school districts except as therein provided." And in this connection reference is made also to language found in sections 11238, 11240, 11243, and 11251, Rev. St. 1919. And, reasoning thus, appellant's learned counsel conclude that the authority to select or change a site for a high school building in a town district resides in the qualified voters, or assessed, taxpaying residents of the district, where it is lodged, by section 11210 of article III, supra, relating to common school districts. That section deals with the powers of annual meetings in common school districts, and provides, *inter alia*, that the qualified voters assembled at such meetings, "when not otherwise provided," shall have the power (tenth) "to determine, in districts newly formed, or wherein no schoolhouse site has yet been selected, the location thereof, notice having been given in the manner provided by law," or (eleventh) "to change the location of schoolhouse site when the same for any cause is deemed necessary." The last-mentioned subdivision of this section contains a proviso that—

"In every case a majority of the voters who are resident taxpayers of said district shall be necessary to remove a site nearer the center of said district; but in all cases to remove a site farther from the center of said district, it shall require two-thirds of the legal voters who are resident taxpayers of such school district voting at such election."

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That section relates alone to common school districts, and has to do with the powers of the qualified voters of such districts "assembled at such meeting." It manifestly has no application to a town school district where no such annual meetings are held, but where elections, to vote upon propositions that may be lawfully submitted, are required to be by ballot and conducted in the same manner as elections for state and county officers. See section 11251, Rev. St. 1919. If, as appellant contends, we must look to the "general school laws" to determine where the authority for selecting or changing a high school site, in districts such as this, is vested, we regard it as clear that the provisions of section 11210, supra, cannot be said to be general in character, applicable to districts other than common school districts. Not only is it a section found in an article which is expressly made applicable to common school districts, but the very terms of the section are such as to render it inapplicable to a district such as that here involved.

Having in view appellant's argument that we must look to the "general school laws," we turn to article II of chapter 102, containing laws applicable to all classes of public schools. But one section of that article has to do with the selection or changing of school sites, viz. section 11143, which is as follows:

"Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education in city, town or consolidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices, and public parks and playgrounds, and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the board of directors or board of education aforesaid may proceed to condemn the same in the manner as provided for condemnation of right of way in chapter 13, article II, of the Revised Statutes of 1919," etc. (Italics ours.)

The language of this section clearly indicates that it was the intention of the Legislature that in a common school district the authority to select a schoolhouse site be vested in the resident taxpayers of the district, assembled in annual meeting, but that in a city, town or consolidated district such authority be vested in the board of education. And when this section is considered with section 11241, supra, and with section 11238, Rev. St. 1919, vesting the government and control of town and city districts in a board of education, and it is borne in mind that the authority here in question is not, by any other statute applicable to a district of this character, vested in the qualified voters of the district, it seems quite clear that by section 11241, supra, it was intended to confer upon the board authority to select and ac-

quire, or change, high school sites, as well as sites for schools of lower grade; that the authority to "establish schools of higher grade" was intended to carry with it the authority to select a site and provide a home for the school. See *Martin v. Bennett*, 139 Mo. App. 237, loc. cit. 245, 122 S. W. 779. The matter has been recently passed upon by the Springfield Court of Appeals in *Young v. Consolidated School District No. 3*, 196 Mo. App. 419, loc. cit. 421, 193 S. W. 627, 628. In the opinion, by Sturgis, J., it is said:

"The plaintiffs concede, as we understand, that so far as ward or primary schools are concerned the statute gives the school board, and not the voters, the power and authority to 'select and procure a site' in each ward and erect buildings thereon; but plaintiffs contend that the power there given to 'establish schools of a higher grade' does not include the selection of a site for such higher school. In view of the fact that there is no provision made in the article relating to town, city, and consolidated schools for the voters to select a site of the schools of a higher grade, we think this construction of section 10869, supra, is too narrow. The Supreme Court, in *State ex rel. v. Jones*, 155 Mo. 570, 576, 56 S. W. 307, after referring to this section, there mentioned as section 8088, Revised Statutes 1889, and the establishment of high schools thereunder, said: 'The statute vests in the qualified voters of the district of country districts, and in the directors of the city districts, full and complete discretion as to the location of the schoolhouses (sections 7979, 8001, and 8085, R. S. 1889).' The sections there referred to are now sections 10845, 10792, and 10866, Revised Statutes 1909 [sections 11210, 11143, and 11238, Rev. St. 1919]. Of these sections so referred to by the Supreme Court as conferring power upon the board of directors in city, town, and consolidated schools to select school sites, section 10866 is part of the article on such kind of schools, and vests the government and control of same in the board of education of six members. Section 10792 is part of the article of the same chapter applicable to all schools, and provides for the condemnation of sites when selected, and no agreement is reached with the owner as to the price. It is significant that this section was amended in 1913 (Acts 1913, p. 713) by adding the words printed in italics so as to read: 'Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education, in city, town, or consolidated school districts, under the provisions of the statute applicable thereto shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices, and public parks and playgrounds, and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the board of directors or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way.' etc. This plainly implies the right of the school board, and not the voters, to select all new schoolhouse sites in city, town and consolidated districts. In *Martin v. Bennett*, 139 Mo. App. 237, 245, 122 S.

W. 779, the court used this language with reference to locating high schools in consolidated districts: 'I think also that the authority to establish a high school carries with it the authority to provide a home for the school and to erect a building for the purpose on ground owned or to be acquired by the district.'

"The case of *Buchanan v. School District*, 25 Mo. App. 85, is cited as holding that in city, town, or consolidated schools the same as in country schools, 'not the directors but the entire corporate body is constituted the judge of the necessity or propriety of changing the school site.' That case was written when section 7146, Revised Statutes 1879 [section 11241, R. S. 1919], was in force, and before that section was amended so as to confer on the board of directors the power now contained in section 10869, supra, to select and procure school sites. What is said in *Richardson v. McReynolds*, 114 Mo. 641, 646, 21 S. W. 901, about the power of the voters only to change a school site has reference to a country school district only."

We are satisfied with the conclusion reached by the Springfield Court of Appeals. The opinion in the *Young Case* is referred to approvingly by the Kansas City Court of Appeals in *Kemper v. Long*, 203 S. W. 632. That case went to the Supreme Court on certification, where, in an opinion by Judge James T. Blair, reported in 278 Mo. 290, 212 S. W. 871, the decision of the Kansas City Court of Appeals was sustained. Appellant refers us to certain language used by Judge Blair in that opinion as supporting the view that the authority conferred by said section 11241, supra, to establish schools of a grade higher than ward schools does not include the power to select and procure school sites and erect buildings for such schools. Some language of the opinion, when taken alone, may seem to lend support to appellant's contention; but the court had under consideration the question of the right of the board of education to rent a building for high school purposes; and when the whole opinion is considered it will be readily seen, we think, that nothing decided in that case affects the ruling in the *Young Case*, supra, or cases there relied upon. The gist of the decision of the Supreme Court in the *Kemper Case* is that the power to "establish" a high school includes the power to rent a building for such purpose; and our ruling herein is in no wise in conflict with the decision of the Supreme Court upon the matter there in judgment.

The *Elsberry school district* has a population of less than 5,000. And it is contended by appellant that section 11314, found in article VIII, supra (which article contains "laws applicable to certain school districts"), makes it clear that in town districts having a population of less than 5,000 no authority is conferred upon the board to select and purchase sites for schoolhouses. Section 11314 provides as follows:

"In all such school districts as are mentioned in article IV of this chapter that have or that may hereafter have a population exceeding five thousand and not exceeding one hundred thousand inhabitants, the board of education of such school districts shall have full power, by an affirmative vote of not less than two-thirds of all the members of such board, to locate and direct and authorize the purchase of sites for school houses, libraries, school offices and public parks and playgrounds adjacent to the school-house site or elsewhere in said school district, and, by a like vote, to direct and authorize the sale of any real estate," etc.

In *Kemper v. Long*, supra, 208 S. W. 632, the Kansas City Court of Appeals points out that the portion of that section here relied upon was in force when the decisions in *State ex rel. v. Jones*, 155 Mo. 570, 56 S. W. 307, and *Martin v. Bennett*, supra, were decided. The court said:

"But that part of the statute just quoted was in force when those decisions were rendered (section 8000, R. S. 1889, and section 9878, R. S. 1890), and we must assume was considered by the court."

While section 11314 vests in the boards of districts there mentioned the power to locate, direct and authorize the purchase of sites for schoolhouses, libraries, etc., nothing therein contained purports to limit the power conferred by section 11241, supra, upon boards of town districts, though having less than 5,000 inhabitants. Certainly as to selecting and acquiring sites for schools other than high schools, the same power is conferred by both sections. And we think that, upon a proper construction of section 11241, the same power is conferred by both sections with respect to selecting and acquiring sites for high schools. There is merely an overlapping of the statutes touching the matter, and no room appears for the application of the maxim "expressio unius est exclusio alterius."

In conclusion we may say that, in view of the nature of city and town school districts, and the various statutes applicable thereto, it seems well-nigh inconceivable that the Legislature intended that the question of selecting a high school site should be left to the qualified voters of such districts. As said above, elections held in such districts are required to be by ballot, and conducted as are elections for state and county officers; and the polls must be kept open from 7 o'clock a. m. to 6 o'clock p. m. (section 11251). No provision whatsoever is made by law for submitting at such an election the question of the selection of a schoolhouse site or the changing of such a site, nor does this appear practicable. To leave the matter entirely to the judgment of the qualified voters of the district would mean that each voter would have the right to vote for any site that he might indicate. There is no provision in the

law as to how a voter shall indicate on his ballot what site he is voting for. An effort to have each voter, of his own initiative, point out or describe the site of his choice might well lead to utter confusion. And if the board of education should designate two or more sites, between which the voters are to choose, then the voters would be precluded from exercising their independent judgment in the matter, being confined to a choice between the sites submitted by the board. And for this there is no sanction in the law. On the other hand, in common school districts, where the qualified voters assemble in annual meeting, the matter of selecting or changing a schoolhouse site may be considered in a parliamentary way and intelligently disposed of.

And in this connection it may be observed that other reasons why the provisions of the tenth and eleventh subdivisions of section 11210, supra, are not adopted to city or town districts, readily suggest themselves. But we need not pursue the matter farther. We are of the opinion that the defendant members of the board of education of the Elsberry district were acting within their authority in selecting a new site for the proposed high school in said school district, or in changing the site previously selected.

It follows that the judgment below should be affirmed, and it is so ordered.

DAUES, J., concurs.  
BECKER, J., absent.

# HELPER v. HAMBURG QUARRY CO. et al. (No. 17368.)

(St. Louis Court of Appeals. Missouri. July 20, 1921.)

1. Process  $\S$  19—In suit against corporation where action accrued nonresident codefendant cannot be summoned.

Under Rev. St. 1919,  $\S$  1177, authorizing suit in the county where any defendant resides, and section 1180, authorizing suits against a corporation in the county where the cause of action accrued, an action against a corporation begun in a county where the cause of action accrued, but where the corporation did not have an office for the transaction of its business and where neither of the individual defendants resided cannot be maintained against an individual defendant, and service upon such defendant in his home county is not authorized by section 1190.

2. Malicious prosecution  $\S$  67—Loss of time item of damage for malicious attachment.

Loss of time from business reasonably necessary to defend against a malicious attachment constitutes an item of damage which naturally flows from the attachment so that it may be recovered under Rev. St. 1919.  $\S$

2983, allowing recovery of all damages occasioned by the attachment.

**3. Malicious prosecution ¶67—Jury can infer value of time lost in absence of direct proof.**

In a suit for malicious prosecution of an attachment, a jury can infer the value of the time reasonably lost by plaintiff from his business in defending against the attachment in the absence of direct proof of such value.

**4. Appeal and error ¶930(1)—To uphold verdict, evidence considered most favorably to appellee.**

Where plaintiff asked for exemplary damages because the attachment was sued out against him maliciously and without probable cause, and the jury allowed such damages, the evidence must be considered most favorably to plaintiff on defendant's appeal in determining whether defendant had probable cause as a matter of law.

**5. Embezzlement ¶36—Criminal intent can be inferred from shortage in accounts of corporate officer.**

Where an officer of a corporation is short in his accounts and has property in his possession belonging to the corporation, the jury may infer therefrom that he possessed the criminal intent essential to embezzlement under Rev. St. 1919, § 3327, though such shortage may have innocently existed.

**6. Malicious prosecution ¶59(7)—Judgment for shortage in accounts competent on issue of probable cause for attachment.**

Where an attachment sued out by a corporation against its officer was dissolved, but the corporation recovered judgment for the claimed shortage in the officer's accounts, the fact of such shortage was material in an action by the officer for damages in determining whether the attachment was malicious so as to subject the corporation to exemplary damages, and therefore the exclusion of the judgment which established the fact of the shortage, though not the criminal intent, was error which requires reversal of the judgment for exemplary damages.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by John J. Helfer against the Hamburg Quarry Company and Thomas Loneragan to recover damages for the malicious prosecution of an attachment. From a judgment awarding plaintiff compensatory and exemplary damages against both defendants, defendants appeal. Reversed as to defendant Loneragan, and reversed and remanded as against the defendant Quarry Company unless the plaintiff shall file a remittitur of the exemplary damages allowed.

Anderson & Gilbert, of St. Louis, for appellants.

John A. Gilliam and Smith & Percy, all of St. Louis, for respondent.

**BIGGS, C.** This action for damages arose out of the alleged malicious prosecution of an attachment suit by the defendant Hamburg

Quarry Company against the plaintiff. By his petition plaintiff alleges that on February 14, 1917, the defendant quarry company was a Missouri corporation with a capital stock of \$40,000, of which the plaintiff held \$12,000 and the defendant Loneragan \$14,000 par value; that plaintiff, defendant Loneragan, and one Rutledge (Rutledge was originally joined as a defendant, but died before the trial, and the action as to him was dismissed) were directors of the company; that Loneragan was president, Rutledge secretary, and the plaintiff was vice president and general manager. It is further averred that on said date the said quarry company, Rutledge, and Loneragan wrongfully, wantonly, maliciously, and without probable cause sued out an attachment against plaintiff in a justice court in the city of St. Louis, alleging that said plaintiff was indebted to the said quarry company in the sum of \$138.81, and that the damages for which said action was brought were for injuries arising from the commission of some felony or misdemeanor, and that said debt was fraudulently contracted on the part of said Helfer, the defendant in said attachment suit, and that said defendants wrongfully, maliciously, and wantonly and without probable cause had an attachment writ issued in said cause and levied upon the 120 shares of stock owned by the said plaintiff in said quarry company. It is also averred that after a change of venue the cause was tried in a justice court on a plea in abatement and resulted in a finding on behalf of said Helfer on his said plea, and that no appeal was taken from the decision thereon, and that said attachment was completely dissolved and fully terminated.

It is then alleged that the acts of said defendants have caused the plaintiff to incur obligations for attorney's fees for the defense of said attachment suit in the sum of \$1,000, and have caused him to lose time from his business of the value of \$1,000, and have injured his standing and reputation in business, and greatly humiliated and harassed him, to his damage in the sum of \$25,000. Judgment is asked for the sum of \$27,000 actual damages and \$20,000 punitive damages.

Defendant Loneragan and the quarry company answered separately. Loneragan by his answer sets up that he has been and is now a resident of Jackson county, Mo., and that until his death in March, 1918, the defendant Rutledge was a resident of Chicago, Ill.; that the quarry company is a Missouri corporation with its chief office and place of business at Hamburg, St. Charles county, Mo.; that neither at the time the suit was filed nor at any time since has said quarry company maintained an office, had an agent, or done any business in the city of St. Louis. By reason of these facts it is alleged the



court had no jurisdiction over the defendant Lonergan, and the suit as to him cannot be maintained. The answer further set up a general denial of the allegations of plaintiff's petition. The answer of the defendant quarry company was a general denial.

The cause, being tried before a jury, resulted in a verdict and judgment against both defendants for the sum of \$1,485 actual damages and \$2,000 punitive damages, making a total of \$3,485. From this judgment defendants Lonergan and the quarry company have prosecuted separate appeals.

As to the appeal of defendant Lonergan: It is first asserted in his behalf the court acquired no jurisdiction over his person by reason of the manner of service of the writ of summons upon him at Kansas City, Mo., where he resided. By reason of the allegations of fact set forth in the petition showing that the cause of action against defendant accrued in the city of St. Louis, and the defendant quarry company being a corporation, the writ of summons was issued under the provisions of section 1180, R. S. 1919, and served in Jackson county upon the defendant Lonergan, as president of the quarry company. At the same time a copy of the writ was issued and served personally upon Lonergan in Jackson county.

The authority, if any, for this procedure is found in section 1190 of the statute, which authorizes a plaintiff to have a summons directed to any sheriff in the state when there are several defendants residing in different counties.

The following stipulation appears in the record:

"It is conceded that at the time this suit was instituted and at all times since then the defendant Lonergan was, has been, and is now a resident of the county of Jackson, state of Missouri, and that at all said times until his death in April, 1918, defendant James E. Rutledge was a resident of the city of Chicago, state of Illinois, and nonresident of the state of Missouri; that the Hamburg Quarry Company is a corporation, incorporated under the laws of the state of Missouri, in June, 1916, with its chief office and place of business at Hamburg, St. Charles county, Mo.; that neither at the time this suit was filed nor at any time since has said Hamburg Quarry Company maintained an office, had an agent, or done any business in the city of St. Louis, Mo.; that at the date the writ was delivered by the sheriff of Jackson county the Hamburg Quarry Company had gone out of business and had no office at Hamburg, Mo.; that the plaintiff was at the time this suit was filed a resident of the City of St. Louis, and ever since has been a resident of the city of St. Louis.

"It is conceded by the Hamburg Quarry Company that it had waived its right to question the propriety of the method of service."

The place and manner of bringing suits is governed by statute law. Section 1177, R.

S. 1919, provides that suits may be instituted:

"First, when the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found; second, when there are several defendants, and they reside in different counties, suit may be brought in any such county; third, when there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides."

Section 1180 provides:

"Suits against corporations shall be commenced either in the county where the cause of action accrued, \* \* \* or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business."

Section 1190 is as follows:

"When there are several defendants residing in different counties, the plaintiff may, at his option, have a summons directed to 'any sheriff in the State of Missouri,' or have a separate summons directed to the sheriff of any county in which one or more defendants may be found."

It should be noted section 1180 says nothing about bringing in other defendants in case the suit is brought against the corporation in the county where the cause of action accrued. And under the provisions of section 1190 the right of a plaintiff to bring in defendants residing in other counties applies only to a case where plaintiff sues a defendant in a county in which a defendant resides.

[1] Under the conceded facts as disclosed by the stipulation, *supra*, the defendant quarry company at the time the suit was filed did not have an office or an agent in the city of St. Louis and could not be said to be a resident of said city. It was brought within the jurisdiction of the court only by reason of the fact that the cause of action accrued in St. Louis, and, it being a corporation, the statute (section 1180) authorized the service of the summons upon it at Kansas City, where its president resided (see section 1192). With this service upon the defendant quarry company as a basis plaintiff attempts to bring within the jurisdiction of the St. Louis court the defendant Lonergan by having a writ of summons issued under the provisions of section 1190. This the statute does not authorize, as that section applies only to a case where one of the defendants is a resident of the county in which the suit is brought. Such construction was placed upon this statute by the Supreme Court in the case of *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96. In that case one of the defendants did not reside, but was found, in the county in which the plaintiff resided and was served with process there. The plaintiff then caused a writ to issue to another county for

service on another defendant in the same action. It was held that such procedure was unauthorized by the statute. See, also, *Roberts v. Stone*, 99 Mo. App. 425, 73 S. W. 888, and *Conrad v. McCall* (Springfield Court of Appeals) 226 S. W. 265, loc. cit. 267. The situation would be otherwise if the defendant quarry company or any other individual defendant was a resident of the city of St. Louis and served here, but such is not the case, as it was conceded that at the time the suit was instituted the defendant quarry company had no office or agent here, and that the then defendant Rutledge was a nonresident of the state of Missouri. We are compelled to look to the statute law for authority, and it does not authorize service of summons upon the defendant Lonergan under the facts of the case as herein set forth. It follows that his point is well taken, and that his plea in abatement should have been sustained, and also his demurrer to the evidence at the close of plaintiff's case should have been given. There is no contention that the defendant Lonergan in any wise waived the question of jurisdiction or by any action of his submitted himself to the jurisdiction of the St. Louis court. It follows that as to the defendant Lonergan the judgment should be reversed.

On the quarry company's appeal: This defendant was concededly within the jurisdiction of the court, and, it being the plaintiff in the attachment suit, upon its abatement was rendered liable as a matter of law under the provisions of section 2963, R. S. 1919, "for all damages occasioned by the attachment or other proceedings in the case." It being admitted that the attachment was dissolved, the court instructed the jury to find against the defendant quarry company for such actual damages as they may find from the evidence plaintiff has sustained as will reasonably and fairly cover a reasonable attorney's fee in connection with the defending of said attachment and the sustaining of the plea in abatement, and in addition thereto actual damages, if any, which you may find and believe from the evidence plaintiff has sustained on account of the loss of time from his business necessarily occasioned in the defense of said plea in abatement.

[2, 3] Defendant complains of this instruction because it permits a recovery for loss of time from plaintiff's business which is said to be speculative and remote, and consequently not a proper element of damage. To this assertion we do not agree. The statute makes the plaintiff in the attachment suit upon dissolution thereof liable for "all damage" occasioned thereby. Loss of time may reasonably be said to come within this category and to constitute an item of damage which naturally flows from the attachment. *Talbott v. Plaster Co.*, 151 Mo. App. 538, 132

S. W. 15; *Carp v. Ins. Co.*, 208 Mo. 295, loc. cit. 335, 101 S. W. 78; *Walser v. Thies*, 56 Mo. 89; *Sutherland on Damages* (4th Ed.) §§ 1235, 1236, and 1237. And in the absence of proof of the value of the loss of time the jury could infer the reasonable value thereof. *Walser v. Thies*, supra; *Jennings v. Appleman*, 159 Mo. App. 12-19, 139 S. W. 817.

The foregoing is the only attack made against the judgment on behalf of the quarry company as far as the actual damages found by the jury are concerned.

[4] It is contended by defendants that the evidence conclusively established probable cause for the attachment, and consequently the allowance in the form of punitive damages should not stand, as such are permissible only in the event the attachment was malicious and without probable cause. This is based on the fact that it is said plaintiff himself admitted on the stand that he was short in his accounts with the defendant company, and that such admission constituted embezzlement of the funds of the company. While plaintiff stated that, if he was short, he would make it good, he denied that there was a shortage, and his evidence must be considered in the light most favorable to him in determining the question. The plaintiff was a superintendent at the quarry, and the accounts were kept at the defendant's then office in the city of St. Louis. We have examined the record carefully, and think the question of malice and probable cause were questions which were correctly submitted to the jury for their determination. The evidence as a whole would fully warrant a finding that the plaintiff had no intention of embezzling any of the funds of the defendant intrusted to his care, and a finding of a want of probable cause for the attachment was fully justified by the evidence. Malice may be inferred from a want of probable cause.

On the issue of probable cause it is claimed that the court committed error in not permitting defendant to show the result of the suit on the merits appealed from the justice court. In the suit before the justice the quarry company, plaintiff in that action, defendant here, failed to sustain the attachment, and also failed in the trial on the merits. The company appealed from the decision of the justice court to the circuit court, and there obtained a judgment against this plaintiff, Helfer, for \$53.35. Upon the trial of this case the defendants herein offered in evidence the judgment in that case together with the pleadings involved. The statement alleges that the quarry company, plaintiff in that action, paid to the defendant certain amounts of money (fully described in the statement) to be held by defendant and expended for the account of plaintiff, that thereafter defendant expended for the use and benefit of plaintiff a certain amount of

said fund, but that of said money delivered to defendant defendant converted to his own personal use the sum of \$360, which sum and every part thereof is due and owing to plaintiff. It is then alleged that defendant is entitled to certain credits which left a balance of \$53.35, for which sum judgment is prayed. The judgment based on the statement assesses the plaintiff's damages at the sum of \$53.35.

[5] Whether the judgment based on the pleadings referred to tended to establish the fact that Helfer was guilty of a common-law conversion of specific funds it is not necessary to here say. However, we think such record and judgment did tend to establish as between Helfer and the quarry company that Helfer was short in his accounts with said company. Such shortage may have innocently existed, and Helfer may have been free from any criminal intent. However, if the fact that he was short in his accounts was established, and that he had in his possession money of the defendant quarry company for which he had not accounted, a criminal intent to embezzle such money could be inferred. *State v. Lentz*, 184 Mo. loc. cit. 239, 83 S. W. 970; *Wells v. Surety Co.*, 194 Mo. App. loc. cit. 395, 184 S. W. 474.

Section 8327, R. S. 1919, provides:

"If any agent, clerk, apprentice," etc., "of any private person, \* \* \* or if any officer, agent, clerk, servant," etc., "of any incorporated company, or any person employed in any such capacity, shall embezzle or convert to his own use \* \* \* without the assent of his master or employer, any money, goods," etc., "belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished," etc.

Under this statute a criminal intent may be presumed from the act; that is, from a shortage and failure to account. *State v. Lentz*, supra.

[6] On the issue of probable cause we think it was competent for the defendant quarry company to show that in a suit between the same parties it had recovered a judgment against the plaintiff, Helfer, on pleadings which alleged that Helfer had funds of the plaintiff company in his possession for which he had failed to account and which he had converted to his own use. This alone would not conclusively establish probable cause, because the shortage may have innocently existed and without criminal intent. While this record in the case in the circuit court did not establish the fact that Helfer was guilty of embezzlement, it was competent evidence tending to establish one of the elements of that crime, namely, a shortage in the accounts of the company. We think the court erred in not permitting

the introduction of the evidence. *Boogher v. Hough*, 99 Mo. 185, 12 S. W. 524; *Crescent City Co. v. Butchers' Union Co.*, 120 U. S. 159, 7 Sup. Ct. 472, 30 L. Ed. 614; *Smith v. Clark*, 37 Utah, 116, 106 Pac. 653, 26 L. R. A. (N. S.) 953, Ann. Cas. 1912B, 1366. In a criminal prosecution under the statute it would be necessary to show such shortage and failure to account. In the event the issue as to whether or not plaintiff, Helfer, was guilty of embezzlement had been involved in the circuit court case, the argument of defendant's counsel to the effect that the judgment in that case was conclusive evidence of probable cause would be persuasive, but such question was not an issue in that case, but only one of the elements constituting embezzlement was an issue, namely, a shortage in the accounts. Such shortage may or may not have been with a criminal intent. The jury in the criminal prosecution may or may not infer such criminal intent from the shortage. We think the evidence was admissible, but that it was not such as to conclusively establish probable cause.

We have examined the instructions, and think the trial court correctly stated the rule as to probable cause and the meaning thereof, and that no error was committed in regard to such question. *Carp v. Ins. Co.*, 203 Mo. 295, loc. cit. 355, 101 S. W. 78.

As the error in refusing to admit in evidence the record and judgment in the circuit court affects only the exemplary damages, the judgment against the quarry company will be reversed, and the cause remanded, with directions to enter judgment for plaintiff for \$1,485, with interest from the date of the original judgment, provided the plaintiff will within 10 days remit the amount of punitive damages allowed, namely, \$2,000; otherwise the judgment should be reversed, and the cause remanded for a new trial as to the quarry company. As to the defendant Lonergan the judgment should be reversed as heretofore indicated.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court as to Hamburg Quarry Company will accordingly be reversed, and the cause remanded, with directions as recommended by the Commissioner, provided plaintiff enters a remittitur of \$2,000 within 10 days; otherwise the judgment is reversed, and the cause remanded for a new trial.

The judgment as to defendant Lonergan is reversed.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., absent.

**ZALLEE v. MUTUAL LIFE INS. CO. OF NEW YORK.** (No. 16443.)

(St. Louis Court of Appeals. Missouri. June 29, 1921. Rehearing Denied July 18, 1921.)

1. Insurance  $\S$  392(1)—Conclusive showing that insurer, cancelling policy, kept premium; entitled insured to directed verdict in action for wrongful cancellation.

In insured's action against insurer for wrongful cancellation, in which it was conclusively shown by documentary evidence that the insurer had canceled the policy because of non-payment of premium when due, but had retained the premium on receipt thereof, the insured was entitled to a directed verdict, notwithstanding insurer's contention that it had not waived timely payment of premium, and that the question of such waiver was for the jury, since the insurer, having retained the premium, had no right to cancel the policy.

2. New trial  $\S$  70—Motion properly granted where court would have been justified in directing a verdict for movant.

It was proper for the court to grant plaintiff a new trial following a verdict for the defendant where the evidence was such that the court would have been justified in directing a verdict for the plaintiff.

Appeal from St. Louis Circuit Court; Benj. J. Klene, Judge.

"Not to be officially published."

Action by Andrew Zallee against the Mutual Life Insurance Company of New York. Verdict for defendant; plaintiff's motion for a new trial granted, and defendant appeals. Affirmed.

Fordyce, Holliday & White, of St. Louis, for appellant.

Charles A. Llach, of St. Louis, for respondent.

**NIPPER, C.** This is an action for damages in which plaintiff alleges defendant wrongfully canceled an insurance policy. Upon a trial in the court below, the jury returned a verdict for defendant. Plaintiff filed a motion for a new trial, and the court sustained said motion, stating as a reason therefor that there was no substantial testimony to sustain the verdict. From this action of the trial court, defendant appeals.

The first count of the petition, upon which the case was submitted to the jury, alleges that a semiannual premium had become due on the 28th of December, 1916, and payable within the grace allowed (which was 30 days), or January 27, 1917; that while said policy was in force, and in accordance with its rules and practice, defendant waived the payment of said semiannual premium for a period of 60 days from the expiration of said 30 days of grace; that on the 17th day of March, 1917, and within the time allowed by such waiver, he paid the semiannual premium of \$18.45 on said policy, which had become

due on the 28th day of December, 1916; that although defendant accepted and retained the payment, it notified plaintiff that the policy had lapsed, and that it would not accept same as the payment of the premium unless plaintiff would submit to a medical examination, contrary to the provisions of the policy.

It appears from the record before us that plaintiff had paid in premiums, up to the time the policy was canceled, about \$562. He had been paying his premiums semiannually. On the 28th of December, 1916, there was a semiannual premium of \$18.18 due the defendant. Prior to the time this payment became due, he asked defendant for an extension of 60 days in addition to the 30 days of grace. Several times prior to the last-named date, under the rules of the company, he had been permitted to do this. The defendant sent him the necessary blanks to be filled out. He states he filled out these blanks and mailed them to the office of defendant, and, not having received any answer, he considered that such extension had been granted, as had been the custom, and did not send the semiannual premium to the defendant company until March, 1917, at which time defendant wrote him a letter and notified him that his policy had lapsed, and that it would not accept the money as payment of that premium, as no extension had been granted and the policy had become a lapsed policy, but that he would be reinstated if he would furnish a health certificate and have it completed before the company's doctor. This plaintiff declined to do, and brought suit as heretofore stated.

In view of the points made and presented for our consideration on this appeal, it is unnecessary to further set out the testimony, as the question for our consideration is whether or not the court properly sustained the motion for new trial. In granting a new trial on the ground that there was no substantial evidence to support the verdict for the defendant, the court was evidently of the opinion, under the facts of this particular case, that it should have directed a verdict for plaintiff.

[1, 2] Defendant contends that there was a question of waiver, and such question was a question of fact for the jury to determine. Plaintiff is not seeking to recover on the policy, but is seeking damages for wrongful cancellation. When it is either admitted by defendant, or conclusively shown by documentary evidence, as here, that defendant canceled the policy, and retained the premium, there is no question of waiver requiring the case to be submitted to the jury; and, on the theory that the trial court would have been justified in directing a verdict for plaintiff, the motion for new trial was properly sustained. *Peper Automobile Co. v. St. Louis Union Trust Co.*, 187 S. W. 100; *Bank v. Houck*, 215 S. W. 758.

Defendant admits that it received the money, and has kept it. It canceled the policy, and so admits. Defendant could not accept and retain the benefits, and rightfully cancel the policy. *Andrus v. Insurance Association*, 168 Mo. 151, 87 S. W. 582; *Jaggi v. Prudential Insurance Co.*, 191 Mo. App. 384, 177 S. W. 1064.

This ruling in no way conflicts with *Gannon v. Gas Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505, or the rule as announced therein requiring all questions which depend upon oral testimony to be submitted to the jury; for it is therein stated that the rule does not apply to written instruments that call for the court's construction and meaning, nor does it apply where defendant concedes to be true all facts necessary to make plaintiff's case.

Defendant makes the point that plaintiff has not asked for the return of the premiums. This affords no reason or legal excuse for its action in accepting and retaining plaintiff's money.

In our view of the case, the action of the trial court should be affirmed. The commissioner so recommends.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

ALLEN, P. J., and BECKER, J., concur.  
DAUES, J., not sitting.

#### HATTEN v. CHICAGO, B. & Q. R. CO. (No. 16662.)

(St. Louis Court of Appeals. Missouri. June 29, 1921. Rehearing Denied July 22, 1921.)

1. Appeal and error  $\S$  927(7)—On review of denial of peremptory instruction for defendant evidence most favorable to plaintiff considered.

In passing on the question whether the court should have given a peremptory instruction to find for defendant, where there is a conflict in the testimony only such as is most favorable to plaintiff need be considered.

2. Railroads  $\S$  307(3)—Automatic bell negligently maintained.

In an action for injuries in a crossing accident, the railroad company's negligence was established when it was shown that an automatic bell, maintained at the crossing to warn travelers of the approach of trains, had been out of order for a sufficient length of time to enable the company by the exercise of ordinary care to know that it was not in working order.

3. Railroads  $\S$  350(13)—Contributory negligence held question for jury.

In an action for injuries in a crossing accident occurring after dark, the question of contributory negligence was one for the jury, though it appeared that plaintiff saw the approaching train, where an automatic bell which had given warning on other occasions, and upon which he was relying, failed to ring, and he testified that he thought the train was on another track, because it was a freight train, with a passenger car attached, and because the rays of the headlight did not extend along defendant's railway.

Appeal from Hannibal Court of Common Pleas; William T. Ragland, Judge.

"Not to be officially published."

Action by James E. Hatten against the Chicago, Burlington & Quincy Railroad Company, revived after plaintiff's death in the name of Ida A. Hatten, administratrix. From a judgment for plaintiff, defendant appeals. Affirmed.

H. J. Nelson, of St. Joseph, and Geo. A. Mahan and Dulany Mahan, both of Hannibal, for appellant.

D. H. Eby and Ben E. Hulse, both of Hannibal, for respondent.

NIPPER, C. This action was brought by James E. Hatten. He recovered judgment for the sum of \$5,000, for personal injuries sustained by being struck by an engine and train of defendant. James E. Hatten died, and the cause was revived in the name of the administratrix, Ida A. Hatten. The accident happened where the Hannibal and Paris gravel road crosses defendant's line of railway, about a mile and a half west of the city limits of Hannibal. Defendant's railway crosses this gravel road at the point where the accident occurred, at an acute angle going west. The Missouri, Kansas & Texas Railway runs parallel with defendant's line of railway, and 83½ feet south at this crossing. On account of the angle at which the two lines of railway cross the gravel road, it is 229 feet from the point where the gravel road crosses the Chicago, Burlington & Quincy Railroad to where it crosses the Missouri, Kansas & Texas Railway. Plaintiff was going west over this gravel road, driving a team of horses hitched to a spring wagon about 7 o'clock on the evening of the accident, which occurred on November 17, 1916. Plaintiff had been living in Ralls county, west of this crossing, and had traveled over this crossing for a number of years. When plaintiff got within 100 feet of this crossing, his attention was drawn to a train coming from the east, traveling in the same direction in which he was traveling. He saw the headlight of the engine, which was something near a quarter of a mile away when he first observed it. He

could see the reflection of the light, which extended up the valley and to the south of defendant's line of railway. He continued to drive toward the crossing, and, as he said, listened for the ringing of the automatic bell which had been maintained at this crossing by defendant for a number of years, but which on this occasion was out of order and did not ring. He continued to look back as he drove toward the track. Plaintiff had traveled over this road for 10 years, during all of which time this bell had been at this crossing. He says he had never known it to fail to ring when trains were passing before, although he had not traveled over this particular road for about three weeks prior to the accident. The railroad approaches the gravel road from the south with a curve, swinging to the north as it crosses the gravel road. Plaintiff states that he thought the train was on the Missouri, Kansas & Texas track, because no bell was ringing at the Chicago, Burlington & Quincy crossing, because of the way the light reflected up the valley from the headlight on the engine, and for the further reason that he noticed the train was carrying a passenger coach, and he did not know that the Chicago, Burlington & Quincy ever carried a passenger coach on its freight trains, but that he had noticed such being done on the Missouri, Kansas & Texas freight trains. When his horses stepped on the front rails, the engine came around the curve and flashed the light on them. They suddenly turned to the right, threw plaintiff out, and when he fell down by the side of the track the train ran over one of his hands, causing three of his fingers to be crushed, which necessitated amputation.

[1] The only assignment of error urged here is that the trial court should have given a peremptory instruction to find for defendant, declaring plaintiff guilty of contributory negligence as a matter of law. It is unnecessary to set out all the evidence of defendant, because in passing upon the question presented to us, where there is a conflict in the testimony, we need only consider such as is most favorable to plaintiff. Defendant relies upon the fact that the ringing of the bell would not have afforded plaintiff any additional warning, because, notwithstanding the fact that the bell did not ring, he saw the train and knew of its approach, and was therefore guilty of contributory negligence, barring his right to recovery, by attempting to cross the track in front of this train which he knew was coming. This would no doubt be correct if there was only one line of railway, for the ringing of the bell would have given plaintiff no information which he did not already have. *Peterson v. United Railways Co.*, 270 Mo. 67, 192 S. W. 938.

[2] In the case at bar, we have two lines of railway, running parallel, and close together. The ringing of the bell in this particular case would have served the additional purpose of informing plaintiff upon which line of railway the train was traveling as it approached the crossing. Defendant's negligence is established when it is shown that the automatic bell maintained at this crossing for the purpose of warning travelers of the approach of trains upon these tracks had been out of order for a sufficient length of time to enable defendant, by the exercise of ordinary care, to know that it was not in working order. Defendant's negligence having been established, was plaintiff guilty of contributory negligence as a matter of law such as to bar his right to recovery? The facts of this record present a very close question, which under a slightly different state of facts would perhaps necessitate a different ruling.

[3] This accident occurred after dark, and there was a slight elevation between the gravel road and defendant's railway. Plaintiff saw a passenger car attached to this freight, which he had never before noticed on a freight train of defendant, but had seen such attached to a freight train, or to freight trains of the Missouri, Kansas & Texas Railway. This is one fact which would give him some reason for believing the train was being operated over the Missouri, Kansas & Texas Railway. Another reason given by plaintiff why he thought the train was on this other track was that the rays of light coming from the headlight on the engine extended directly up the valley to the west, instead of along defendant's line of railway. These facts and circumstances, connected with the further fact that the bell which had so often given warning, and which he says he was relying upon in this instance, failed to ring, all taken together, make plaintiff's contributory negligence a question for the jury. *Montgomery v. Railroad*, 181 Mo. 477, 79 S. W. 930; *Swigart v. Lusk*, 196 Mo. App. 471, 192 S. W. 138.

No objections are here made to the size of the verdict, to the giving or refusing of any instructions, or to any other misconduct attending the trial of the case, other than what has heretofore been noted. Therefore the Commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

ALLEN, P. J., and BECKER and DAUES, JJ., concur.

**QUEENY v. WYTHE ENGRAVING CO. et al.**  
(No. 17440.)(St. Louis Court of Appeals. Missouri.  
July 18, 1921. Rehearing Denied  
July 18, 1921.)**1. Landlord and tenant ⇨104—Forfeiture of lease by tenant by subleasing puts an end to the term of the subtenant.**

Where a lease provided that the tenant should not assign without written permission from the landlord, but an assignment without such permission was made, a subsequent forfeiture forfeited both the main lease and a sublease made by the assignee.

**2. Landlord and tenant ⇨112(2)—Forfeiture of lease held not waived as to sublessee.**

Where a lease contained a clause against assignment without written consent of the landlord, and the lease was forfeited after an assignment without consent, the fact that the landlord permitted the assignee's sublessee to remain in possession, and accepted rent from him, did not amount to a waiver of the forfeiture of the lease, and under these circumstances a peremptory instruction for the plaintiff was not erroneous.

**3. Landlord and tenant ⇨120(2)—Right of sublessee holding over after forfeiture of lease might be terminated by 30 days' written notice.**

Where the lease provided there should be no assignment without written consent of the lessor, and the lease has been forfeited after an assignment without the consent of the lessor, in absence of a written agreement with the lessor, a holding over by the assignee's sublessee is a tenancy which can be terminated by 30 days' notice in writing, under Rev. St. 1919, § 6880.

**4. Landlord and tenant ⇨104—Evidence held to show no defense to action for possession of premises.**

Where the lease provided that there should be no assignment without the written consent of the lessor, and the lease was forfeited after a violation of this clause, even if testimony to the effect that lease had been assigned to S. by the lessee, and that S. had leased to defendant were admitted, it would constitute no defense in unlawful detainer, since the assignment of the lease made without consent of the lessor was contrary to the lease.

Appeal from St. Louis Circuit Court; Vital W. Garesche, Judge.

"Not to be officially published."

Action by John F. Queeny against Wythe Engraving Company and another. From judgment for plaintiff, defendants appeal. Affirmed.

R. M. Nichols, of St. Louis, for appellants.  
Jourdan, Rassieur & Pierce, of St. Louis, for respondent.

**NIPPER, C.** This is an action of unlawful detainer. John F. Queeny, plaintiff, purchased from the Allen Estate Association, a corporation, hereafter referred to for brevity as the Allen Estate, city block No. 104, in the city of St. Louis, it being that block lying between Fourth street and Broadway, and Walnut and Elm streets, on which is located the old Southern Hotel building, and the old Tony Faust restaurant property. This deed was dated the 12th day of April, 1920, and recorded on the 28th day of June of the same year. Prior to this, and on the 31st of December, 1917, the Allen Estate executed a 20-year lease to what is known as the Exhibit Corporation, for all of city block No. 104, as aforesaid. Under the terms of this lease, it was provided that the lease as an entirety could not be assigned without the written consent of the lessor, its successors and assigns. The lease gave to the lessee the right to make subleases to and with said tenants of any portion, or portions, of the buildings. It also provided that the word "lessor" as used therein should be understood as including the "lessor" or its successors or assigns; and the word "lessee" should include the lessee or its successors or assigns.

On the 27th day of May, 1918, as shown by defendants' offer of proof, the Exhibit Corporation made an assignment, or an attempted assignment, of this lease, to one, E. W. Shutt, as trustee. From the above offer of defendants, it appears that the original lease was recorded on February 26, 1919, with this assignment appearing on the back. It also appears from defendant's offer of proof that E. W. Shutt, assignee of the Exhibit Corporation, executed a lease to these defendants, dated December 3, 1918. These offers of proof were rejected by the court, on the theory that there was nothing to show any consent on the part of the Allen Estate that this assignment could be made. There is nothing in the record tending to show such consent on the part of the Allen Estate.

At the close of all the evidence, the court instructed the jury to find for plaintiff, and to award him such damages as they found from the evidence to be a fair and reasonable value of rents and profits on the 1st day of September, 1920, to the date of the trial, not exceeding the sum of \$175 per month, and also the monthly value of the rents and profits. The jury found the defendants guilty as charged in the complaint, and found the value of the rents and profits to be \$100 a month, but assessed no damages.

The plaintiff offered in evidence a certified copy of a warranty deed from the Allen Estate to plaintiff; it being the deed heretofore mentioned.

W. R. Allen testified that he was treasurer of the Allen Estate, and had been about a year and a half. At the time the Allen Es-

tate sold the property to the plaintiff, it was in possession of all of block No. 104 except that portion occupied by defendants, and had been since June, 1919. He said the arrangement whereby the defendants occupied these premises after the forfeiture of the lease to the Exhibit Corporation was a verbal one; that he collected the rent for the Allen Estate from defendants, which was \$100 per month, payable in advance; that he collected such rent from June, 1919, until and including May, 1920. Several paid checks were then introduced in evidence, some signed by the Wythe Engraving Company, and some by the Brown Embossing Company. Six of these checks were for \$100 each, and on the face of each check was indicated the month for which the rent was intended. Three of the checks were for \$200 each, and they also indicated on the face the two months which each check was intended to cover. Plaintiff introduced statutory copies of notices to the defendants to vacate. Plaintiff then read a portion of certain depositions of William Brown and William J. Wythe, who were partners in business. Notices to vacate were served on the 20th day of July, 1920, requiring defendants to vacate on August 31st of the same year. In the spring of 1919, the Allen Estate forfeited the lease to the Exhibit Corporation, as such last-named corporation failed to pay the rent and perform certain other covenants in the lease. The Allen Estate employed Mr. William F. Woerner, an attorney, to take such legal steps as were necessary to vacate this lease, which was done.

William J. Wythe, secretary and treasurer of the Wythe Engraving Company, said he knew about the forfeiture of the lease to the Exhibit Corporation. He testified as to conversations he and Mr. Brown had with Mr. Woerner, in which Mr. Woerner, as representing the Allen Estate, stated that neither he nor Mr. Brown need worry, that all they wanted was to get rid of the Exhibit Corporation. He says Mr. Woerner did not say anything about their being monthly tenants. They went to see Mr. Woerner a second time in June, 1919, at which time Mr. Woerner told them he was disgusted with the whole affair, and took them over to and introduced them to a Mr. Healy, who was interested in the Allen Estate and represented it in certain matters. He further states that Mr. W. R. Allen called upon them in March or April of 1919 to collect the rent. In May, 1920, he says Mr. Allen called on him and asked him to sign a statement, which was offered in evidence and excluded by the court, that the Wythe Engraving Company was occupying the premises from month to month, which he refused to sign. This offer was rejected by the court on the theory that it was dated a year after defendants began paying rent to plaintiff.

The defendants complain here of the court's

action in excluding the lease from Shutt to the Wythe Engraving Company, and the certified copy of the assignment of the Exhibit Corporation to Shutt. Complaint is also made of the failure of the court to submit the question to the jury as to whether or not there was a new contract or new tenancy between the Allen Estate and the defendants after the forfeiture of the lease to the Exhibit Corporation, and also failure to submit to the jury the question as to whether or not the collection of the rent by the Allen Estate and the plaintiff was not a waiver of the forfeiture of the sublease.

[1] Defendants in their brief contend that while the Allen Estate might forfeit the lease to the Exhibit Corporation, it is estopped from doing any act in derogation of this lease, and that the surrender of the main term did not extinguish the subterm. In support of this contention, we are cited to the following Missouri authorities, in addition to those from other jurisdictions: McDonald v. May, 96 Mo. App. 236, 69 S. W. 1059; Carlat v. Clothing Co., 178 Mo. App. 370, 165 S. W. 1177; B. Roth Tool Co. v. Champ Spring Co., 93 Mo. App. 530, 87 S. W. 967.

Defendants' contention, however, is not sustained or upheld by these authorities. There was no surrender in this case by the lessee to the lessor, but the lease was terminated by a forfeiture. Where there is a forfeiture by operation of law for a failure on the part of the lessee to comply with the terms of the contract, a different rule applies. Where defendants receive their lease from the assignee of the lessee, and the original lease provided that such assignment could not be made without the written consent of the lessor, and the original lease is canceled by the lessor for the failure of the lessee to comply with the terms thereof, and no consent to assignment was ever given by the lessor then such forfeiture of the main term forfeits the subterm. Geer v. Zinc Co., 126 Mo. App. 173, 103 S. W. 151; Appleton v. Ames, 150 Mass. 34, 22 N. E. 69, 5 L. R. A. 206; Shermmer v. Paciello, 161 Pa. 69, 28 Atl. 995.

The reason for this rule is apparent. The lessee may not, by an agreement of surrender made with the lessor, voluntarily surrender his lease and thereby terminate the tenancy of the sublessee. But where the main lease is forfeited by reason of the lessee's failure to comply with the terms thereof, then such forfeiture carries with it a forfeiture of the sublease, because the subtenant takes with notice, and his remedy would be by action against the lessee. Geer v. Zinc Co., supra, and cases cited.

[2-4] There is no evidence in this case of any waiver of forfeiture. The written documentary evidence introduced in evidence, as well as that offered by defendants and rejected by the court, shows that the court was justified in giving the peremptory instruction



for plaintiff which it did. The lease having been forfeited, and no written agreement having afterwards been made between plaintiff and defendants, or the Allen Estate and defendants, the holding over was such a tenancy as could be terminated by 30 days' notice in writing. R. S. 1919, § 6880. And even if such testimony had been admitted, as defendants here complain of, it would not have made any defense to plaintiff's cause of action, because the admitted facts of this record show that this attempted assignment was made without the consent of the lessor or his assigns, and the lease was forfeited by, and according to the terms thereof, by the lessor.

Under the facts of this record, the trial court's action was justified, and the judgment was for the right party. The Commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., absent.

# EISENSTADT MFG. CO. v. STAR BLDG. CO. (No. 16512.)

(St. Louis Court of Appeals. Missouri.  
July 20, 1921.)

1. Contracts ⇨170(1)—Construction by parties strong evidence of what they intended contract to mean.

The construction placed upon a contract by the parties is strong evidence of what they both intended it to mean.

2. Landlord and tenant ⇨41—Lease construed according to construction placed thereon by parties during ten-year period.

Where lease entitled lessee manufacturing company to free electricity not to exceed eight horse power, without stating in terms whether the power was to be based on the rated capacity of the motors or on the power actually consumed by the lessee, and where the parties, during a period of ten years, construed the lease so that the amount of electricity for which lessee would be liable was based on the amount actually consumed, and not on the rated capacity of the motors, the court will so construe the lease.

3. Landlord and tenant ⇨124(3)—Lease entitling lessee to free electricity to the extent of eight horse power construed.

Lease requiring lessee manufacturing company to pay for electricity furnished in excess of "eight horse power" held to entitle lessee

to electricity to the extent of eight horse power actually consumed, in the absence of a provision specifying whether the power was to be based on the rated capacity of the motors or on the power actually consumed.

4. Injunction ⇨59(2)—Lessor may be enjoined from discontinuing service of electric power to lessee.

Equity has jurisdiction to grant lessee manufacturing company an injunction restraining lessor from discontinuing the service of electric power under provision of lease requiring it to furnish such power, notwithstanding lessee could procure the power from another source, in the absence of a showing that it could be procured from the other source for the same consideration, since lessee in such case would not have a complete and adequate remedy at law, and since the refusal of such injunction might result in a multiplicity of suits.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Action by the Eisenstadt Manufacturing Company against the Star Building Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Richard A. Jones and Louis B. Sher, both of St. Louis, for appellant.

David Goldsmith, of St. Louis, for respondent.

NIPPER, C. This is an action in equity in which the plaintiff obtained an injunction against the defendant, restraining it from discontinuing the service of electric power to the plaintiff for certain premises, being one of the floors of the defendant building company. Plaintiff also recovered judgment for \$102 suffered by the plaintiff through the wrongful action of the defendant in discontinuing the service of power. The premises were demised by the defendant to the plaintiff, by a lease executed in November, 1905, and running for a term of ten years, commencing on the 1st day of April, 1906, and ending on the 31st day of March, 1916. On July 6, 1914, a renewal lease was executed between the parties at an increased rental, and for a term of ten years ending on the 31st day of March, 1926. The renewal lease duplicated the original lease as to all matters material, but changed the term and rental. The provisions of this lease, so far as we deem material to the question at issue, are as follows:

"Said lessor further covenants and agrees with said lessee that it, the said lessor, will furnish to said lessee all the electric power and all steam power which it, the said lessee, shall or may require or desire to use during the term of this lease on the premises hereby demised or any part or parts thereof for factory

or other purposes, including as factory purposes the operation of said drophammers and its other machinery in said basement, and that the said power shall be furnished without cost to said lessee, excepting that if the electric power so furnished by said lessor shall at any time during the term of this lease exceed eight horse power, then said lessee shall pay to said lessor the reasonable value of so much of the power so furnished as shall be in excess of said eight horse power, but it is further covenanted and agreed by and between said lessor and said lessee that no shafting or pulley of the lessee shall be suspended from the ceiling of said third floor without the prior consent in writing of said lessor, and that a motor or motors shall be used by said lessee for the operation of its machinery on said third floor by power furnished by said lessor."

About July, 1916, defendant began to make demands upon plaintiff for payments for light furnished in excess of what it contended plaintiff had a right to use without additional payments. This demand was based upon defendant's contention that it had been furnishing power in excess of eight horse power, and therefore was entitled to the extra amount demanded. In other words, or to state it in another way, plaintiff contends that it was to pay the excess only in the event that it consumed more than eight horse power. Defendant's contention is that, by the terms of the lease above set out, plaintiff's liability is fixed and measured, not by the current consumed, but by the amount as indicated by what is termed the "connected load," and that electric horse power is measured by watts or kilowatts; one horse power being 750 watts or three-fourths of a kilowatt. Defendant introduced testimony showing that the term was so used and understood among the companies furnishing light and power under such contract.

Plaintiff introduced testimony tending to show that at the time his contract was executed various kinds of contracts were then being used in the city of St. Louis by the various companies furnishing electric light and power; some basing their charges on the amount of horse power actually consumed, and others making contracts and basing their charges in a manner similar to that contended for by defendant.

The damages allowed were on account of defendant having disconnected the wires and cut off the power, preventing plaintiff from operating its business on the 2d of June, 1917.

The petition, among other things, alleges that the wires conducting the power to plaintiff's plant came up from the basement of the building, and through and over the premises of other tenants. Defendant's answer admits that the electric current can be furnished plaintiff only by wire or wires conducted into the basement or said building,

and leading thence to that portion occupied by plaintiff.

Injunction was denied in a similar suit in *Kienle v. Gretsche Realty Co.*, 133 App. Div. 391, 117 N. Y. Supp. 500. The lease, however, in that case, provided for the furnishing of 25 horse power, "based on the rated capacity of the motors." And in that case no allegations were found in the petition tending in any way to show the inability of the complainant to procure all the power necessary.

There is no provision in this lease that the horse power mentioned therein is based on the rated capacity of the motors, or the connected load. The defendant in the instant case made no objections to any payments based on the theory that the contract or lease required plaintiff to pay only for the amount of electricity actually consumed until about ten years after the original lease was executed, and not until some time after the renewal lease was executed. The defendant certainly knew, or should have known in ten years, whether or not it should contend for the construction of this contract which it now seeks to place upon it.

[1-3] This contract does not state in terms whether the power is to be based on the rated capacity of the motors, or whether it is intended to apply only to the power actually consumed by plaintiff, but the construction placed upon this contract by the parties thereto appears to be that both parties treated the contract as meaning the power actually used. The construction placed upon the contract by the parties thereto is strong evidence of what they both intended it to mean. *Sparks v. Gus. V. Brecht Butchers' Supply Co.*, 225 S. W. 1022, and cases cited. We think the language of the contract, as well as the action of the parties thereto, justifies this construction.

[4] Defendant complains of the action of the trial court in rejecting its offer of proof that the Union Electric Light & Power Company of St. Louis had agreed to furnish the power necessary for plaintiff's use, and the defendant would arrange so that the wires could be run through its premises. The court rejected this evidence with the statement that this would have nothing to do with the rights of the parties under the contract. The learned trial judge was right in so far as the construction of the contract was concerned, but the proof, if made, would be competent, perhaps, as tending to show whether or not plaintiff would be entitled to the injunctive relief it asked for. However, the offer of proof is in the record. And treating it as here, we are of the opinion that even then plaintiff would be entitled to injunctive relief, for it could not be said that plaintiff would have a complete and adequate remedy at law by action for damages. Plaintiff would have to continue to pay the regular monthly rental to defendant

even though the power was furnished from some other source. There is nothing in the offer of proof to indicate that the Union Electric Light & Power Company would furnish the power for the same consideration that defendant was furnishing it. Plaintiff would be compelled to keep an account of the difference between the price it was paying defendant for the power and the price it would have to pay the Union Electric Light & Power Company, from month to month, and then finally seek redress in the courts, and perhaps a multiplicity of suits would result in order that plaintiff may obtain its rights under the terms of this contract as we construe it. We do not think in this suit that plaintiff's remedy at law would be full and adequate, so as to attain the full end of justice and reach the whole mischief, and secure the right of the plaintiff at the present and in the future. *Pocoke v. Peterson*, 256 Mo. 501, loc. cit. 519, 165 S. W. 1017.

Under the provisions of our statute, as well as the rules of equity, plaintiff is entitled to the remedy prayed for by injunction. *Western Union Telegraph Co. v. Light Co.*, 46 Mo. App. 120, loc. cit. 144.

The commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., absent.

**CROMEENS v. SOVEREIGN CAMP, WOODMEN OF THE WORLD.**  
(No. 2900.)

(Springfield Court of Appeals. Missouri. June 18, 1921. Rehearing Denied Aug. 9, 1921.)

**1. Appeal and error §1003—Weight of evidence for jury.**

It is the province of the jury, not the appellate court, to weigh the evidence.

**2. Insurance §825(2)—Whether false representations as to disease were made held for the jury.**

In action on benefit certificate, evidence that insured did not falsely represent absence of disease or consultation with physician for five years prior to application held sufficient to go to jury as against a motion for a directed verdict.

**3. Appeal and error §1064(1)—Insurance §723(2)—Instruction making a defense of misrepresentations depend on purpose for which made held erroneous.**

In action on benefit certificate in which defense was that insured had made false an-

swers in application as to existence of disease and consultation with physician, an instruction making defense depend on fact false answers were made to obtain certificate, was erroneous and prejudicial, as purpose of misrepresentation is immaterial.

**4. Insurance §723(1)—Representations by applicant considered as warranties.**

Representations by an applicant for membership in a fraternal beneficiary society are considered as warranties, and, when false, avoid the policy.

**5. Appeal and error §882(12)—Instruction making defense of misrepresentations dependent on the purpose for which made held not cured by defendant pleading such purpose.**

Though fraternal insurer pleaded that insured made false answers in application as to existence of disease and consultation with physician for purpose of obtaining insurance, it did not waive its right to object to an instruction making defense and false answers depend on fact that answers were made to obtain the certificate as one of the essential elements, or waive his intention and that element was lacking.

**6. Insurance §724(2)—Effect of false answer in application not waived by clerk of local camp accepting premiums.**

That clerk of local camp of fraternal beneficiary society had knowledge when it sent in the application and when it collected premiums that insured had disease and was attended by a physician within five years before certificate was issued did not waive right of insurer to avoid certificate for false answer of insured as to such facts, as clerk could not be expected to know what warranties were contained in the application.

**7. Insurance §724(1)—Constitution and by-laws, forbidding agents of camps to waive conditions of certificate, valid.**

Constitution and by-laws of fraternal beneficiary society, providing that no officer, employee or agent of the Sovereign Camp, or any camp, has power to waive any of the conditions on which benefit certificates are issued, is valid.

**8. Insurance §724(2)—Clerk of local camp has no power to waive conditions of certificate.**

In view of Rev. St. 1919, § 6418, and constitution and by-laws of fraternal benefit society, clerk of local camp could not waive condition of certificate that false answer by insured as to existence of disease and consultation with physician for five years preceding application would avoid certificate.

**9. Insurance §688—Benefit society, avoiding certificate for false answer, need not tender back premiums paid.**

By virtue of Rev. St. 1919, § 6401, fraternal beneficiary associations are exempt from provision of section 6145 of the general insurance statute, requiring a deposit of premiums paid as a prerequisite to defending on misrepresentations.

10. Evidence  $\Leftrightarrow$  354(1)—Where testimony at former trial introduced books of accounts of witness not admissible.

Where physician's testimony relating to treatment of insured for disease was read in a subsequent trial in behalf of insured to show breach of warranty, it was not error to exclude what book account of physician would show in reference to treating insured.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Dulcie Cromeens against the Sovereign Camp, Woodmen of the World. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

N. C. Hawkins, of Caruthersville, for appellant.

Corbett & Stiles, of Caruthersville, for respondent.

BRADLEY, J. Plaintiff, the widow of J. Roy Cromeens, deceased, sued to recover upon a policy issued by defendant to her husband, in which policy plaintiff was named as the beneficiary. The issues were submitted to a jury, and resulted in a verdict and judgment for plaintiff for the amount of the policy, and defendant appealed.

This cause was previously in this court, the former opinion being reported in *Cromeens v. W. O. W.*, 224 S. W. 15. We remanded the cause when here before because of the exclusion of certain evidence offered by defendant. Insured was a member of the local camp at Caruthersville, Mo., and had been since 1908. The policy or certificate originally issued was in the sum of \$1,000, and insured's mother was named therein as beneficiary. Insured married September 8, 1911, and thereafter on August 17, 1915, made application to defendant for an additional certificate of insurance in the sum of \$1,000, designating his wife, the plaintiff, as beneficiary. Defendant approved the application. The original certificate was surrendered, and a new one issued August 23, 1915, but not delivered until October 5, 1915. In the new certificate the mother was named beneficiary for the original \$1,000 certificate, and plaintiff was named beneficiary for the additional \$1,000. Insured died on December 21, 1918, while in good standing. Proofs of death were made, and defendant paid the \$1,000 to the mother the amount of the old certificate, but refused to pay plaintiff on the new certificate. The defense is alleged misrepresentations. Defendant avers in effect that the insured had or had had gonorrhea, syphilis, tuberculosis, and pneumonia at the time of the application for the increase, and that he had been under the care of a physician within the five years prior. In the application and medical examination insured was asked if he had had any of these

diseases, and if he had consulted or been treated by a physician for any disease or injury mentioned in the application during the past five years. Insured answered no to all these questions. The reply was a general denial and a plea in the nature of waiver.

Defendant assigns error: (1) In refusing its request for a directed verdict; (2) in giving and refusing instructions; (3) in the admission and exclusion of evidence; (4) in permitting plaintiff to amend her reply after the evidence was all in; and (5) in certain remarks of the court during the progress of the trial.

1. Plaintiff introduced the certificate sued on, together with the application and medical examination for the increase, and showed that insured died while in good standing as a member of defendant society. Plaintiff then testified that she was the beneficiary in the certificate sued on, and rested. Defendant introduced in evidence the record of the local camp of which insured was a member to show that insured was sick in January, 1915. This record shows that on January 7, 1915, the local camp took up a collection, and collected \$7.50 "for the purpose of hiring some one to wait on sovereign Cromeens." On January 21, 1915, the local camp record discloses that \$5 was paid "for sovereign Roy Cromeens to man sitting up." J. L. Daniels, who was consul commander of the camp during 1915, testified:

That he went to see insured "while he was sick out there—that was during this time, during the time mentioned in these records. He was in bed sick. I don't remember that he told me what was the matter with him. There was no doctor there at that time. He said he had just come back from some place near Springfield, Mt. Vernon, I believe, and was afraid he had consumption. I don't know that he said that he had it."

On cross-examination this witness stated:

That he couldn't swear about the dates of the entries on the camp record, except from the entries on the book. "I was present, and I see my name on it where I signed it. Threlkeld, or some such name, wrote it. It was my duty to see that it was kept, but it was kept by the clerk."

Clarence Meeks, a member of the local camp, testified:

That he saw insured "during the time he was sick, out at his mother's."

Witness was shown the dates on the local camp record, and was asked if it was during that time that he saw insured sick, and answered:

That he couldn't remember whether it was those dates or not. "I remember we taken up a little collection to hire a nurse to kind of look after him. I was present when they made up that money. I don't know whether it

was that night. I went to see him once or twice. I couldn't say how long he was sick. I think it was several days. I would probably stay an hour and a half. There had been a doctor they said. There was no nurse at that time."

Defendant called Dr. Hudgings, who examined insured for the increase. He testified:

That he went through the regular order of examination; that he did not examine for gonorrhea or syphilis. "The examination I gave would not indicate whether or not he had had gonorrhea, not unless there were external symptoms of it. I didn't give him the Wasserman test. I simply took his statement for that fact that he had not—he said he had not."

Dr. Faris testified:

That he had a talk with insured concerning gonorrhea about December 1912, and that insured said that he had had gonorrhea, and had spent lots of money trying to get rid of it. "Q. Did he say what doctors treated him for it? A. If I remember correctly it was either Dr. Lutten or Dr. Hendrix. I am not sure—probably both. I made no examination of him."

Dr. Lutten testified from his record:

That he treated insured on February 26, 29, March 1 and 9, 1912; that he examined him for gonorrhea, and that he had gonorrhea.

"Q. Did he have any talk with you about syphilis—tell you anything about having syphilis prior to August 17, 1915. A. Yes, sir; he told me he thought he had syphilis—he had been subjected to it—and talked to me about it and the treatment. I treated him for syphilis. I have no record of the time, and I don't remember the date. It was prior to the time he got married. Q. What treatment did you give him for syphilis? A. Gave him mercury—what we call '6-0-6'; gave him injections—the way we treat syphilis. '6-0-6' is an injection you shoot into the vein. It is a syphilis treatment. I am not very clear whether I examined him or not for syphilis. He told me he thought he had it, and asked to be doctored for it. He bought the '6-0-6' and brought it to me to be injected; that's my recollection. Just before he got married he came to me and wanted to know if we thought he was well, and I told him I didn't know; couldn't tell; that he was taking big chances in getting married. Seems like it was just prior to his marriage. He was contemplating marriage. I had given him the '6-0-6' prior to that. He consulted with Dr. Hendrix and me both."

This witness stated that he did not give insured the Wasserman test. "That is not the only sure way of telling whether he had syphilis or not." This witness further testified that he did a good deal of family practice for the insured; that he was out with Dr. Conrad to see insured when he (insured) was living with his mother near Sherman Rice's but did not remember date; that insured had pneumonia then.

Dr. Conrad's evidence given at the former trial was introduced. He testified:

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That he treated insured for pneumonia, but did not have his book present and could not fix the date; that he thought it was prior to August 23, 1915; that he treated insured in January, but was not sure of the year. "Q. State whether or not it was in January, 1915. A. It was in January, but I am not real sure what year it was. I recall I showed you the record one day as a witness; I don't know whether that is a copy or the original. I can't tell you what year it was. I use one book a year, and when that is gone I use another book; never put down the date and never keep these books over a year or two."

Plaintiff was recalled, and testified in rebuttal that she lived continuously with insured as his wife from the date of the marriage on September 8, 1911, until his death on December 21, 1918, and cohabited as man and wife, and that insured did not have gonorrhea or syphilis; and that she contracted no such disease from him; that a child was born of the marriage October 13, 1912; that insured left for Colorado in the spring of 1918 on account of having tuberculosis. She testified also that it was in the spring of 1918 when insured had pneumonia. In addition to this evidence the medical examination introduced tended to contradict the evidence of defendant as to insured having gonorrhea or syphilis. We do not deem it necessary to set out the examination in full. It, together with the evidence of plaintiff, made the controverted issues questions of fact for the jury.

[1, 2] There is no substantial evidence that insured had tuberculosis prior to taking out the additional insurance in August, 1915, or that he was not in good health when the certificate was delivered. The question is: Did the insured give false answers to the inquiry in the medical examination relating to gonorrhea, syphilis, and pneumonia, and as to when he consulted or was treated by a physician? Defendant's evidence tends to show that insured had had gonorrhea prior to his examination on August 17, 1915, and, while not so strong, there is some evidence tending to show that he also had syphilis prior to that date. On the other hand is the insured's answers in the medical examination, and the physician's private report and also the evidence of the plaintiff, who was in a position to have some knowledge of the subject. She testified that insured did not have gonorrhea or syphilis while she lived with him, and that she contracted no such disease from him. There was no test made which one physician said was necessary in order to know to a certainty. Dr. Lutten treated insured for syphilis, but he was not certain that he ever examined for syphilis. On the question as to whether insured had pneumonia in 1915 prior to the examination for the increase in the certificate the evidence is also in conflict. The evidence of the local camp members, and the

local camp record, tends to show insured was sick in January, 1915, and the evidence of Dr. Conrad and Dr. Luten, who accompanied Dr. Conrad on one trip, tends to show that insured had pneumonia in 1915 prior to August 17th. But on the other hand plaintiff testified that insured had the pneumonia in 1916. This was after the increased certificate was issued. Unless insured consulted and was treated by a physician at the time defendant claims he had pneumonia in 1915, then there is no false answer as to consulting or being treated by a physician in the five years prior to August 17, 1915. It is not our province to weigh the evidence; that was the province of the jury. Defendant's request for a directed verdict was properly refused.

[3] 2. At plaintiff's request the court gave three instructions as follows:

"The court instructs the jury that if you find and believe from the evidence in this case that defendant issued and delivered to one J. Roy Cromeens the beneficiary certificate or policy of life insurance offered in evidence, and that the plaintiff, Dulcie Cromeens, is the beneficiary therein, and that the assessments thereon were fully paid up at the time of the death of said J. Roy Cromeens, if you find he is dead; and further find and believe from the evidence that said J. Roy Cromeens fully complied with all the requirements of said certificate, required therein to be performed by him, and that he made no misrepresentation as to the condition of his health, or as to any other matter in his application for said certificate or policy of insurance, *in order to obtain the same* (italics ours), and that he was in good health at the time the same was delivered to him; and further find and believe from the evidence that said J. Roy Cromeens died more than two years after the date of said certificate, or policy of insurance, and that the plaintiff, Dulcie Cromeens, has furnished to the defendant all the proofs of death of said J. Roy Cromeens, required by defendant, and surrendered to the defendant said certificate or policy of insurance—if you so find, you will find the issues for the plaintiff in the sum of \$1,000, the amount of said certificate or policy.

"The jury are further instructed that the defendant pleads as a defense in this cause that J. Roy Cromeens *in order to obtain* (italics ours) the certificate of insurance offered in evidence misrepresented the state and condition of his health at and prior to the time of the making of his application for said insurance, and that he misrepresented the condition of his health at the time the policy was delivered to him, and misrepresented as to his having been attended and consulted by a physician within five years next before the making of said application, and in this connection you are instructed that the burden of proving such misrepresentations is upon the defendant, to prove the same by the greater weight or the preponderance of the evidence in this cause.

"The court instructs the jury that, even though you should find and believe from the evidence that the insured, J. Roy Cromeens, misrepresented the condition of his health, and made misrepresentations as to his having had

gonorrhea or syphilis, or any other disease, and misrepresented as to his having been treated, attended, or consulted by a physician within five years next; before the making of his application for the insurance, policy, or certificate mentioned in the evidence, and that any or all of said misrepresentations were made by the said J. Roy Cromeens at the time and in his application for said insurance, yet if you further find and believe from the evidence that the defendant, with knowledge of the facts that said representations had been made by the said J. Roy Cromeens, continued to accept from the said J. Roy Cromeens the payment of the premiums or assessments on said certificate or policy of insurance, after the defendant had knowledge of the fact that said representations had been made by the said J. Roy Cromeens, if you so find, you will find the issues in this case for the plaintiff."

[4] Defendant challenged the italicized portions of the first and second instructions. We think the point is well taken. The purpose of the misrepresentations, if any, is not of consequence. If the misrepresentations were made, then plaintiff cannot recover, and it makes no difference for what purpose they were made. A clause in the application for the certificate provides that:

"I hereby certify, agree and warrant that all of the statements, representations and answers in this application, consisting of two pages, as aforesaid, are full, complete, and true whether written by my own hand or not; and I agree that any untrue statements or answers made by me in this application or to the examining physician, or any concealment of facts in this application or to the examining physician intentional or otherwise, or my being suspended or expelled from or voluntarily severing my connection with the order in any of its jurisdictions, or if I fail to comply with the laws, rules and usages of the order, now in force or hereafter adopted, my beneficiary certificate shall become null and void, and all the rights of any person or persons thereunder shall be forfeited."

If insured, gave false answers to questions in the medical examination such would avoid the certificate or policy sued on. *Kribs v. United Order of Foresters*, 191 Mo. App. 524, 177 S. W. 766. Representations made by an applicant for membership in a fraternal beneficiary society are, in this state, considered as warranties, and when false avoid the policy. *Valleroy v. Knights of Columbus*, 135 Mo. App. 574, 116 S. W. 1130; *Hoagland v. Modern Woodmen*, 157 Mo. App. 15, 137 S. W. 900.

[5] Plaintiff contends that since defendant pleaded that insured made false answers for the purpose of obtaining the insurance the instruction is proper. It was perhaps unnecessary in this cause for defendant to so plead, but by doing so it did not waive any of its rights under the law. To hold that because defendant pleaded that the alleged false answers were given for the purpose of obtaining the insurance would justify the

challenged portion of the instruction would, in effect, change the entire character of the insurance certificate sued on. There is no support for such holding only on the theory that by so pleading defendant waived its right to invoke the law applicable to fraternal beneficiary societies. One of the essential elements of waiver is *intention*, and that element is wholly absent here. To the contrary every act of the defendant conclusively shows that it had no intention by so pleading to waive any of its rights. Nor can it be said that the italicized portion of the first instruction is harmless. In fraternal policies the insured may give answers touching the condition of his health, etc., in perfect faith, and ignorant of their falsity, yet if it turns out that he was in error, and the policy provides, as here, that such will avoid the policy, then the policy is void. We think the italicized portion of the first instruction should have been eliminated. That wording would mislead the jury, and tend to deprive defendant of the laws applicable to it. What we have said concerning the first instruction is equally applicable to the second so far as concerns the challenged portion, and it is therefore unnecessary to discuss the second instruction separately. This error appeared in these instructions when the cause was here before, but no point was made in the respect here made, and the matter was not called to our attention.

[8-3] The third instruction is bottomed upon waiver. Plaintiff contends that one Robertson, who was clerk of the local camp when insured's certificate was increased, took the application for the increase, and knew all the facts, and that subsequent clerks were cognizant of all the facts, and that notwithstanding this knowledge on the part of the local camp, said camp through its clerk continued to collect dues from the insured, and send said dues to the head camp, and for this reason defendant cannot rely on the alleged false warranties. While it appears that the clerk took the application and sent it in, there is nothing to show that he had any knowledge concerning the information contained in the medical examination. He may have sent in the medical examination along with the other papers pertaining to the application, but he certainly would not be expected to acquaint himself with the information contained therein. There is nothing here to show that the local camp had any information concerning insured's health, except that the local record shows that insured was sick in January, 1915. But how could the local officers be expected to know that in the medical examination of August 17, 1915, insured made false answers to questions which if answered correctly would have disclosed this sickness, if insured was in fact sick at the time? Insured may have had pneumonia in January, 1915, and

may have been treated by a physician for pneumonia at that time, and might have given this information correctly in his medical examination, and yet received the policy. The fact that insured may have had gonorrhea, syphilis, or pneumonia, or that a physician may have treated him for some disease mentioned in the five-year period, does not prevent a policy from issuing; but if the insured made false warranties concerning matters inquired about, then the false warranty is what avoids the policy. The issue of the alleged false representation or warranty in the case here is established by proof that insured had had gonorrhea, syphilis, or pneumonia, or had consulted or been treated by a physician in the five-year period. There is nothing to show that the local officers had information about anything that would tend to establish waiver, and it was error to submit that issue. Plaintiff injected into the waiver theory the fact that the local camp through its clerk, with knowledge that insured was in Colorado in 1918 presumably because he (insured) had tuberculosis, continued to accept dues from insured. There is no evidence that insured had tuberculosis in August, 1915, and certainly defendant did not waive its right to plead false representations merely because the local camp, clerk, or other local officer *understood* that insured was in Colorado because of tuberculosis some three years after the policy was delivered, when there is no evidence that insured had tuberculosis when the certificate for the increase was issued and delivered. What we have said thus far on the question of waiver is on the assumption that the local officers might waive if the facts supported waiver. Not only are there no facts to support waiver, but the local officers had no authority to waive, and could not waive in the manner contended for here. Defendant offered in evidence section 69 of its constitution and by-laws as follows:

"No officer, employee or agent of the Sovereign Camp, or of any camp, has the power, right or authority to waive any of the conditions upon which benefit certificates are issued, or to change, vary, or waive any of the provisions of this constitution or these laws, nor shall any custom on the part of any camp or any number of camps—with or without the knowledge of any sovereign officer—have the effect of changing, modifying, waiving or foregoing such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the constitution and laws then in force or thereafter enacted."

By the terms of the policy this by-law was a part of the contract. This is a valid by-law, and has been upheld a great number of times in this state. *Brittenham v. W. O. W.*, 180 Mo. App. 523, 167 S. W. 587; *Hubbard v. Modern Brotherhood*, 193 S. W. 911; section

6418, R. S. 1919. In all the cases, at least since the enactment of 1911 (Laws 1911, p. 292, § 22), now section 6418, supra, where such waiver as urged here has been upheld, knowledge in some manner was attributed to the head camp or organization. In the case at bar there is no evidence tending to show that the head camp had any information, or chance to have information, of any fact relied upon by plaintiff to constitute waiver.

[9] Plaintiff in her reply pleaded that defendant had waived its right to plead misrepresentations for the reason that it had failed to tender back the premiums or assessments received from the insured. Plaintiff, however, did not submit this point in her instructions. The Supreme Court in a very recent case (*State ex rel. Brotherhood of American Yeomen v. Reynolds et al.*, 229 S. W. 1057) held that by virtue of section 6401, R. S. 1919, fraternal beneficiary associations are exempt from the provisions of section 6145, R. S. 1919, of the general insurance statute, requiring a deposit of the premiums paid as a prerequisite to defending on misrepresentations, and quashed the opinion by the St. Louis Court of Appeals in *Wilson v. Brotherhood of American Yeomen*, 223 S. W. 992.

[10] 3. The evidence admitted of which meritorious complaint is made pertained princ-

pally to the issue of waiver, and since we have disposed of that question, it is not necessary to take it up here. The evidence excluded related to what Dr. Conrad's book would show with reference to when he treated insured. Dr. Conrad was called away just prior to the trial, and defendant read the evidence of this witness as given at the first trial. Defendant then sought to show what Dr. Conrad's book account would show with reference to treating insured in January, 1915. Objection was made and sustained. There was no error in this ruling.

4. The fourth assignment is based upon the permission given plaintiff to amend her reply and specifically plead waiver. This question in effect is disposed of, supra, under the disposition of the question of waiver submitted in the third instruction; hence we could and would decide nothing by considering the assignment based on the permission of the amendment pleading waiver. Waiver is not an issue, and cannot be under the facts here.

5. We find no remarks of the court that would tend to prejudice defendant. The judgment below, for the errors noted, should be reversed, and the cause remanded; and it is so ordered.

COX, P. J., and FARRINGTON, J., concur.



**PATTON v. AMERICAN HOME LIFE INS. CO. (No. 9655.)**

(Court of Civil Appeals of Texas. Fort Worth.  
June 4, 1921. Rehearing Denied  
July 2, 1921.)

**1. Monopolies §20—Statutes held not contravened by insurance company selling its properties to another company.**

For a life insurance company, after determining to dissolve, to sell its properties to another such company, with provision that the other should underwrite its policies, does not contravene Rev. St. arts. 7796, 7797, as to trusts and monopolies; it not tending to prevent or lessen competition.

**2. Contracts §138(2) — Prohibited contract when executed by voluntary act of parties confers rights.**

Even if the contract whereby intervenor acquired the note and properties of plaintiff were illegal as contravening the statute against monopolies, so that it could not be enforced in court, yet, it having been executed by voluntary act of the parties, its illegality would be no defense to the maker of the note when sued on the note by intervenor.

**3. Pleading §35—Allegation of place of incorporation of intervenor held immaterial and surplusage.**

Where, in the original petition in intervention seeking recovery on defendant's note, intervenor was described as a Missouri corporation and in the amended petition as a Texas corporation, and the answer to the amended petition alleged intervenor was a Missouri corporation, and on oral argument intervenor's counsel stated that the allegation in the amended petition was an inadvertence, and that there was only one intervenor and it a Missouri corporation, the allegation as to place of incorporation was surplusage and immaterial, and unavailing in support of defendant's contention that the Missouri corporation was not shown to be the owner of the note.

Appeal from District Court, Tarrant County; Ben M. Terrell, Judge.

Action by the American Home Life Insurance Company against Frank Patton. From a judgment in favor of intervenor, the International Life Insurance Company, defendant appeals. Affirmed.

Jas. A. Stephens, of Benjamin, and Ocie Speer, of Fort Worth, for appellant.

Bryan, Stone & Wade, of Fort Worth, for appellee.

BUCK, J. On October 14, 1914, the American Home Life Insurance Company, a Texas corporation, sued Frank Patton, to recover on a note in the principal sum of \$4,375, dated July 1, 1909, and due July 1, 1914, and to foreclose a deed of trust lien on 275.3 acres of land in Knox county. By answer filed November 28, 1914, Frank Patton pleaded a gen-

eral demurrer, a general denial, and specially pleaded that the note was given for stock in the American Home Life Insurance Company, and that said stock was issued to plaintiff for the note, and that said transaction was prohibited by law, and therefore the contract was null and void. Other pleadings were filed by plaintiff and defendant, and on October 11, 1920, defendant alleged that plaintiff had dissolved as a corporation subsequent to the filing of the suit, and hence prayed that the suit be abated, and that he go hence without day. On September 25, 1917, the International Life Insurance Company, alleged to be a Missouri corporation, with a permit to do business in Texas, filed its plea of intervention, and alleged that the plaintiff sold defendant \$6,250 worth of capital stock, and that defendant paid part cash therefor and secured a loan from the plaintiff to pay for \$4,875 of balance, giving a deed of trust on the land described in plaintiff's petition to secure the same. Intervenor further alleged that it was the owner and holder of this note and the lien to secure the same; the plaintiff "having sold, assigned, and delivered said note and deed of trust, together with all of the balance of its said property on the — day of —, 191—." On October 11, 1920, intervenor filed its amended petition, setting up substantially the same fact theretofore pleaded, and further alleged that the collection of the note had been placed in the hands of the attorneys of record here. In this petition intervenor alleged that it was a Texas corporation. In answer to this plea defendant alleged that plaintiff and intervenor had entered into an agreement whereby the plaintiff undertook to sell, transfer, and assign all of its physical properties, or the greater portion thereof, and whereby the intervenor undertook to acquire such properties, for the purpose of preventing and lessening competition between said companies, and that said attempted contract and arrangement was and is, under the laws of Texas, a monopoly, and in violation of the law and was absolutely void, and that plaintiff (intervenor?) acquired no right, title, or interest to the note sued on. Intervenor answered by certain special exceptions, directed to defendant's plea of a monopoly, and further pleaded that, even though the plaintiff had not authority to sell, nor the intervenor to acquire, such property, and such contract was in violation of the laws of the state prohibiting monopolies, said contract had been made and approved by the proper officers of the state, the commissioner of banking and insurance and the Attorney General, and that the title to the note thereby vested in the intervenor, and the defendant could not question the validity of the title.

On October 11, 1920, a trial was had before the court, and the court overruled defend-

ant's plea in abatement and the exceptions contained in defendant's answers, and gave judgment for intervener against defendant in the sum of \$8,317.29, with interest on \$4,375 at the rate of 10 per cent. per annum, and interest on \$3,942.29 at 6 per cent. per annum, with costs of suit and a foreclosure of the deed of trust lien. The court further rendered judgment in defendant's favor against the plaintiff. From this judgment, the defendant has appealed.

The evidence in this case, principally introduced by the defendant, supports the conclusion that the American Home Life Insurance Company was desirous of going out of business and dissolving the corporation before any contract was entered into between it and intervener. On December 23, 1914, at a stockholders' meeting of the American Home Life Insurance Company, a vote was taken in favor of the dissolution of the insurance company, and the officers of the corporation were appointed to settle and wind up the affairs of the company—

"after which the different bids for the business of the American Home Life Insurance Company was [were?] read and explained to the stockholders of this company, and after the amount of such bids was so understood by the said stockholders resolution was duly and legally proposed that the bid of the International Life Insurance Company, of St. Louis, Mo., of \$75,000 for the insurance and business of this company and \$500,000 for the other assets of this company, payable in cash, be accepted, and that all of such insurance and business and assets of this company, of every character, be properly transferred and delivered to said International Life Insurance Company, of St. Louis, Mo., which purchaser should assume all of the liabilities of the American Home Life Insurance Company."

This resolution was passed.

Article 7796 of our Civil Statutes defines a trust as a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them for purposes therein indicated.

Article 7797 provides:

"A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

"(1) When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

"(2) Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished direct-

ly or through the instrumentality of trustees or otherwise."

[1] If plaintiff below had determined to dissolve, it certainly had the right to do so under the law, and the sale, under the circumstances, of its properties could not tend to prevent or lessen competition. It was right and proper for it to take care of its policy holders, and the provision in the contract between plaintiff and intervener that the latter would underwrite the former's policies could not in any way contravene the provisions of articles 7796 and 7797 of the statute. We think, under this view of the case, the judgment must be affirmed.

[2] But even though the contract by which intervener acquired the note and other properties of the plaintiff was illegal, it would not follow that intervener would be precluded from recovering on the note. Contracts which are illegal because prohibited by law are void, in that they are incapable of enforcement in courts of justice and will not support a remedy, and in that no legal obligation is incurred by either party; but they are not void in the sense that they do not confer legal rights, since they can be executed by voluntary acts of the parties, or through some means or agency other than the courts, and, when so executed, they may confer actual and irrevocable rights upon the parties. *Hall v. Edwards* (Com. App.) 222 S. W. 167; *California Life Ins. Co. v. Kring*, 208 S. W. 372; *Wegner v. Biering*, 65 Tex. 506. Upon this view of the case, the trial court's judgment must be affirmed. Intervener not seeking an enforcement of the contract alleged to be illegal, and not invoking it to sustain its cause of action here, such illegality would be no defense. 13 *Corpus Juris*, p. 511, § 467; *Harriman v. Northern Security Co.*, 197 U. S. 297, 25 Sup. Ct. 493, 49 L. Ed. 763; *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. Therefore we overrule the first and second assignments of error.

[3] As has been heretofore noted, intervener was alleged in its original petition to be a Missouri corporation, but in its amended petition it was alleged to be a Texas corporation. Defendant, on the same day intervener filed its amended petition, filed his amended answer, in which he alleged that the intervener was a Missouri corporation. On oral argument, counsel for intervener stated that the allegation in the amended petition to the effect that intervener was a Texas corporation was a mistake and an inadvertence, and that in truth and in fact there was only one intervener seeking to recover, and it was a Missouri corporation. We think the allegation as to the place of the incorporation was immaterial and mere surplusage, and that defendant's contention that the Missouri cor-

poration is not shown to be the owner of the note must be overruled. *Houston Waterworks v. Kennedy*, 70 Tex. 233, 8 S. W. 36; *Sands v. Marquardt & Sons*, 113 Mo. App. 490, 87 S. W. 1011; *Brunswick-Balke-Collender v. Kraus*, 132 Mo. App. 328, 112 S. W. 20. Therefore we overrule appellant's third, fourth, fifth and sixth assignments of error.

Judgment of the trial court is affirmed.

**TURNER et al. v. McFARLAND et al.**  
(No. 9563.)

(Court of Civil Appeals of Texas. Fort Worth.  
April 16, 1921. Rehearing Denied  
May 14, 1921.)

1. Process  $\S$  138—Service on unknown owners cited by publication in proceedings to foreclose street improvement lien held insufficient.

Where sheriff's return in proceedings to foreclose street improvement lien consisted of his signature to blank form, which failed to show the newspaper or the county or state in which citation was published, or dates of publication, and where the citation on which the return was made was only the skeleton of a citation, and omitted any statement of the cause of action, or other recitals required to be shown in such a citation, and where the return stated that a copy of the publication was made a part thereof and that it was published in a particular paper, but failed to state in what county or state the publication was made, the service was insufficient to confer jurisdiction on unknown owners cited by publication.

2. Judgment  $\S$  461(1)—Presumptions in favor of validity of judgment do not control in a suit directly attacking judgment.

The usual presumptions indulged in favor of the validity of a judgment in case of collateral attack by a party who was made a party defendant to the former suit do not control in a suit which is a direct attack on the judgment.

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Suit by E. S. Turner and others against J. W. McFarland and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

S. D. Goswick, of Mineral Wells, for appellants.

Ritchie & Ranspot, of Mineral Wells, for appellees.

DUNKLIN, J. E. S. Turner and others, claiming to be the owners of a lot of land situated in the city of Mineral Wells, instituted this suit to set aside a judgment foreclosing a lien on the property, created by reason of certain improvements which were made on the street upon which the lot abutted. The judgment sought to be annulled

was rendered in a suit instituted by J. W. McFarland against the "unknown owners" of the property. McFarland, the plaintiff in that suit, had done the work upon the street, and had fixed a lien upon the property in controversy, in accordance with the requirements of the charter of the city of Mineral Wells, and the validity of which lien and the amount claimed to be due for the street improvements made by him were not questioned in the present suit. An order of sale was issued under the judgment of foreclosure and by virtue of that writ the property was sold to satisfy the judgment, and no question is made as to the regularity of that sale. The amount of the judgment in the foreclosure suit, plus interest, costs, and attorney's fees, aggregated \$93.63, and the sale under the foreclosure was for \$100; George P. Maury being the purchaser.

J. W. McFarland, plaintiff in that suit, and George P. Maury, purchaser of the property, were made defendants in the present suit. This case is a companion to the case of *Turner v. Maury*, reported in 224 S. W. 255. Both suits were predicated upon the same judgment of foreclosure and they involved the same property as now in controversy. The former suit was instituted by George P. Maury, as a purchaser under that foreclosure, in trespass to try title, while the present suit was instituted by the owners of the property prior to the foreclosure, to set aside that judgment of foreclosure. The proof of service in the foreclosure suit which was made in the present suit was the same as that shown in the opinion disposing of the former appeal, referred to above.

[1] That service was insufficient to confer jurisdiction upon the unknown owners, who were cited by publication. The sheriff's return consisted of his signature to a blank form, which failed to show in what newspaper or in what county or state the citation was published, or how often or on what dates the same was published; nor did the certificate of the printer, attached to the copy of citation, stating that the same was published, show in what county or state the publication was made. Furthermore, the citation upon which the sheriff's return was made, and supposedly the original citation, was only the skeleton of a citation and omitted any statement of the cause of action or other recitals required to be shown in a citation of that kind, and, according to the sheriff's return, that was the citation which was published, although the return also contained the statement that a printed copy of the publication was made a part of his return, evidently referring to the copy to which was attached the printer's certificate, stating that it was published in the Index.

but failed to state in what county or state the publication was made.

[2] This suit was a direct and not a collateral attack upon the judgment, and the usual presumptions indulged in favor of the validity of a judgment in case of collateral attack, by a party who was made a party defendant to the former suit, do not control in the present suit. In view of the fact that the service of citation shown above was the only service made in the former suit, upon which the judgment of foreclosure was based, the trial court erred in not vacating that judgment of foreclosure. The statute also requires an affidavit for service of citation by publication as a predicate for the issuance of such process, and one of the allegations in plaintiffs' petition in the present suit was that such affidavit was not filed with the clerk. There was proof tending to sustain that allegation, but there was also proof tending to show the contrary, and this court would not be warranted in concluding that the court erred in overruling that contention. However, as the proof conclusively shows a failure of service of citation, as noted above, and since a compliance with the statutory requirements of service by publication against the unknown owners was necessary to confer jurisdiction to decree the foreclosure, the judgment of foreclosure and sale thereunder were without legal effect.

For the reasons stated, the judgment of the trial court is reversed, and the cause is remanded for further proceedings, not inconsistent with this decision. In this connection we will add that plaintiffs in the present suit made no attack upon the validity of the lien for paving, which lien was foreclosed in the former judgment, and in the absence of such an attack, even though the former judgment is set aside, no reason appears why there should not now be a proper judgment of foreclosure of the same lien and the property ordered sold thereunder, unless the plaintiffs in the present suit shall tender into court the full amount justly due for such paving, and perform any other acts which equity would require of them under any circumstances which may be shown.

Reversed and remanded.

#### KENDALL et ux. v. WILLIAMS et ux. (No. 8555.)

(Court of Civil Appeals of Texas. Dallas.  
June 18, 1921.)

1. Habeas corpus  $\S$  113(12)—Finding of lower court as to proper custody of child is conclusive, unless against great preponderance of evidence.

The finding of the lower court as to whose custody of a little girl will be most beneficial

to her is not reviewable, unless contrary to the great preponderance of the evidence.

2. Habeas corpus  $\S$  99(4)—Church-going devoutness not determinative as to right to custody of child.

Where all the applicants for the custody of a little girl were of high character and able to give her a good home, that one family of applicants might be more devout, as shown by church going and zeal in church activities, than the family of the respondent where the little girl was living, was not conclusive as to their right to custody of the child; there being no evidence that the girl's character would not properly develop with the family where she was.

Appeal, from District Court, Rockwall County; Joel R. Bond, Judge.

Habeas corpus by H. D. Kendall and wife against Wester Williams and wife, and by D. H. Blacketer against the same defendants, which were consolidated. From judgment for defendants, plaintiffs appeal. Affirmed.

H. M. Wade, of Rockwall, for appellants.

E. D. Foree, of Rockwall, and Claude M. McCallum, of Dallas, for appellees.

HAMILTON, J. This suit involves three conflicting claims of right to the custody of Marie Wrye, a little orphan girl, in the custody of appellees. Appellants, Kendall and wife, in pursuit of their desire for custody of the child, instituted habeas corpus proceedings in the district court of Panola county against appellees. The venue of this proceeding was transferred to the district court of Rockwall county. Then appellant D. H. Blacketer filed application for a writ of habeas corpus to take the child from appellees. These causes were consolidated at the request of all parties, after appellees had answered, contesting and denying the right of the court to take from them the custody of the child upon either petition. A hearing was had by the court in vacation. Custody of the minor was decreed to appellees, and all the appellants have appealed.

D. H. Blacketer is Marie Wrye's grandfather; Mrs. H. D. Kendall is her distant cousin, and Mrs. Wester Williams is her aunt. She was about eight years old at the time of the trial. Her father died when she was four years old and thereafter her mother married a man named Cain. With her mother and this stepfather she lived until they died in November, 1918, only one day intervening between their deaths. They left four other surviving children. Immediately after the death of Cain and that of his wife, the brothers of Mrs. Cain, who were named Blacketer, without consulting D. H. Blacketer, who was their father, as well as the grandfather of Marie Wrye and her brothers and sisters, unceremoniously took

charge of the five parentless children, and made distribution of them among their relatives.

Marie was thus given into the custody of her uncle, John Blacketer. Within a few days subsequent to this disposition of Marie to John Blacketer, his wife received a letter from appellee Mrs. Wester Williams, stating that she would like to have one of the orphan boys. Mrs. Blacketer replied, advising Mrs. Williams that she had Marie, and that since she and her husband had a large family Mrs. Williams could come and take Marie. The child soon thereafter was delivered into the care and custody of Mr. and Mrs. Wester Williams, and had been in their home continuously for about 19 months when these proceedings were instituted.

During all this time she had been treated as parents in similar circumstances should treat their own child. Her reasonable wants had been supplied. Her surroundings were wholesome. She regularly attended school, and every advantage conferred upon Lavina Williams, appellees' natural daughter, was also given Marie. No distinction was made between them. Appellees had formed a deep-seated devotion to Marie. Mr. Williams seems to have bestowed upon her the affection which a true father cherishes for his own daughter, and Mrs. Williams gave her the gentle love of a good mother. Their affection she reciprocated, giving them her love in return for theirs. Although by no means wealthy, or as well to do as appellants, they are removed from the miseries and dangers of poverty, and are able to supply the necessities of this ward and bestow upon her the comforts and attainments available to the daughters of the average farmer.

Happily the proof in the case establishes beyond question, and it is mutually conceded by the parties, that all the appellants and appellees are people of good character, and that the surroundings and influences of all their homes are wholesome, so that the situation for the little girl was never perilous, no matter into the hands of which of the contenders the decree might have cast her.

[1] The controlling question is, In whose of the contending parties' custody will the interests of the child probably be best secured and promoted? As a matter of law, her custody must be reposed where her comfort, her happiness, and her highest interests most surely will be conserved. But the question as to whose custody of her will effectuate these requirements of law, and thus be most beneficial to her, is one of fact, which we are without jurisdiction to determine. *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Kirby v. Morris*, 198 S. W. 995; *Radicke v. Radicke*, 206 S. W. 964; *Dugan v. Smith*, 199 S. W. 655; *Clayton v. Kerbey*, 226 S. W. 1117. That function, under the circumstances,

belongs to the trial court. We cannot disturb the findings of fact made by the trial court unless they should be so far contrary to the great preponderance of the evidence as to reveal that truth and justice had not been attained in the judgment rendered.

The trial court has found that the best interests of the child will be served by leaving her in the care and custody of appellees. This finding is supported by substantial evidence in the record. It is unnecessary to set it out. Sufficient it is to say that such evidence forecloses the right of appellants to invoke the judgment of this court upon the facts. A finding that her best interests would be served in the custody of any of appellants would have been a finality also, because there was abundant evidence from which such finding could have been deduced. In such circumstances, it is so well settled that the findings of the lower court will not be disturbed on appeal that the citation of precedent authority is not required.

[2] The proof discloses that each and all of the appellants are devout Christians, while Wester Williams is not a member of the church, although his wife belongs to a church. It also appears that appellees attend religious services only at infrequent times, but that they send Marie to Sunday school for religious instruction. On the other hand, the proof, particularly as to Kendall and Mrs. Kendall, is that they give zealous adherence to all the church activities which distinguish a devoutly religious life. From these circumstances appellants argue that the findings of the trial court are contrary to the proof, and that uncontradicted proof of the extremely religious atmosphere of appellant Kendall's home establishes, conceding other things to be equal, that the decree ought to have awarded the little child to his custody in order that there might be instilled into her, day by day, during her childhood, the teachings of that religious faith by which appellants' way through life is lighted and guided, to the end that her development into Christian womanhood may be assured. The sentiments embodied in appellants' argument in support of this view are well calculated to weigh heavily, as mere religious sentiments, with a tribunal all of whose members, under some form or other, embrace and give allegiance to the faith comprehending the various creeds denominated as Christian. But whatever religious allegiance or belief dominates the individual hearts of those who for a time are called to administer the judiciary, their allegiance to judicial functions requires that their judgments conform alone to the rules of law and fundamental justice. The spirit of our government, which itself is the handiwork of Christians, demands as much. The basic principles of upright, honorable, and wholesome living govern the home of those into whose keeping this father-

less and motherless child has been committed. Those who embrace the Christian faith as well, it seems, as those who do not, have come into court, and under the solemnity of oath have declared that appellees are good people, and that their lives always have been so ordered as to command universal respect and confidence. These facts are unchallenged. The highest standards required by law have been applied and complied with. The test of comparative extent of devoutness cannot be substituted for those standards. A court of law is not a place in which to ascertain and declare religious orthodoxy, and derive from it the rights and welfare of people in the ordinary relations of life. Here a test of an exclusively religious nature cannot be entertained.

There is no proof in the record to support the apprehension that Marie Wrye's character will not be molded along proper lines by appellees, that she may not be happy in her situation, or that there she may not body forth into the noblest type of womanhood—such as her foster mother is—thereby attaining her own highest interests as well as those of society and the state.

The judgment is affirmed.

#### GOOD v. ADRIAN et al. (No. 9650.)

(Court of Civil Appeals of Texas. Fort Worth. May 21, 1921.)

**Venue**  $\Rightarrow$  22(1)—In suit on joint and several contract defendants may be sued in the county where any of them reside.

In suit against obligors in a joint and several contract to reimburse plaintiff for his expenses in securing settlement of an estate in which defendants were interested and one who had assumed the obligations of one obligor, suit may be brought in the county in which any of the defendants reside, since all the defendants have a legal interest in subject-matter of the suit, and should be made parties.

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Action by Billy Good against Gwendoline Adrian and others. From an order to transfer the cause to another county, plaintiff appeals. Reversed and remanded.

Bryan, Stone & Wade, of Fort Worth, for appellant.

H. S. Lattimore, of Fort Worth, for appellees.

BUCK, J. Plaintiff, Billy Good, filed suit in the district court of Tarrant county against Gwendoline Adrian and her husband, alleged to reside in Tarrant county, and Dessie Williams and her husband, Nep Williams, L. A. Ledbetter, and W. L. Ledbetter, alleged to reside in Hardeman county. The

plaintiff alleged that the defendants named and other parties were heirs at law of L. J. Ledbetter and his two wives; that Ledbetter and his said wives were all dead prior to April 13, 1917, having died intestate, leaving a community estate of said two marriages, which was located in Chillicothe, Hardeman county, Tex.; that no administration was ever had on said estate, and that the estate belonged to said heirs; that on said date the defendants, in conjunction with other heirs named, executed a power of attorney, by the terms of which they authorized the plaintiff as attorney in fact to settle up the estate and to divide it among the heirs; that the defendants and other heirs agreed that each would pay his pro rata part of the reasonable expenses and attorney's fees incurred in the settlement; that, acting under the said power of attorney and in behalf of said heirs at law, the plaintiff incurred and paid and became liable to pay certain items of expenses, including railroad fare, hotel bills, attorney's fees, etc., aggregating \$1,121.41, and that the estate was partitioned among the heirs; that all of the heirs except W. L. Ledbetter signed the power of attorney, and that subsequently and pending the suit for partition, Estella Ledbetter Truitt and husband sold and conveyed their interest in said estate to the defendant W. L. Ledbetter, who, as a part of the consideration for the purchase of said interest, assumed the payment of Mrs. Truitt's pro rata part of the expenses incurred. In the alternative, plaintiff alleged that if W. L. Ledbetter did not assume the payment of Mrs. Truitt's pro rata part of the expenses, he purchased said interest in said estate with full knowledge and notice that said power of attorney had been so executed, and that said interest was charged with a lien in favor of said Good for the expenses incurred by him under said power of attorney.

Defendants Dessie Williams and husband and L. A. Ledbetter and W. L. Ledbetter filed their plea of privilege to be sued in Hardeman county. The plaintiff filed a controverting affidavit, stating that, inasmuch as the defendant Gwendoline Adrian and husband resided in Tarrant county, and that the suit was brought for the purpose of recovering a judgment against all of the defendants on the joint and several obligations described in plaintiff's petition, executed by all of the heirs except W. L. Ledbetter, and, as alleged, W. L. Ledbetter had assumed the payment of the pro rata part of Mrs. Truitt, the venue was properly laid in Tarrant county in a suit against all the defendants.

Evidence was introduced showing Mrs. Adrian and husband lived in Tarrant county, and the other defendants lived in Hardeman county, and that the power of attorney had been executed by the heirs, including the

defendants aforesaid, except W. L. Ledbetter. The court sustained the plea of privilege, and ordered the cause to be transferred to the district court of Hardeman county, and the plaintiff has appealed.

The power of attorney contains the following clause:

"We do further agree that all usual and reasonable expenses of our said attorney in effecting the closing and settlement of said estate, including railroad fare, hotel bills and other expenses, and reasonable attorney fees, together with costs of court, shall be paid by us and deducted from our share and portion of the said estate, pro rata, in the event of nonpayment of the same."

In the case of *Merchants' & Manufacturers' Lloyds' Insurance Exchange v. Southern Trading Co. of Texas*, 205 S. W. 353, which was a suit against the Exchange and a number of persons who were alleged to be individual underwriters of the policy of insurance, this court in an opinion by Chief Justice Conner, said:

"Arising out of such wording of the policies appellants insist that the court erred in not sustaining their plea of misjoinder of parties and causes of action, the contention being that where the liability of each underwriter is fixed at a certain and definite percentage of the loss, and the policy stipulates that the liability of each is separate and distinct from that of any and all other underwriters, it is a misjoinder of parties and causes of action for the plaintiff to join all underwriters in one suit. While it possibly should be held otherwise under the strict rule of the common law, in equity and under our liberal system of pleading and practice, we feel no hesitation in saying that the plea of misjoinder was not well taken. 'The fundamental rule as to parties to suits in equity is that, however numerous they may be, all persons interested in the subject of the suit and its results should be made parties. The reason for the rule is the aim of the court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order perfectly safe to those who have to obey it, and to prevent further litigation.' 16 Cyc. 181. The principle thus announced has been applied in many of our decisions. Thus it is said in *Moore v. Minerva*, 17 Tex. 20, to be 'common in chancery, where several claims under the same title to decree to each one his own particular interest; and our proceeding by petition is analogous to a proceeding in chancery. There is no inconvenience in such rule; it dispenses with a multiplicity of suits, which is a favored object, always to be encouraged by our jurisprudence,' etc. That was a case where a negro woman and her children instituted a suit to establish their freedom, claiming under a deed of manumission to the mother, damages for services being also claimed, and the court said:

"The parties, all claiming their freedom under the same title, might well unite in the action; and, so far as the damages for the deprivation of their liberty is involved, though the

damage would be separate and to each individual according to the proof of the value of their services, there can be a separate judgment. The judgment and decree would be in favor of each for his freedom, and the damages assessed to each."

"We see no reason why the rule thus indicated is not equally applicable here. As will be observed, the defendants in this action all joined by their authorized agents in the execution of the policies of insurance declared upon. They are parties to the policies, all jointly interested in them and all liable thereunder, and even if their liability is but several, and even though in the adjustment of the litigation the court should find it necessary to adjudge damages against each defendant severally to the extent only of the liability incurred by him, the court nevertheless retained jurisdiction over all."

While the judgment in the cited case was reversed by the Supreme Court on other questions involved (229 S. W. 312), yet the Supreme Court in effect held that the plea of misjoinder of the parties was properly overruled by the trial court.

In the case of *Cobb v. Barber*, 92 Tex. 309, 47 S. W. 963, the Supreme Court had before it certified questions from the Court of Civil Appeals for the Dallas District, and held that the maker of a certain promissory note, secured by a chattel mortgage on certain cattle, and other named defendants who it was alleged had converted the cattle to their own use and benefit, were properly sued in one action, and that the plea of privilege of the other defendants to be sued in the county of their residence was properly overruled. The court, in discussing the questions involved, said:

"Our system does not favor the bringing of a multiplicity of suits, and therefore permits all causes of action growing out of the same transaction to be joined, and all interests in the same property or fund to be litigated and the equities of the parties adjusted in the same suit."

See *Skipwith v. Hurt*, 94 Tex. 322, 60 S. W. 423; *San Angelo Cotton Oil Co. v. Mfg. Co.*, 185 S. W. 887; *Buckholts State Bank v. Thallman*, 196 S. W. 687; *Nueces county v. Guesett*, 213 S. W. 725.

*Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751, writ of error refused, was a case in which certain obligors, who had paid the obligation, sued the other obligors on certain instruments for contribution. The defendants pleaded a misjoinder of causes of action and parties. The Galveston Court of Civil Appeals, in overruling the objections raised by the defendants, said:

"Did the common-law system of pleading apply to the case presented by the petition of appellees, the assignments would doubtless be well taken; but that system has never been adopted by the Legislature of this state, and those rules of pleading have been recognized and enforced by our courts to a limited extent only. Our rules of practice are very analogous

to those which obtain in the courts of equity of England and of the United States. The general rule as to the joinder of parties, both in this state and in courts of equity, is that in case of joint interests, joint obligations and contracts, and joint claims, duties, and liabilities, all the joint owners, joint contractors, and others having a community interest in duties, claims, or liabilities, who may be affected by the decree, should be made parties to the suit. The rule is often more succinctly stated thus: 'All persons who have a legal or beneficial interest in the subject-matter of the suit should be made parties, either plaintiffs or defendants.' The subject-matter of this suit is the enforcement of contribution between joint obligors, where some of the obligors have discharged the joint obligation without assistance from the others. The rule that all who are interested in the subject-matter of the suit must be parties has its origin in considerations of justice and convenience for all concerned, and has for its object the prevention of circuity of action and the multiplicity of suits. We are of the opinion that there is no misjoinder of parties in this suit."

See *Jalufka v. Matejek*, 22 Tex. Civ. App. 384, 55 S. W. 395; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015; *Rich v. Parks*, 177 S. W. 184.

We believe the court erred in sustaining the plea of privilege, and, accordingly, the judgment below is reversed, and the cause is remanded.

#### GARNER v. BOWLES et al. (No. 9618.)

(Court of Civil Appeals of Texas. Fort Worth.  
April 23, 1921. Rehearing Denied  
May 21, 1921.)

##### 1. Habeas corpus $\S$ 99(3)—Custody of children determined by their welfare.

The custody of infant children as between their father and their maternal grandmother and aunt, in whose possession the father had placed the children on the death of the children's mother, will be determined according to the best interests and welfare of the children.

##### 2. Habeas corpus $\S$ 85(1)—Facts to be proved to deprive parent of custody of child as against other person to whom child has been committed.

It is not sufficient, to deprive a natural parent of the custody of his child, to merely show that he has promised to give its custody to another, or that he has been guilty of some act or conduct justifying criticism, or that the interests of the child will be as well served by leaving it in the custody of its grandparents or other person to whom it has been committed, but the proof must go further and show the unfitness of the parent as a whole, or his inability to serve the best interests of the child.

##### 3. Habeas corpus $\S$ 99(4)—Father who is a fit person to care for children and is able financially will be given custody.

Where father was better able financially to support infant children than their maternal

grandmother and aunt, into whose possession the father had placed the children on the death of their mother, and where both the father and his second wife were intellectually and morally proper persons to exercise parental duties toward the children, and where the grandmother was 70 years of age and the aunt was working, the court will give the father possession of the children.

Appeal from District Court, of Montague County; C. R. Pearman, Judge.

Application for writ of habeas corpus by R. A. Garner against Mrs. A. R. Bowles and another. Judgment for defendants, and relator appeals. Reversed and rendered.

Homer B. Latham, of Bowlie, and W. O. Davis, of Gainesville, for appellant.

Donald & Donald, and Benson & Benson, all of Bowlie, for appellees.

CONNER, C. J. This proceeding was instituted by R. A. Garner, a resident of the state of Oklahoma, in the district court of Montague county, by an application for a writ of habeas corpus to recover from Mrs. A. R. Bowles and Miss Hella Bowles the custody of his two minor children, Rebecca May and Samuel E. Garner, 9 and 3 years of age, respectively. The writ of habeas corpus was issued as prayed for, upon the return of which a hearing was duly had on June 17, 1920. The court, after having heard the evidence, refused the prayer of the relator, and remanded the custody of the children to the respondents, and the relator has duly appealed.

The only assignments of error presented by appellant are assignments which question the sufficiency of the evidence to sustain the court's judgment. The evidence has been carefully considered, but there is little, if any, conflict in the material facts. Appellant's first wife was Rexie Bowles, a daughter of appellee Mrs. A. R. Bowles and a sister of appellee Hella Bowles. After the marriage, for some time appellant and his wife lived with appellees at the home of Mrs. A. R. Bowles. Appellant was engaged in ordinary labor, at a salary from \$50 to \$70 per month, he contributing to the support of his family. To this marriage were born three children, to wit; Richard A., already in appellant's custody, and Rebecca May, and Samuel E. Rexie Bowles Garner died March 23, 1918, leaving surviving her appellant and the said children. At the time Rebecca May was 6 years of age and Samuel E. was 9 months of age. The evidence tends to show that appellant was then unable to properly care for his children, and in order to have this done they were committed to appellee Mrs. A. R. Bowles, with the statement by appellant that she might keep them as long as she lived. Appellant thereafter removed to Wichita



Falls, Tex., where he was in the employ of one or more parties, and later removed to Oklahoma, where he, together with another party, engaged in business, in which he has accumulated a net interest of \$16,000. Some 9 months after the death of his first wife, appellant married again. His present wife at the time of the marriage was 19 years of age, at the date of the trial 23. She has never had any children of her own but was the oldest of a family of eight children, and assisted in caring for them. Witnesses who knew her testified that she was of good disposition, and gave no account of her life or actions to her discredit. On one or more occasions the little children in controversy visited appellant and his present wife, and witnesses who observed her demeanor testified that she treated them kindly. Mrs. Garner herself testified, among other things, that:

"I desire to take care of these three children of Mr. Garner, and have been willing to do so since I married him. I contemplated doing this at the time I married, and expected to do so. I will treat them as near like a mother as I can. I did not treat the little girl in a cruel manner when she visited us, and did not chastise her, but did speak to her, but not harshly. I would expect them to obey me, if we are given the custody of the children. I am physically able to take care of and look after these children and do the additional work, and I am willing. I worked about 4 years before I married, as I had to make my living."

On the other hand, Mrs. Bowles testified that at the time of the trial she was 63 years of age, was in good health, and she owned her own home, a cow, chickens, and garden; that appellee, her daughter, Hella Bowles, lived with her, and earned \$70 per month, which with the aid of the cow, chickens, and garden enabled them to live comfortably; that she felt able to support the children without the aid of their father; that she was unable to state the exact amount the father of the children had contributed to the support of the children while she had them. She further testified:

"I suppose he done the best he could. Mr. Garner and my daughter came to my house before the little girl was born, and stayed until she was 2 years old. He did not pay any house rent. His wife and all were there for 17 months, but what he actually spent I do not remember. Mr. Garner gave as his reason for wanting the children was that his wife was making him do it, forcing him to do it, and she was making him live in hell. [This Mr. Garner denied.] The little girl and her brother have visited Mr. Garner in his home. They stayed two or three days and came back with never a thing washed. \* \* \* When the little girl was sick I called Doctor Wilson, as I get excited over the children when they get sick. I called her father, and he said he wouldn't come unless something serious happens, and he never called up and asked me how the child was; he never came at all. My daughter, Doctor

Wilson, and I waited on the child for six months, just nothing but skin and bones. \* \* \* Hella and I are in a position to care for the children. We are all members of the church. The little girl is in the third grade at school, and has never been kept out of school and never was tardy. I desire to keep these children because of the relationship. I would give my life for them. I have stayed right at home with them all the time. I never go to the picture show and leave them. I wouldn't leave them to go to the nearest neighbor's house. \* \* \* I have raised five children of my own in Bowie, and am as well qualified to raise them as my own."

Further testimony was to the effect that in addition to the two children now with her she is rearing another grandchild; that her daughter Hella lives with her and contributes to her support. Appellee Hella Bowles testified that she had worked for the telephone company off and on for some 8 years, and contributed to the support of the children, and was able to provide for them in connection with her mother's help; that while Mr. Garner lived in their home from February, 1911, to June, 1913, some 28 months, that she paid half the expenses incurred, and Mr. Garner contributed approximately \$25 per month; that she received from Mr. Garner \$150, for which she offered to give her note, but that he would not let her do so, stating that it was a Christmas present; that she loved the children better than herself; that from February, 1915, to June, 1916, he gave Mrs. Garner \$77, and \$20 after that, and later he sent \$15, \$112, in all; that he was with the telephone company at the time, making \$55 a month. The family consisted of Garner, his wife, and the little girl, in 1911. She further testified:

"I should think Mr. Garner has contributed as much as \$900 in 2 years and 3 months; about \$25 a month. He has sent \$25 a month since last fall; before that he wouldn't send more than \$12.50 sometimes, sometimes more. I could have supported the children without it. He gave me \$25 in cash when I started on a trip to Arkansas; I had forgotten that. He gave the children a little which I put in a savings bank; I have it in the bank for them, \$30."

Other witnesses testified to an acquaintance with Mrs. Bowles and Miss Hella, and stated that they were members of the church, of good character, and that in their opinion the home life of Mrs. Bowles was conducive to the welfare of the children she was raising.

Under this statement of the facts, in our judgment, the court should have granted the prayer of appellant, and awarded to him the custody of his children.

[1] In all such cases the essential fact to be determined is what is to the best interest and welfare of the children, and in the case of *State v. Deaton*, 93 Tex. 243, 54 S. W. 901,

in an opinion by Mr. Justice Brown, then associate justice, it is said that burden of proving that the best interests of a child will be subserved thereby is not upon the parent seeking to recover its custody but, upon the party denying such restoration of the child to the charge of its parent, in the case before us, the testimony, as we read it, furnishes no ground for a criticism of appellant, unless it can be said that his failure to visit Mrs. Bowles during the sickness of the little girl indicated a want of affection on his part. Mrs. Bowles herself testified, however, that he said he would come if it was serious, and she does not testify that then or at any time thereafter she notified appellant that the little girl's sickness was serious. The evidence tends to show that at the time he was working at a distant point for monthly wages, and unless he was apprised of serious sickness on the part of the child it may be well supposed that he could trust Mrs. Bowles to lovingly look after it. Other than this circumstance, neither of the appellees testified to any occasion when appellant was unkind or inattentive to either his deceased wife or the children, nor does the evidence otherwise indicate any want of that natural affection that a father has for his offspring. In the case cited, *State v. Deaton*, it was there made clearly to appear that the child involved in that controversy had been committed by the mother to a distant relation with a promise that it might be kept as their own, and that such relation was in all respects worthy and able to care for the child. The Supreme Court nevertheless held that the trial court should have awarded the custody of the child to its mother. In this connection the court said:

"God, in his wisdom, has placed upon the father and mother the obligation to nurture, educate, protect, and guide their offspring, and has qualified them to discharge those important duties by writing in their hearts sentiments of affection and establishing between them and their children ties which cannot exist between the children and any other persons. Especially is this the case with the mother. Parents cannot divest themselves of the obligation imposed upon them by their Creator, but when they become disqualified for a proper discharge of such duties, civil government has the right, in the interest of the child, to provide for its proper nurture and education.

"When the parent has parted with the possession and control of his or her child and seeks to regain that possession through the courts, it becomes the duty of the court, in a proper case, to protect the child against the evil results that may flow to it from an improper direction through incompetent or disqualified parents. The rule which should guide the court is aptly expressed in the case of *Weir v. Marley*, which we have quoted, and is supported by the case of *State v. Richardson*, 40 New Hampshire, 275, in this language: 'The discretion to be exercised is not an arbitrary one, but, in the absence

of any positive disqualification of the father for the proper discharge of his parental duties, he has, as it seems to us, a paramount right to the custody of his infant child, which no court is at liberty to disregard. And while we are bound also to regard the permanent interests and welfare of the child, it is to be presumed that its interests and welfare will be best promoted by continuing that guardianship which the law has provided, until it is made plainly to appear that the father is no longer worthy of the trust. The breaking of the ties which bind the father and the child can never be justified without the most solid and substantial reasons. Upon the father, the child must mainly depend for support, education, and advancement in life, and as security for this he has the obligation of law, as well as the promptings of that parental affection, which rarely fail to bring into the service of the child the best energies and the most thoughtful care of the father. In any form of proceeding, the sundering of these ties will always be approached by the courts with great caution, and with a deep sense of responsibility. The rule laid down is sustained by the authorities, of which we cite the following: *Richards v. Collins*, 45 N. J. Eq. 286; *Miller v. Wallace*, 76 Ga. 479; *State v. Banks*, 25 Ind. 500; *Rust v. Vanvacter*, 9 West Va. 612; *State v. Libbey*, 44 N. H. 324; *Moore v. Christain*, 56 Miss. 408; 31 Am. Rep. 375; *Chapsky v. Wood*, 28 Kan. 653; *In the Matter of Bernice S. Scarritt*, 76 Mo. 577."

[2] In the case of *State v. Dowdell*, 168 S. W. 2, by the Galveston Court of Civil Appeals, in which a writ of error was refused, it was held that on an application of a father for the custody of his infant child on the death of his wife, as against the child's maternal grandparents, that proof by the child's maternal aunt that the father on two occasions had been intoxicated and on one occasion had punished the child with a switch as large as a woman's finger was insufficient to justify the court in denying him the child's custody. See, also, *Smith v. Moore*, 171 S. W. 823; *Carter v. Lambert*, 214 S. W. 566; *Cardenas v. Barrera*, 216 S. W. 474; *Dunn v. Jackson*, 212 S. W. 959. An examination of these cases will disclose a steady adherence to the principles annunciated by the Supreme Court in the case of *State v. Deaton*, supra, and the three cases last cited will illustrate the conclusion of the courts that it is not sufficient to deprive the natural parent of the custody of his child to merely show that he has promised to give its custody to another, or that he has been guilty of some act or conduct justifying criticism, or that the interest of the child will be as well served by leaving it in the custody of its grandparents, or other person to whom it has been committed. The proof must go further, and show the unfitness of the parent as a whole, or his inability to meet and fulfill the ultimate purpose of the law, to wit, to serve the best interests of the child.

[3] In the light of these authorities, as solemn as may be the determination, we feel unwilling to approve the judgment of the trial court. It is doubtless true that appellees would love and care for the children in question as best they could, but they certainly are not financially as able to do so as the father, and there is no testimony worthy of serious consideration which will justify the conclusion that either appellant or his present wife is intellectually or morally an improper person to exercise all of these duties which by nature is placed on the father, and which by obligation and love for the father, as we must assume, rests upon the stepmother. Or should it later be made to so appear, the courts, in the interest of the children, have yet the power to commit their custody to other proper persons. Appellee Mrs. A. R. Bowles has nearly lived the allotted period of three score and ten years, and has arrived at that age of life when we are apt to be overindulgent, particularly to our grandchildren. The course of life makes it certain that the allwise One has committed to youth the responsibility and joy of giving birth to and rearing children. It is during this period of life that it may be well supposed that they have more of that vigor necessary to restrain and correct infantile delinquencies, and less of that harmful indulgence that is natural during our closing years, and it certainly cannot be said that the natural instinct placed in the breast of man to love and care for his children is less than the natural love and instinct of the grandparent. So that, however worthy Mrs. Bowles may be, and however able during the remaining period of her life to care for appellant's children, we think they should be committed to appellant as his right, and as being equally able to serve their best interests. We think this is particularly true in that by the judgment below appellant was awarded the custody of his oldest boy, and it can but be the desire of a father's heart that his children shall grow up together and love one another as brothers and sisters, a result for their sake also to be desired, and not so probable if they are separated.

Certain testimony introduced suggests a possible personal estrangement between appellant on the one side and the grandmother of the children on the other. If such estrangement there be, the children are in no manner responsible therefor, and should not be visited with any injurious consequences from it. It cannot be doubted that it would be to the interest of the children to be allowed to associate and visit with their grandmother and aunt upon reasonable occasions and under reasonable conditions, and that to take the children from them and place them in a home with a stranger will be inexpressibly

sad to them for a season, to say the least. It will be equally grievous to appellees, for God has likewise planted in their hearts a self-sacrificing love for those children almost, if not fully, equal to that of the father. While we have deemed it our duty under the law to decide this case in favor of appellant, we think it not amiss to suggest that the love and affection cherished by the appellees and the tender care they have taken of the children in their tender years when appellant had no place else to put them should appeal strongly to the manly nature of a loving father, and cause him to forget any possible offense by the grandmother which grew out of her jealous love for his offsprings. We therefore venture to express the hope that all bitterness or ill feeling, if any, engendered by the unfortunate circumstances of this case, may be forgotten by all parties, to the end that the little children may have the pleasure and benefit of free intercourse and association at all proper times with their grandmother and other maternal relatives.

We conclude that the judgment of the court below must be reversed, and here rendered in appellant's favor, awarding him the custody of all of his children. It is further ordered, however, that all costs of the suit, both here and below, be taxed against appellant.

#### SHUGART v. SHUGART et al. (No. 703.)

(Court of Civil Appeals of Texas. Beaumont.  
June 18, 1921. Rehearing Denied  
June 29, 1921.)

##### 1. Deeds §128—Intention of grantor prevails.

In construing deeds the rule is that the intention of the grantor will prevail, if such intention is manifested from the language of the deed, though there may be words used therein which, if unrestricted, would bring it within the rule in *Shelley's Case*, and the intention is that which is manifested by the whole instrument.

##### 2. Deeds §128—Rule in *Shelley's Case* not a rule of construction or intention.

The rule in *Shelley's Case* is a rule of law, and not a rule of construction or intention, and is founded on the use of the technical words "heirs," "heirs of his body," or "bodily heirs," and requires that such words and phrases be used in a technical sense, and not to denote certain individuals.

##### 3. Deeds §128—Rule in *Shelley's Case* held not to apply to deed; "heirs"; "heirs of their body."

In a deed providing that, "in case either or both A. and L. should die without heirs of their body," the land should revert to and be divided between S. and his heirs, *held* that the words "heirs" and "heirs of their body" were used, not in their technical sense, but in the

sense of "children," and that the rule in Shelley's Case did not apply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs; Heirs of the Body.]

#### 4. Deeds §97—Rule as to repugnant clauses.

The rule that where two clauses in a deed are repugnant the first shall stand applies where the clauses are incapable of being harmonized, and apparent repugnant clauses must, if possible, be harmonized so as to give effect to both.

Appeal from District Court, Milam County; John Watson, Judge.

Action by N. B. Shugart and others against M. L. Shugart and others. Judgment for plaintiffs, and defendant named appeals. Affirmed.

W. A. Morrison, of Cameron, for appellant.

Henderson, Kidd & Henderson, of Cameron, for appellees.

O'QUINN, J. This is an action of trespass to try title to a tract of land in Milam county, brought by appellees against appellant and others. The following is the statement of the nature and result of the suit taken from the brief of appellee:

"On the 19th day of July, 1877, Stokely S. Shugart executed a deed, conveying to his wife, Nancy, a life estate in 178 acres of land, with remainder to their two daughters, Artitia and Louisa (the lower half to Artitia and the upper half to Louisa), upon conditional limitation expressed in the following clauses contained in the deed, to wit:

"And in case that either or both Artitia and Louisa Shugart should die without heirs of their body, the above and within described land shall revert to and be divided between L. C. Shugart and his heirs; and if only one should die without heirs, her half shall be divided between the other and L. C. Shugart's heirs."

"Louisa survived her father, the grantor, and the mother, Nancy, the life tenant, and died in 1915 seized of the upper half of the land. No children were born to her, but she left surviving her the above-named Artitia, a full sister, and L. C. (Shugart), a half-brother, besides other legal heirs. On May 19, 1917, L. C. (Shugart) executed a deed purporting to convey to appellant, his second wife and the step-grandmother of appellees, an undivided one-half interest in the upper half of the land conveyed to Louisa by the Stokely S. Shugart deed above referred to. Appellees, as the children and descendants of a deceased child of L. C. (Shugart), brought suit against appellant for an undivided one-half of said upper half of the land, making Mrs. Artitia Hill and husband defendants, and asking for partition."

The case was tried before the court without a jury, who, after hearing the evidence, rendered judgment for appellees, granting the relief prayed for, from which appellant alone appeals.

The court made and filed his findings of fact and conclusions of law, as follows:

#### "Findings of Fact.

"N. B. Shugart, R. E. Shugart, and B. L. Hudnall, children, and Alvey, Fred, Lula May, and Griffin H. Dossey, minors, grandchildren of L. C. Shugart, deceased, by their next friend, N. B. Shugart, brought this suit in action of trespass to try title, and for damages, against M. L. Shugart, Artitia Hill and her husband, W. B. Hill, and T. H. Freeman, for title, possession, and rents for an undivided one-half interest in a tract of 89 acres of land on the Levi Taylor league in Milam county. Freeman filed a disclaimer as to title, being only a tenant. The Hills made no appearance, and M. L. Shugart filed a general demurrer and general denial.

"Plaintiffs in their petition allege that they and the defendant Artitia Hill are the joint owners of the land, and set forth their respective interests. Defendant M. L. Shugart, claims under a deed to her from L. C. Shugart. The contest is between plaintiffs and defendant Hill on the one side and M. L. Shugart on the other. M. L. Shugart is the second wife of L. C. Shugart, deceased, but is not the mother or grandmother of plaintiffs. Stokely S. Shugart, father of L. C. Shugart, is the common source, and the controversy arises over the construction of the following deed from Stokely S. Shugart to his wife, Nancy, and daughters, Artitia and Louisa, and is as follows, to wit:

"The State of Texas, County of Milam:

"Know all men by this public instrument made and entered into by and between Stokely S. Shugart of the county of Milam, state of Texas, of the first part, and Nancy Shugart and Artitia Shugart and Louisa Shugart, of the county of Milam in the state of Texas, second party, witnesseth:

"That for and in consideration of the natural love and affection of the party of the first part, for the party of the second part, as his wife and children, and also divers other good causes and considerations to the part of the first part, has given, granted, bargained, sold and conveyed and do hereby give, grant, bargain, sell and release first to his wife, Nancy Shugart, during her natural life, she having relinquished all claims to title in and of the estate of said Stokely S. Shugart, the following described land and premises lying and being situated in the county of Milam, state of Texas, and being a part of the Levi Taylor league on the Brazos river, to wit [field notes omitted herein] to the beginning, containing 178½ acres. After the death of said Nancy Shugart to Artitia the lower half of the above survey upon which the family residence now stands \* \* \* is hereby and herein deeded to said Artitia Shugart and her heirs after her, and to Louisa Shugart and her heirs after her is hereby and herein deeded the upper half of the above-described land [89½ acres] and in case that either or both Artitia and Louisa Shugart should die without heirs of their body, the above and within described land shall revert to and be divided between L. C. Shugart and his heirs, and if only one should die without heirs, her half shall be divided between the other and L. C. Shugart's heirs. \* \* \*

"To have and to hold all and singular the premises and hereditaments above mentioned, and hereby and herein granted, with the appurtenances thereto belonging to the said party of the second part and heirs after them, as above directed, to the only proper use and benefit of the said [party] of the second part and heirs after them, as above directed, forever, and said party of the first part by this act binds himself, his heirs and administrators to warrant and forever defend all and singular the hereinbefore described premises unto the said party of the second part and their heirs after them, as above directed, against every person or persons whomsoever lawfully claiming or to claim the same or any part thereof. \* \* \*

"[The record discloses said deed to have been properly signed and acknowledged by the grantor on the 19th day of July A. D. 1877, and placed of record.]

"The deed was made a short time prior to the death of Stokely S. Shugart, and was filed for record by him on the 18th day of February, 1878. Nancy was the second wife of Stokely S. Shugart, and Artitia and Louisa were his children by her. By his first wife Stokely S. Shugart had five children, viz.: L. C. Shugart, Annie Lou Brown, Texana Green, Dorothy Jackson, and William Shugart. William died before his father, and prior to the execution of the above deed. His wife also died and they left one child, Fred, who is now living. Mrs. Brown was reported dead, and so were her children. They have not been heard from for 25 or 30 years. Texana Green and Dorothy Jackson have not been heard of in 25 years. L. C. Shugart died the 27th of January, 1918. He had four children, N. B. Shugart, R. E. Shugart (Hudnall), R. L. Shugart, and one child, Alice Shugart, mother of the minors, Harvey, Fred, Lula May, and Griffin Dossey. Alice was the only one of L. C. Shugart's children that died and left children. It was agreed by counsel for plaintiffs and defendants that the minor plaintiffs have no guardian.

"Stokely S. Shugart, died in possession of the land in controversy, and his wife, Nancy, and daughters, Artitia and Louisa, occupied the land after his death. After the death of Stokely S. Shugart, his wife married a man by the name of Oglesman. She died about 24 years ago. After her death, Artitia and Louisa took their respective tracts of land. Artitia is living, a party defendant, and has four children. Louisa married James Simms. He lived only about 8 years after their marriage, and she remained a widow and died without having child or children and never had any children. She had possession of her tract of land up until her death, about 5 years ago, which was before the execution of the deed by L. C. Shugart to M. L. Shugart.

"In 1917, L. C. Shugart made and delivered the following deed to his wife, M. L. Shugart, defendant, which was filed for record 21st day of May, 1917, in county clerk's office, Milam county, to wit:

"The State of Texas, County of Limestone:

"Know all men by these presents, that I, L. C. Shugart, of the county of Limestone, state of Texas, for and in consideration of the love and affection I have for my wife, Mrs. M. L.

Shugart, and for other good and valuable considerations, have granted, given and conveyed and by these presents do grant, give and convey unto the said Mrs. M. L. Shugart, of Limestone county, Texas, all that said lot or parcel of land described as follows: My undivided one-half interest in and to 89 acres of land, a part of the Levi Taylor grant situated in the county of Milam, state of Texas, the said 89 acres being described by metes and bounds in a deed from Stokely S. Shugart to Nancy Shugart, Artitia Shugart and Louisa Shugart of date July 18, 1877. \* \* \* The land hereby conveyed being the same undivided interest in said 89 acres of land which I inherited from my deceased sister, Louisa Shugart. \* \* \*

#### "Conclusions of Law.

"I conclude that the deed from Stokely S. Shugart to his wife, Nancy, and his daughters, Artitia and Louisa Shugart, conveyed a life estate to Nancy and an estate in fee simple, upon conditional limitation to the daughters, Artitia and Louisa. The words 'heirs' and the words 'heirs of their body' in the deed, are therein used in a restricted and nontechnical sense, and mean children.

"Louisa having died without child or children, her tract passed in fee simple, one-half to Artitia Hill and the other half to the plaintiffs, children and grandchildren of L. C. Shugart."

The construction of the deed executed by Stokely S. Shugart, above set forth, is the only question in the case, appellant contending that same falls within the rule of Shelley's Case, and appellees insisting that Shelley's rule does not apply. As we understand appellant's contentions, they are: (1) That Louisa took her half of said land (89 acres), in fee simple, without limitation, and that upon her death, L. C. Shugart (appellant's grantor) inherited a portion of her half; and (2) that if that is not the correct theory, then the entire estate of both Artitia and Louisa, under the first limiting clause in the deed, descended to L. C. Shugart and his heirs, and that under the rule in Shelley's Case, L. C. Shugart was entitled, either to the entire 178 acres, or an undivided half of same, under the theory that appellees took half.

[1] In construing deeds, the rule is that the intention of the grantor will prevail, if such intention is manifest from the language of the deed, though there may be words used therein which, if unrestricted, would bring it within the rule in Shelley's Case. In construing the instrument, all of its provisions should be looked to for the purpose of ascertaining what the real intention of the grantor was, and if this can be ascertained from the language of the instrument, then any particular paragraph of the deed, which considered alone would indicate a contrary intent, must yield to the intention manifested by the whole instrument. *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412; *Hopkins v. Hopkins*, 103 Tex. 15, 122 S. W. 16; *West v. Glisson*, 184 S. W. 1042.

[2] The rule in *Shelley's Case* is a rule of law and not a rule of construction or intention, and is founded on the use of the technical words "heirs," "heirs of his body," or "bodily heirs." The words "heirs," "heirs of his body," and "bodily heirs" must be used in a technical sense, and not to denote certain individuals. If the instrument indicates that the words were used in the latter sense, the rule does not apply. *Simonton v. White*, 93 Tex. 50, 53 S. W. 339, 77 Am. St. Rep. 824. The manifest intention of the grantor will control the rule in *Shelley's Case*, if in conflict with it.

[3] If it appear from the instrument that the words "heirs" and "heirs of their body" are used to designate the children of the grantees, effect should be given to that intention. To us the intention of the grantor is apparent, and to apply the rule in *Shelley's Case* would defeat the purpose and intent of the grantor, and render the instrument incongruous and contradictory in all its parts, while the enforcement of the intention of the grantor will harmonize its every provision. We think that the grantor clearly used the words "heirs" and "heirs of their body," not in their technical sense, but in the sense of "children." This is plainly manifest in the first clause, where he provides, "in case either or both Artitia and Louisa should die without heirs of their body," the land should revert to and be divided between L. C. Shugart and his heirs. The word "either" must have been inadvertently used, the intent, as we construe it, being that if both died without heirs of their bodies the land should be divided between L. C. Shugart and his heirs. To apply the technical use of the words "heirs" in that clause would make it impossible of consummation, as the lands could not be divided between L. C. Shugart and his heirs, for if he were living he could have no heirs. The grantor evidently means, in the event named, that the land should be divided between L. C. Shugart and his children. To apply the rule in *Shelley's Case* and give the technical meaning to the word "heirs" as it is used in each of the clauses in the deed would render the provisions thereof impossible of execution and absurd, and both clauses must fall, because no effect could be given to either, and the obvious intention of the grantor ignored. But if the word "heirs" be construed to mean "children," then effect can be given to each of said clauses, and the manifest intention of the grantor carried out.

[4] In the first limiting clause, it is provided:

"In case that either or both Artitia and Louisa Shugart should die without heirs of their body \* \* \* the land shall revert to and be divided between L. C. Shugart and his heirs."

In the second clause, it says:

"If only one should die without heirs, her half shall be divided between the other and L. C. Shugart's heirs."

The use of the word "either" in the first clause renders the two clauses apparently inconsistent. The use of the words "either or" in the first clause evidently was inadvertent or a clerical error, for when considered together, the two clauses manifest the intention of the grantor to provide that in case both Artitia and Louisa should die without children, the land should be divided between his son L. C. Shugart, and L. C. Shugart's children; but if only one should die without children, then her land should be divided between the other (meaning the other one of the sisters, Artitia) and L. C. Shugart's children. But appellant contends that where two clauses are repugnant the first shall stand. This rule applies where there are repugnant clauses, and they are incapable of being harmonized. The rule is equally well established that where there are apparently repugnant clauses in an instrument, they must, if possible, be harmonized, so as to give effect to both. *Martin v. Rutherford et al.*, 153 S. W. 158; *Cartwright v. Trueblood*, 90 Tex. 537, 538, 39 S. W. 930; 13 Cyc. 619. Louisa did die without heirs of her body, and to give effect to the words "either or" as used in the first clause would terminate Artitia's estate in the land, and thus defeat the plainly expressed intention of the grantor as to what should be done with the land in case only one of the daughters should die without children, as expressed in the second clause, and would render the two clauses so repugnant as that one or the other must fall. It is hardly conceivable that the grantor intended that the death of Louisa, without heirs of her body, should defeat the estate conveyed to her sister, Artitia, and the provision in the second clause plainly shows that such was not his intention. Eliminating the words "either or" as being used inadvertently, the two clauses harmonize perfectly with each other, and with the plain intent of the grantor, as is manifest from the reading of the whole instrument. *Cartwright v. Trueblood*, 90 Tex. 537, 538, 39 S. W. 930; 13 Cyc. 619. We believe that the rule in *Shelley's Case* has no application to this case, for from a consideration of the whole instrument, together with the situation and relation of the parties, it is manifest that the words "heirs" and "heirs of their body" were used by the grantor in the sense of "children," and, that being true, appellant's contention must fall. *Hunting et al. v. Jones*, 215 S. W. 959; *Hopkins v. Hopkins*, 103 Tex. 15, 122 S. W. 16; *McMahon v. McMahon*, 198 S. W. 355; *Simon-*

ton v. White, 93 Tex. 50, 53 S. W. 339, 77 Am. St. Rep. 824; 21 Cyc. 430.

The judgment is affirmed.

### WALKER et al. v. HALEY. (No. 497.)

(Court of Civil Appeals of Texas. El Paso.  
June 14, 1921.)

**Pueblo lands**  $\Leftrightarrow$  175(7)—Taking lease from state held not to estop patentee from claiming land under his patent.

Where patentee of land from state had the boundaries as recited in the patent marked on the ground and went into possession, and thereafter resurvey by the state developed a vacant strip which was included in his original boundaries, conduct of patentee in leasing from the state such vacant strip, and having it surveyed for possible purchase, and transferring his lease to another, did not estop him from claiming the land as included in his patent as against one with full knowledge of the facts, claiming title through purchaser from state as an addition to the home tract, after application by transferee of lease as addition to his home tract was forfeited to the state.

Appeal from District Court, Brewster County; W. C. Douglas, Judge.

Trespass to try title by L. Haley against J. W. Walker; J. C. Bird, transferee of Walker, being made a party. Judgment for plaintiff, and defendants appeal. Affirmed. See, also, 110 Tex. 50, 214 S. W. 295.

J. D. Martin, of San Antonio, for appellants.

Geo. M. Thurmond, of Del Rio, W. B. Teagarden, of San Antonio, W. Van Sickle, of Alpine, and Chas. Rogan, of Austin, for appellee.

#### Opinion.

**WALTHALL, J.** This is an action in trespass to try title to about 30 acres of land in what is known as the L. Haley block of land, in Brewster county. The suit was originally brought by appellee, Lawrence Haley, against J. W. Walker. Pending the litigation and with knowledge of the suit appellant J. C. Bird bought the land in controversy from Walker, and by amended pleading was made a party in the suit and filed answer. Appellants' answers consisted of a general demurrer and pleas of not guilty. The defense asserted by appellants is estoppel. The case was tried with a jury, and, at the conclusion of the evidence, the court instructed a verdict for appellee, Haley.

At a former hearing this court refused to consider appellants' assignments of error touching the peremptory instruction for the reason that appellants, defendants below, presented no objection to the charge, being then of the opinion that the objection was waived under Acts of 1913, c. 59, and made

no findings of fact. The Supreme Court granted a writ of error on the ground of conflict between the decisions of the Courts of Civil Appeals upon the question, and reversed and remanded the case for a consideration of the assignments of error. Walker v. Haley, 110 Tex. 50, 214 S. W. 295.

#### Findings of Fact.

1. On July 17, 1884, Haley bought 160 acres of land from the state, being the N. E. quarter of section No. 4, block No. 13, G., H. & S. A. Ry. Co. surveys in Brewster county, obtaining a patent therefor from the state; the field notes in the patent further describing the land as follows: Beginning at a rock mound for the northeast corner of said survey No. 4, and the northwest corner of survey No. 5, block 13, and the southwest corner of survey No. 23, block W. J. G. 8, from which a cedar bears S. 22° W. 42 varas; thence south 950 varas to a rock mound in the west line of survey No. 5, block No. 13; thence 950 varas to a rock mound; thence north 950 varas to a rock mound in the south line of survey No. 22, block W. J. G. 8; thence east 950 varas to the place of beginning.

2. Patent No. 460, vol. 27, was issued to Lawrence Haley by the state to survey 22, block W. J. G. 8, Texas Central Railway Company, dated January 13, 1904; the field notes further describing the survey as follows: Beginning at the S. E. corner of survey No. 21, made by virtue of certificate No. 779, issued to Texas Central Railway Company, and N. E. corner of survey No. 23, S. W. corner 24; thence west 1,900 varas to rock mound; thence south 1,900 varas to rock mound on south side of hill, from which a cedar 3 feet in diameter bears S. 85½° W. 154 varas; thence east and crossing Calamity creek at 1,110 varas and 1,900 varas to rock mound from which a cedar bears S. 22° W. 42 varas, the N. E. corner of survey No. 4, block No. 13, survey for the G., H. & S. A. Ry. Co.; thence north 1,900 varas to beginning.

3. Patent No. 42, vol. 72, of survey 23, block W. J. G. 8, was issued to Lawrence Haley, of date September 14, 1882, duly recorded. We need not give the field notes of this survey.

4. There is found in the record field notes to surveys numbers 1, 2, 3, 4, and 5, in block 13, G., H. & S. A. Ry. Co. We think we need not give the field notes to these surveys. These surveys were made in September, 1875.

5. When Haley bought quarter section No. 4 (a part of which is involved in this controversy), he had it surveyed and the lines and corners marked out and established on the ground. He identified, in his testimony, the rock mound fixed for the N. E. corner at the time the survey was made, also the cedar

tree, one of the bearing trees called for in the patent. The cedar tree was still there at the time of the trial. Haley also owns sections 22 and 23, block W. J. G. 8. For many years Haley had been in actual possession by enclosure of the N. E.  $\frac{1}{4}$  of survey 4, block 13, and surveys 22 and 23, above described, until the occurrence of the circumstances hereafter stated. Sections 22 and 23, in block W. J. G. 8, tie on, by common lines and corners, to sections 4 and 5, in block 13, G., H. & S. A. Ry. Co. survey.

6. In 1889 the commissioner of the general land office sent Surveyor Ammerman to Brewster county to make a survey or resurvey of block No. 13. Ammerman made the survey of said block. His survey made a vacant strip of from 160 to 200 varas between blocks W. J. G. 8, and 13 G., H. & S. A. Ry. Co. surveys at section 4, in block 13, establishing different lines for block 13, and necessarily a different north boundary line for Haley's quarter section No. 4, in block 13.

7. In 1900 Haley leased from the state the vacant strip between blocks W. J. G. 8 and 13, for a period of 10 years.

8. In 1905 Haley made application to W. M. Harmon, county surveyor of Brewster county, for a survey of a portion of the vacant strip, beginning at the northwest corner of survey No. 1, in block 13, thence east with the north line of surveys 1, 2, 3, 4, 5, 6, 7, and 8, to the northeast corner of No. 8, block 13, and thence south, west, and north to the place of beginning, meandering and embracing the said vacant strip, and stating in his application for the survey that he desired said land surveyed with the intention of buying it. Harmon made the survey as applied for and described the land embraced therein by metes and bounds. Haley did not buy the vacant land from the state.

9. On the 1st day of May, 1907, Haley assigned and transferred to Arthur Thomas all of his right, title, and interest in and to the lease No. 31595.

10. On May 31, 1907, Arthur Thomas applied to purchase the land embraced in the lease from Haley as additional to his home section. On the Thomas application to purchase the land commissioner indorsed thereon on October 7, 1907, the land forfeited for failure to reside thereon and for collusion in the purchase.

11. On the 10th day of March, 1911, James W. Walker duly applied to buy the block embracing the vacant strip, including the land in controversy, as additional land to his home tract. The land was sold to Walker on the 14th day of March, 1911. On the 26th day of August, 1914, Walker filed with the land commissioner proof of three consecutive years of residence and occupancy on the land.

12. A lawsuit ensued between Arthur Thomas and J. W. Walker for the title and possession of that portion of the Haley block, which had been awarded to Thomas. The suit resulted in a judgment in favor of Walker, about the year 1912.

13. During the time Haley had the vacant strip under lease he paid rent to the state on the land. He paid rent on 400 acres—the acreage at that time thought to be all the land in the vacant strip; but Haley claimed in his testimony that he did not pay rent on the vacant land on the strip involved in this controversy; the vacant strip embraced in his lease included the land in controversy, and the record does not show that in leasing or in paying rent he excluded the land in controversy. We find that the land in controversy was contained in his lease and that he paid rent to the state on the land in controversy. Haley has for more than 20 years owned the quarter section No. 4, in block 13, and has been in possession and paid all taxes due on the quarter section as located.

14. Appellant Bird had lived in the immediate neighborhood of the land in controversy for some 25 years, and before buying of Walker had knowledge of all the material facts entering into this controversy. Bird was living about a mile from Haley's quarter section 4, when the L. Haley block (as the vacant strip was designated) was surveyed for Haley. He was with Ammerman when the vacant strip was surveyed, and had read the Ammerman field notes of block 13 after the survey was completed. He is a practical surveyor, and made one of the plats used in the evidence. Assuming that the northeast corner of Haley section 4 is a common corner with section 23, block W. J. G. 8, and beginning there to survey the northeast quarter of section 4, there would be no vacancy between section 23 or section 22 (same block) and the said northeast quarter of section 4.

15. The original maps from the general land office were sent up with the record, and we adopt them and make them parts of our findings.

After hearing the evidence the trial court instructed a verdict for appellee, Haley, and on the verdict so returned judgment was rendered for appellee.

Appellants present four assignments of error. They present practically but one question, and some of the assignments and propositions are but repetitions of others, only stressing a different or additional fact; but we will state the substance of each.

The first assignment is directed to the giving of the peremptory instruction, on the ground that the testimony shows that Haley is estopped from claiming under his patent any portion of the land in controversy lying



within the lines of the L. Haley block (that is, the vacant strip). It is claimed, under this assignment that Haley, with full knowledge of his rights, having recognized the title of the state to the land in controversy by accepting a lease from the state, and having held said land under said lease, is estopped from denying the title of the state under any title acquired by him anterior to the date of the patent; that with knowledge of the facts commenced with the vacant strip of land, and having made application for a survey of the land as vacant public school land, and thus recognized the title of the state, Haley is estopped from setting up title in opposition to appellants, subsequent vendees of the state, holding title in privity with the title of the state; that under the evidence submitted it was a material issue of fact for the jury as to the effect of Haley's acquiescence in the title of the state.

Under the second assignment it is claimed the giving of the peremptory charge was error, because the testimony shows an express contract between Haley and the state, by which the lines of the L. Haley block (the vacant strip) were located on the ground, leaving the quarter section of land sued for south of the vacant strip. It is the contention under the second assignment that, Haley having had the vacant strip surveyed and blocked as public domain (school land), and having fixed the lines on the ground by the survey and his survey 4 south of the vacant strip, he thereby made an agreement with the state that all the land in the vacant strip belonged to the state; that if Haley at one time claimed his quarter section 4 was tied onto block W. J. G. 8, and had actually located his line so as to connect the two blocks (W. J. G. 8 and 18) when the state surveyor located section 4 to the south, it then became a disputed boundary question, and having acquiesced in the last survey Haley is estopped from now claiming the land as he had formerly claimed it.

By the third assignment, and the propositions thereunder, it is appellants' contention that the peremptory charge is error because the testimony offered raised the question of long acquiescence by Haley in the survey locating the north boundary line of section 4, in block 13; that by reason of such acquiescence, and the recognition by the land office of the line as located, it was a question for the jury as to whether Haley was estopped from claiming the land in the vacant strip.

By the fourth assignment it is the contention of appellants that the peremptory charge is error because the testimony offered shows that Haley had attorned to the state, and had so recognized the title of the state to the vacant strip as to cut him off from setting up a title acquired anterior to his attornment; the appellants' title being

in privity with the title owned by the state.

Appellee's counter proposition is submitted to the four assignments as a whole, and is to the effect that the charge complained of was not error, because it was undisputed that Haley was the owner of the land in controversy by patent from the state, and had been the owner from 1884; that appellants sought to defeat Haley's title by estoppel in pais by reason of the above dealings with the land in controversy between Haley and the state, but failed to show that they knew of said acts and conduct, or that they were misled thereby and induced to take a position to their detriment, or that they lost or would lose anything because of the matters complained of; that appellants had failed, as a matter of law, to establish the only claim asserted, that is, that Haley should not now be heard to claim the land in controversy because of the above conduct on his part indicating that at that time he was not claiming it.

The question is presented: Are the facts in the case sufficient, *prima facie*, to take the case to the jury on the issue of estoppel in pais? We have concluded that they are not.

At the time the state made the survey locating block 18, and at all times previous to the time of that survey, the state owned section No. 4, in block 13, as it did sections 22 and 23, in block W. J. G. 8, and also any vacant strip of land lying between the two said blocks of land. It is unquestioned that the state, while owning the lands embraced in the said two blocks, and while owning the vacant strip of land between the two blocks, by its patent granted to Haley section 4, in block 13, and by its survey and calls in the field notes and patent connected and tied section 4, block 13, onto block W. J. G. 8, thus locating on the ground the portion of its land the state intended to grant and did grant to Haley, and Haley went into actual possession of the land thus located, pointed out, and granted to him.

These facts are unquestioned. Thereafter the state by another survey discovered a vacant strip of land lying in between the two said blocks of land, which separate the said two blocks by a distance of some 200 varas, and it is this vacant strip which forms the subject of this controversy.

Appellants refer us to *Floyd v. Rice*, 28 Tex. 344; *Lagow v. Glover*, 77 Tex. 448, 14 S. W. 141; *Koenigheim v. Sherwood*, 79 Tex. 508, 16 S. W. 23, and other cases, holding that on a question of the true locality of a common boundary the acquiescence of the parties in, or their recognition of, a particular line, is evidence which should have weight in determining their boundary, affording, as it does, a presumption that the line so recognized is the correct line, and that such presumption is strengthened by

the lapse of time. But the case at bar, as we view it, is not a boundary case. In a boundary case the effort is to find the footsteps of the surveyor in making the location of the land. Here there is no controversy as to the location on the ground of the quarter section 4, block 13. There is no question of the location on the ground of the common corners of other lands to which it is tied. The cases to which we are referred are not in point.

The estoppel asserted by the appellants is, evidently, equitable estoppel, that is, the effect of the voluntary conduct of Haley, which, it is claimed, precludes him, both in law and equity, from asserting his title from the state to the land in controversy against appellants. But, as said by Judge Simpkins in *Simpkins on Equity* (2d Ed.) p. 609, and the cases referred to: Equitable estoppel has rules to regulate and determine rights arising out of the conduct of men, and the various interests which spring from their dealing with each other. To estop Haley from asserting his title to the land in controversy, appellants should show, we think, that they have in good faith relied upon Haley's conduct in the matters of fact shown in evidence, such as his lease from the state, his assignment of his lease to Thomas, and his acquiescence in the location of his land by reason of the vacant strip. We think also it should appear, to make effectual the estoppel, that appellants' title from the state was acquired by reason of the conduct of Haley, and their reliance in good faith upon his conduct. Appellants were dealing altogether with the state and not with Haley. There is no evidence showing that appellants relied upon anything that Haley did as inducing them to act in procuring their title from the state, or that their grantor, the state, relied upon any act of Haley in awarding title to them. But the facts seem to us to the contrary, that is, appellants knew of Haley's title and claim to the land; it was in his inclosure; they had no dealing with him; their dealing was with the state, and directly antagonistic to Haley's interest.

None of the documents in evidence show a release or conveyance by Haley to any one of his title to the land, nor do the documents or evidence show a contract or agreement by Haley of his title to the land. The evidence shows, we think, that the state, appellants' grantee, relied upon its own survey in establishing the vacant strip and in awarding the land to Walker.

We have concluded that none of the conditions necessary to constitute equitable estoppel, the only defense suggested, are shown in the evidence.

The court was not in error in giving the peremptory charge complained of.

The case is affirmed.

## SPRINGMAN v. HEIDBRINK. (No. 8077.)

(Court of Civil Appeals of Texas. Galveston. June 23, 1921.)

### 1. Sales $\S$ 412—Answer to buyer's petition for failure to deliver held not subject to general demurrer.

In a buyer's action for stipulated damages because of seller's failure to deliver, answer denying that seller had broken his contract, alleging that he had been at all times and was ready and willing to comply therewith, that buyer had extended the time for delivery, and that his failure to deliver was not due to any fault on his own part, but was caused by wrongful acts of the buyer, held not subject to general demurrer, even though it was inartistically drawn and contained portions subject to exception; the facts alleged being sufficient to show that buyer was not entitled to recover.

### 2. Judgment $\S$ 126(1)—Court cannot render judgment for plaintiff after sustaining demurrer to answer without evidence in support of plaintiff's cause of action.

The court, having eliminated defendant's answer by order sustaining general demurrer thereto, could not render judgment for plaintiff without evidence in support of his alleged cause of action.

Appeal from Anderson County Court; Mills Q. Mills, Judge.

Action by B. Heidbrink against George Springman. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Swift & Cotten, of Palestine, for appellant. Campbell, Greenwood & Burton, of Palestine, for appellee.

PLEASANTS, C. J. Appellee brought this suit against appellant to recover stipulated damages for breach of a contract for the delivery of lumber. The petition declares on the contract, a copy of which is attached thereto as an exhibit, and then alleges in substance that in order to secure his compliance with said contract appellant executed his promissory note in favor of appellee for \$750 and deposited it with the Royal National Bank of Palestine, with the understanding and agreement by and between appellant and appellee and the bank that in event appellant failed to comply with his contract for the delivery of the lumber the bank should deliver the note to appellee, but in case the lumber was delivered in accordance with the contract the note should be returned to appellant, that appellant had failed to deliver the lumber, and that appellee was entitled to said note, which was still in the possession of the bank, and to recover the sum due thereon according to its terms and effect, for which judgment is prayed.

The appellant filed an answer containing a general demurrer, general denial, except

as to facts thereafter admitted, and special pleas denying the allegations of the petition that he had breached his contract for the delivery of the lumber and averring that he had been at all times and was now ready and willing to comply with his contract. He further pleaded an agreement by the appellee to extend the time for the delivery of the lumber, and that his failure to make delivery was not due to any fault on his part, but was brought about by the wrongful acts of the appellee.

The appellee interposed a general demurrer to this answer, which was sustained by the trial court, and thereupon, without any evidence being introduced or offered by appellee, judgment was rendered in his favor for the full amount of the note with interest and attorney's fees.

The proceedings in the court below are reflected in the following bill of exceptions, which was approved by the trial judge:

"B. Heidbrink v. George Springman.  
No. 1947.

"In the County Court of Anderson County,  
Texas, October Term, 1920.

"Be it remembered that upon the trial of the above entitled and numbered cause on October 28, 1920, in this court, the plaintiff presented his general demurrer to the second amended answer of the defendant, Springman, filed herein on October 26, 1920, which answer, among other things, contained a general denial; and the court sustained the general demurrer of the plaintiff as to the answer of the defendant, and as to the whole of said answer, including the general denial; and thereupon, over the objection of the defendant, the court entered judgment for the plaintiff as prayed for without any evidence being offered by the plaintiff, and without defendant being permitted to make any proof in rebuttal under his general denial; that the plaintiff never offered in evidence the note sued on, and introduced no evidence whatsoever, and the court rendered judgment for the plaintiff, wholly on his pleadings after the pleadings of the defendant had been stricken out on demurrer, said judgment being rendered without any proof as to the failure of the defendant to perform his part of the contract, or as to his liability on said note under the contract sued on; that defendant duly excepted at the time in open court to the action of the court in sustaining the general demurrer of the plaintiff, and in rendering judgment for the plaintiff, and to the other actions of the court thereon, which exceptions were overruled by the court, and to such ruling the defendant excepted and herewith tenders his bill of exceptions, and asks the same to be signed and made a part of the record in said cause, which is accordingly done.

"This October 28, 1920."

[1] We think the trial court erred in sustaining the general demurrer to the answer. This pleading, though very inartistically drawn, contains averments of facts which,

if true, would defeat appellee's right to recover, and while portions of it, especially the prayer for affirmative relief, were subject to exception, a general demurrer to the whole of it should not have been sustained, and the defendant thus stripped of all of his defenses including his denial of the breach of the contract.

[2] The answer of defendant having been eliminated from the case by the order sustaining the general demurrer, there was no admission of any facts before the court, and judgment should in no event have been rendered without any evidence on the part of plaintiff in support of his alleged cause of action, or without having the note upon which the judgment was rendered before the court.

These conclusions seem to us to be obvious and are well sustained by the authorities. The following cases are in point: *Astlin v. Mosteller*, 144 S. W. 701; *Cooper v. Robischung Bros.*, 155 S. W. 1050; *Kinnard v. Herlock*, 20 Tex. 49.

For the reasons indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

# BUTLER BROS. v. DUNSWORTH et al. (No. 8544.)

(Court of Civil Appeals of Texas. Dallas.  
June 4, 1921. Rehearing Denied  
July 2, 1921.)

## 1. Bills and notes $\S$ 357 — Pledgee of notes held bona fide holder to extent of debt.

Where wholesale merchants acquired from a purchaser of goods the notes of a third person as collateral security, the transaction terminated in the same legal effect as to liability which would have resulted from an outright purchase of a note for the amount of the debt at a price equal to its face value in due course of trade before maturity and without notice of infirmity, and the pledgee of such notes is a bona fide holder only to the extent of the amount of the debt, and can demand no more at maturity.

## 2. Bills and notes $\S$ 534 — Pledgee of notes held entitled to recover attorney's fees.

Where plaintiff acquired notes of a third person as the only security for a debt, and the maker of the note refused to pay or tender the amount of the debt with interest on the ground that the notes were fraudulently acquired by the payee, and that consideration had failed, merely offering to pay if defendant would deliver all notes assigned and without indemnifying plaintiff against the payee's claims, the plaintiff could recover from the maker attorney's fees as specified in the notes.

## 3. Bills and notes $\S$ 126 — Provision for attorney's fees not part of debt until after default.

The provision in a note for attorney's fees to be payable if the note is placed in an attor-

ney's hands or collected by legal proceedings is not a part of the debt until after negotiability ceases by virtue of maturity and default.

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by O. C. Dunsworth against Butler Bros. and others, with cross-action by the named defendant. Judgment for Butler Bros., but denying its claim for attorney's fees, and it appeals. Reversed, and judgment rendered allowing attorney's fees.

Thompson, Knight, Baker & Harris, of Dallas, for appellant.

John Doyle, of McKinney, for appellee.

HAMILTON, J. This appeal is presented as an agreed case, stated as follows:

"On May 1, 1919, Thomas F. Lee conveyed to O. C. Dunsworth 50 acres of land in Cameron county, Tex., and contracted with said Dunsworth to clear said lands ready for plowing, to construct adequate irrigation facilities thereon, and to fence the same. As part of the transaction and as consideration for said conveyance and contract, said Dunsworth paid said Lee \$1,500 in cash, assumed the payment of three notes already charged against said lands, and executed and delivered to said Lee his four notes, payable to the order of said Lee, one in the sum of \$3,200, three in the sums of \$677.77 each, said notes maturing respectively on or before the 1st days of October in the years 1919, 1920, 1921, and 1922. All of said notes were of even date with said deed, bore interest from date until maturity at 6 per cent. per annum, and after maturity at 10 per cent. per annum, and all were secured by vendor's lien on said lands. All of the notes were negotiable in form under the law merchant and under the statutes of the state of Texas pertaining to negotiable instruments. Said notes all provided for the payment by the maker thereof of 10 per cent. additional upon the principal and interest as attorney's fees in case said notes were placed in the hands of an attorney for collection or were collected by suit or other legal proceedings.

"Thereafter, and prior to July 1, A. D. 1919, said Lee validly indorsed in blank all said notes and transferred and delivered the same, so indorsed, to Butler Bros., a corporation, in order to purchase on credit from Butler Bros. certain merchandise, Butler Bros. being wholesale merchants in Dallas, Dallas county, Tex. Relying upon such security, Butler Bros. sold and delivered such merchandise to said Lee on or about July 1, 1919, upon credit to mature September 10, 1919. The merchandise so purchased, with accrued interest thereon to date of trial, was of the value and price of \$2,622.10, and same, though long since past due, was wholly unpaid at the date of the trial. The indorsement, transfer, and delivery of said notes from said Lee to Butler Bros. was made in due course of trade for value, as aforesaid, as security for said indebtedness, and was prior to the maturity of any of said notes or any installment of interest thereon, and Butler Bros. had no notice nor knowledge of any infirmity in said notes or any of them, or of any want

of or failure of consideration in said notes or any of them. Butler Bros. are now the indorsees, transferees, and holders thereof under the circumstances and for the considerations herein stated. Said notes carried provisions entitling the holder, at its election, to mature all of the notes in case of default in the payment of any note or any installment of interest thereon at maturity, and Butler Bros., prior to the commencement of this suit, elected to declare all notes and all interest thereon to be due and payable because of default in the payment of the first maturing note and certain installments of interest upon all notes, which defaults occurred prior to the date of such action by Butler Bros.

"Demand was made by Butler Bros. upon said Lee for the payment of the indebtedness of said Lee to Butler Bros., which demand was refused. Demand was also made by Butler Bros. upon said Dunsworth to pay aforesaid notes and interest, which demand was refused. Said demands were made prior to the institution of this suit.

"Shortly prior to the commencement of this suit said Dunsworth applied to Butler Bros. to surrender to him the four notes aforesaid, and in that connection offered to pay to Butler Bros. the indebtedness due it by said Lee, with lawful interest thereon, provided Butler Bros. would surrender and deliver to said Dunsworth for cancellation the four notes aforesaid in its possession. Said Dunsworth thereupon stated to Butler Bros. that his execution of the notes was obtained by fraud, and that the consideration for same had failed. Butler Bros., upon advice of its counsel, declined to surrender the notes to Dunsworth, except upon being indemnified against claims which might be made against it by said Lee for alleged wrongful surrender of said notes to Dunsworth, but Butler Bros. offered to accept payment from Dunsworth of the indebtedness due to it by said Lee, or to accept payment of so much of the Dunsworth notes as would cover such indebtedness, and offered to hold possession of the notes pending such legal action to cancel the notes as said Dunsworth might wish to institute against said Lee. Said Dunsworth declined to adopt the method proposed for handling the matter, and stated that he would bring suit to cancel the notes and liens securing same, subject to such interest therein as Butler Bros. might establish, and stated to Butler Bros. and their attorneys that he did not question their indebtedness, but admitted the same to be correct. Butler Bros., having theretofore elected to declare all the notes to be due, thereupon placed the same in the hands of its attorneys for collection and authorized suit thereon and agreed to pay its attorneys the fee stipulated in said notes for their services in its behalf.

"Thereafter, on December 13, 1919, Dunsworth brought this suit in the district court for the Sixty-Eighth judicial district of Texas, Dallas county, against Thomas F. Lee, his wife, Mrs. Julia Gorby Lee, and Butler Bros., to cancel and annul the notes above described, and to cancel and annul the apparent lien by which they were secured upon the lands mentioned. He alleged false representations of Lee in inducing his execution of the notes, and also alleged failure of consideration upon which the notes were executed and alleged as against But-

ler Bros., that that concern had the notes in its possession, and prayed the court to adjudicate and establish what rights, if any, Butler Bros. had therein, and that said notes be adjudged, canceled, and returned to plaintiff. After said suit was commenced, Butler Bros. instructed its attorneys to file, and its attorneys did file, cross-action on behalf of Butler Bros.' interest in the matters and things involved herein, as shown in this statement. At the trial claims of said Dunsworth as to the voidability of the notes as between him and Lee were proved. The facts already stated as to Butler Bros.' acquisition of the notes, its interest in and to the same, and its transactions with Lee and Dunsworth, as hereinabove set out, were also all proved.

"Thereupon Dunsworth, in open court, admitted that Butler Bros. was entitled to enforce said notes against him and to establish and foreclose liens on said lands in sums sufficient to discharge the indebtedness of said Lee to Butler Bros., viz. \$2,622.10, but contended that Butler Bros. was not entitled to recover any attorney's fees upon such portion of the notes. Butler Bros., on the other hand, contended that it was entitled to recover its attorney's fees being the sum of \$262.21. The judgment rendered by the court is referred to and will be put in the record herein. It denied the claims of Butler Bros. for the allowance of its said attorney's fees.

"The sole question to be decided upon the appeal or writ of error which may be taken out herein, is whether or not, under the circumstances stated, Butler Bros. is entitled to recover judgment for the 10 per cent. attorney's fees stipulated for in the notes upon the \$2,622.10, to secure which said notes were indorsed, transferred, and delivered to Butler Bros. If not, the judgment of the trial court should be affirmed, otherwise it should be here reversed and rendered so as to increase the recovery of Butler Bros. upon said notes by the sum of such attorney's fees, viz. \$262.21, with interest thereon at 6 per cent. from the date of the judgment of the court below, with costs of appellate proceedings."

[1] The transaction by which Butler Bros. acquired the notes as collateral security terminated in the same legal effect as to liability, which would have resulted from an outright purchase of a promissory note for \$2,622.10 at a price equal to its face value, in due course of trade, before maturity, and without any notice of infirmity. Butler Bros.' rights in relation to the notes are co-extensive with those which would have arisen from such purchase and are to be measured by the standard applicable in such circumstances. Therefore the question decided may be thus correctly stated: Has the bona fide holder of a negotiable promissory note acquired before maturity, as collateral for a debt equal to its face value, a legal right to enforce the provision for attorney's fee upon the maker's refusing to pay the note because of conceded fraud and failure of the consideration rendering it void in the payee's hands, the right to attorney's fee being un-

questioned upon any ground except fraud and failure of consideration, as stated?

[2] That the pledgee of notes transferred under such state of facts as is comprehended in this case is a bona fide holder only to the extent of the amount of the debt is beyond question the settled law. He can lawfully demand no more at maturity. But when such collateral is taken as the only security for the debt, as appears to have been the case here, and the maker of the note refuses to pay or tender the amount of the debt with interest for which the note stands as collateral, the right to enforce payment of the collateral note to the extent of the debt and interest secured by it arises, and we think that right may be exercised in accordance with the stipulations for attorney's fees provisionally inserted in the note for the agreed benefit of the holder of the note in the event of default in payment at maturity.

The conditions superimposed by the defendant in error in offering to pay plaintiff in error's principal debt and interest rendered the offer tantamount to declining to pay at all. His offer to pay only provided Butler Bros. would deliver to him all the notes assigned, no assurance or protection being given or offered in return for such requirement, was a proposition embodying a material curtailment of the existing rights of Butler Bros. as pledgee to which it could not be required to accede.

Accordingly we think the defendant in error thereby put himself in the same attitude he would have occupied had he unconditionally declined to pay any part of the debt and sought to defend against it in its entirety.

While the authorities in treating the rights of innocent holders of negotiable notes as collateral security, to which a defense exists against the payee, seem uniformly to announce in general language that liability does not extend beyond the total amount of the debt to which the notes are collateral, we think an examination and analysis of such holdings upon the subject excludes the idea that the expressions employed were deliberately used to establish the view that, although payment of the amount of the secured debt is refused, and suit is brought to enforce payment, the provision for attorney's fee shall nevertheless be unavailable, and thus the principal cost of enforcing a legal right shall be imposed upon the holder contrary to the terms of the note, although as between the parties this feature of it is as valid as any other. No authority is discoverable which expressly treats the question of attorney's fees in cases like this. The cases holding that the amount of recovery is limited to the amount of the debt secured by the collateral do not consider the question of attorney's fees which alone is here presented, because it seems that in those cases the courts have not been call-

ed upon to determine this particular kind of contention.

Defendant in error has said to plaintiff in error, in effect, that although he is liable for the full amount claimed against him, yet he will not pay any part of it. He has thereby forced upon plaintiff in error the burden of employing and paying attorneys to litigate the claim to judgment. His notes which he has put afloat in the channels of negotiability to pass indiscriminately through the course of trade carry his express indemnification against the outlay of any sum to compel his performance of promised payment to any bona fide holder. This provision for attorney's fees is of equal dignity and force with every other promise embodied in the notes, and the presumption ought to be that it is to be relied upon by a purchaser with faith as full as that which expects and demands payment of the principal and interest for which, in the situation, defendant in error is liable.

[3] The provision for attorney's fees is not a part of the debt, until after negotiability ceases by virtue of maturity and default is made. Then, while it may be said to be transformed to constitute a part of the debt, when steps are taken to compel payment, it nevertheless still, in its nature, is an assurance and a security given against the expense incident to the pursuit of a legal remedy in the event the debtor's failure to perform the obligation expressed by other elements of the note renders necessary the pursuit of a legal remedy. Defendant in error's default having resulted in suit to enforce payment, and his liability pro tanto having been established, he thereby became bound to pay the stipulated attorney's fee, not as a part of the original amount of the note, nor as a part of the original amount for which the note was pledged, but as cost of enforcing a legal remedy against himself, which cost he had validly promised to pay any holder of the notes standing in plaintiff in error's relation to him.

Had the notes been free of infirmities and their validity had been unquestioned, a holder at maturity could have demanded only the principal and interest. Only after default, followed by steps towards suit, would the provision for attorney's fees have become operative. To the extent of plaintiff in error's claim in the instant case the notes were unaffected by any infirmity, and to that extent their validity in its hands, under the circumstances, could not be questioned. At maturity plaintiff in error could demand payment of the notes only in the amount of the account. Such demand and no other was made. Defendant in error declined to pay. Thereupon steps were taken to enforce payment. Defendant in error, by the terms of the notes, had bound himself that in such

event he would pay the amount of attorney's fees incurred in this case by plaintiff in error, and we think that to require him to keep and perform this obligation, under the agreed facts, is not in conflict with the decisions of our courts announcing the general rule that a creditor's recovery upon collateral notes, void in the payee's hands, should be restricted to the amount of the debt for which they are held as collateral. And we believe that under the facts and circumstances of this case we more nearly approximate sound principle and exact justice to uphold appellant's, rather than appellee's contention.

We will therefore reverse the judgment of the trial court, and render judgment allowing attorney's fees, and increasing plaintiff in error's recovery to the extent of \$262.21, in compliance with the prayer.

#### FIRST TEXAS STATE INS. CO. v. SMALL- EY et al. (No. 6774.)

(Court of Civil Appeals of Texas. Galveston.  
Feb. 17, 1915. Rehearing Denied  
June 16, 1921.)

1. Insurance  $\S$ 515—Provision for payment of one-half benefits for death from stated diseases within one year is prohibited.

Rev. St. 1911, art. 4742, subd. 3, making void a provision for any mode of settlement at maturity for less than the amount insured on the face of the policy, when construed with the proviso authorizing provisions for partial payments in the event of suicide or engaging in hazardous occupations, prohibits a clause limiting liability to one-half the stated amount of the insurance in the event that insured should die from certain stated diseases contracted within 12 months after the policy was issued, though in a sense such provision fixes the amount shown by the face of the policy.

2. Constitutional law  $\S$ 154(3), 206(1), 240(2), 276, 296(1)—Insurance  $\S$ 515—Legislature can prohibit provisions for payment of less than face of insurance policy.

It was within the police power of the Legislature to enact Rev. St. 1911, art. 4742, prohibiting provisions in insurance policies for the payment of less than the amount of the benefit stated on the face of the policy, and that statute is therefore not contrary to Const. U. S. art. 1,  $\S$  10, or Amendments 5 and 14, nor to Const. Tex. art. 1,  $\S$  19, as impairing the obligation of contract and taking away from the parties their right to contract, or taking away privileges and immunities, or depriving of property without due process or denying equal protection of the laws.

Appeal from Harris County Court, at Law;  
Clark C. Wren, Judge.

Action by Katie Smalley and husband  
against the First Texas State Insurance

Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 228 S. W. 550.

Baker, Botts, Parker & Garwood, of Houston, for appellant.

Atkinson, Graham & Atkinson, of Houston, for appellees.

LANE, J. This suit was instituted by appellee Katie Smalley, joined pro forma by her husband, Andrew Smalley, against the First Texas State Insurance Company, a corporation, to recover upon a policy of insurance issued by the appellant upon the life of one Henry Jones, a brother of appellee Katie Smalley, wherein and whereby it is provided that in consideration of a weekly premium of 10 cents paid and to be paid, appellant agreed and promised to pay to appellee Katie Smalley \$172 upon the death of the said Henry Jones, subject to the conditions, privileges, and provisions contained therein. Two of the provisions contained therein, and the only ones necessary to be set out so as to explain the issues involved in this suit, are as follows:

"In event of death of insured resulting from any pulmonary disease, or disease of the heart, kidneys or liver, which had their beginning during the first twelve months from the date of this policy, then the liability of the company shall be limited to one-half of the amount that would have been payable under this policy in consequence of death from any other disease.

"One-half only of the above sum payable if death occur within six calendar months from date, and the full amount if death occur thereafter."

Appellee also sues to recover 12 per cent. on the sum of \$172 alleged to be due on said policy, to wit, \$20.64, as damages because appellant refused to pay the amount alleged to be due on said policy, after lawful demand had been made therefor as provided by law, and for \$50 for attorney's fee; the aggregate sum sued for being \$242.64.

The answer of appellant upon which it relies is substantially as follows:

"For further answer, if such be required, this defendant would show that on or about December 23, 1912, it issued policy No. WL168237 for the principal sum of one hundred and seventy-two (\$172.00) dollars on the life of one Henry Jones, the name of the beneficiary being his sister, Katie Smalley. The defendant shows that by the conditions of the said policy it is especially provided, that 'in the event of death of insured resulting from any pulmonary disease or diseases of the heart, kidneys or liver, which had their beginning during the first twelve months from the date of this policy, then the liability of the company shall be limited to one-half of the amount that would have been payable under this policy in consequence of death from any other disease.' That said provision of the policy was a part of the con-

tract of insurance and was agreed to by the insured at the time the policy was issued and is, therefore, binding upon the beneficiary; that, therefore, under the terms of the contract of insurance this defendant is liable for only one-half ( $\frac{1}{2}$ ) of the amount specified in the policy, which would be eighty-six (\$86.00) dollars.

"The defendant would further show to the court that the insured, Henry Jones, died on or about October 25, 1913, of a disease known as pneumonia; that such disease is pulmonary and is included within the provision of the policy above set out; that in the proof of death of the said Henry Jones filed with this company it is set forth that he died of pneumonia and that the beneficiary has not disputed this fact, nor in any way contradicted same; that since the said Henry Jones, within 12 months from the date of the issuance of the policy, died of a pulmonary disease which had its beginning during the first 12 months from the date of the policy, this company is liable for only one-half of the amount specified in the policy, which is eighty-six (\$86.00) dollars; that this defendant, through its agent, has heretofore tendered this amount to the plaintiff and her attorney, and they have refused to accept same and still refuse to accept same. This defendant now tenders the same into the registry of this court, and prays that it go hence without day and recover its costs."

Appellee's reply to the special plea of appellant above set out is as follows:

"For supplemental petition, plaintiff says that so much of paragraphs 8 and 9 of defendant's second amended answer, as seeks to reduce the amount of the face of the policy, because the insured died of a pulmonary complaint, should be stricken out of said answer, because said provision in said policy is contrary to law, is in violation of the law of Texas, and is utterly null and void.

"Wherefore, plaintiffs pray that said paragraphs be stricken out, and further they pray as in their original petition."

The case was tried before the court without a jury, and the court entered a judgment in favor of appellees for \$175.44, principal and interest due upon said policy of life insurance; for \$20.64, being 12 per cent. penalty allowed by law; for \$50 attorney's fee, as prayed for—aggregating \$246.08—and for costs of suit.

The defendant having requested conclusions of fact and of law by the court, the court made and filed the following:

#### "Findings of Fact.

"The court finds that on December 23, 1912, the defendant, First Texas State Insurance Company, issued its whole life policy No. WL168237 on the life of Henry Jones, with plaintiff, Katie Smalley, the sister of said Henry Jones, as beneficiary. I further find that the amount named in the face of said policy was \$172, and that the weekly premium thereon was 10 cents. I further find that said policy contained the following provisions:

"In event of death of insured resulting from any pulmonary disease, or diseases of the heart,

kidneys or liver, which had their beginning during the first twelve months from the date of this policy, then the liability of the company shall be limited to one-half of the amount that would have been payable under this policy in consequence of death from any other disease.'

"I further find that Henry Jones is dead, and that at the time of his death all premiums were paid, and said policy was in full force and effect, and that he died on or about October 25, 1913. I further find that said Henry Jones died of pneumonia, and that same is a pulmonary disease, and that same had its beginning within the first 12 months of said policy.

"I further find that plaintiff Katie Smalley made out proof of death and made written demand for the payment of said policy more than 30 days prior to the institution of this suit, and that payment of said policy was by defendant refused. I further find that by reason thereof plaintiff Katie Smalley employed attorneys and brought this suit, and that \$50 is a reasonable attorney's fee therefor. I further find that defendant has never made a lawful tender to plaintiff or her attorneys of any sum whatever.

"I further find that counsel for plaintiff and defendant, in open court, agreed to all the facts hereinabove found, and agreed that the sole question to be determined by this court was a question of law bearing upon the amount of plaintiff's recovery.

"I further find that the defendant, First Texas State Insurance Company, is a life insurance company incorporated under the laws of Texas, and doing business therein and having its principal domicile in Galveston, Galveston county, Tex., and that the policy sued on herein was issued by defendant in the state of Texas and delivered in the state of Texas."

#### "Conclusions of Law.

"I find that the provision in said policy which reduces plaintiff's recovery to one-half of the face of said policy, in the event the insured should die from a pulmonary disease contracted within the first 12 months of said policy, is in contravention of subdivision 3 of article 4742 of the Revised Statutes of the State of Texas, which provides that no policy of life insurance shall contain any provision for any mode of settlement at maturity of less value than the amount on the face, except in case of death of insured by his own hand while sane or insane, or by following stated hazardous occupations. I therefore find that the provision in said policy is void and of no effect, and find for the plaintiff for the full amount sued for."

There was no exception taken to finding of facts of the court. In fact, such finding is agreed to be correct by both parties; but appellant insists that the court erred in his conclusions of law and assigns the following errors:

First. "The judgment is contrary to law and the evidence in that the policy of insurance sued on expressly provides that, should the insured die from any disease of a pulmonary character within the first 12 months from the date of the policy, the company would pay only one-half of the amount that would otherwise be due on

the policy in consequence of death from any other disease; that the undisputed facts showed that the insured died 10 months from the date of the policy and that he died from pneumonia, a disease of pulmonary character which had its beginning within the first 12 months from the date of the policy."

Second. "The court erred in its conclusion of law in holding that the Revised Statutes of 1911, art. 4742, subd. 3, rendered null and void the provision of the policy of insurance to the effect that:

"In event of death of insured resulting from any pulmonary disease, or diseases of the heart, kidney or liver which had their beginning during the first twelve months from the date of this policy, then the liability of the company shall be limited to one-half of the amount that would have been payable under this policy in consequence of death from any other disease.'

"Because said statute does not apply to the case herein, for the reason that no mode of settlement was provided for in the policy, but the clause as above set out was nothing more than a contract of insurance placing a valid limitation of the liability of the company of the amount payable in the event that the insured should die within the first 12 months from the date of the policy and his death should result from certain named diseases."

Third. "The court erred in its conclusion of law in holding that the Revised Statutes of 1911, art. 4742, subd. 3, rendered null and void the provision in the policy to the effect that:

"In event of death of insured resulting from any pulmonary disease, or diseases of the heart, kidneys or liver, which had their beginning during the first twelve months from the date of this policy, then the liability of the company shall be limited to one-half of the amount that would have been payable under this policy in consequence of death from any other disease.'

"Because said statute is unconstitutional and is a law impairing the obligation of contracts and takes away from the parties their right to contract and is in direct contravention of article 1, § 10, cl. 1, of the Constitution of the United States."

Under the first two of its assignments appellant makes the following propositions:

First. "The provision in the policy providing for the payment of one-half of the largest amount mentioned in the policy in the event the assured died of a pulmonary disease having its inception within a certain time does not contravene section 3 of article 4742, because the stipulation in the policy is not a provision for any mode of settlement at maturity for less value than the amounts insured on the face of the policy; the stipulation in the policy is one of the provisions of the policy, showing what the 'amounts insured on the face of the policy' are."

Second. "Under the amounts insured on the face of the policy, the beneficiary was not entitled to collect from the insurance company more than eighty-six (\$86.00) dollars; the sum of eighty-six (\$86.00) dollars was the amount for which the deceased was insured, under the facts and circumstances of this case."

We cannot agree to either of appellant's propositions. Article 4742, Revised Civil



Statutes of 1911, in so far as it relates to the question here involved, reads as follows:

"No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company incorporated under the laws of this state, if it contains any of the following provisions: \* \* \*

"(3) A provision for any mode of settlement at maturity for less value than the amounts insured on the face of the policy, plus dividend additions, if any, less any indebtedness to the company on the policy, and less any premium that may by the terms of the policy be deducted; provided, that any company may issue a policy promising a benefit less than the full benefit in case of the death of the insured by his own hand while sane or insane, or by following stated hazardous occupations."

[1] We understand from the law above quoted that it prohibits any life insurance company from either issuing or delivering, in this state, any life insurance policy which provides for the payment of less value than the amount stated on the face of the policy, upon the death of the insured, except in case of the death of the insured by his own hands. But in the latter case a policy may provide for a benefit less than the full benefit shown by the face of the policy, and only in such case. The proviso in the article quoted "that any company may issue a policy promising a benefit less than the full benefit" in case of the death of the insured by his own hands, etc., being included in the same article, we think clearly indicates what is meant by the words or phrase preceding it in the same clause, to wit, "a provision for any mode of settlement at maturity for less value than the amount insured on the face of the policy," and clearly comes under the rule of *expressio unius est exclusio alterius*.

The argument in appellee's brief, we think, clearly presents our views on the question at issue, and we have adopted the same.

"If we are to expunge from this statute the exceptions mentioned, and look merely to the words 'amounts insured on the face of the policy,' it might well be said that the policy in question does not contravene the statute. And if we were extremely hypercritical, it might also be said that the words 'face of the policy' might mean the physical face of the policy, instead of the everyday common sense meaning of the word 'face' as applied to any instrument evidencing a liability.

"But when we look at this statute in its entirety, and when we see and consider the exception, which provides that in only two instances can a life policy be issued which provides for the payment of a less amount than the full benefit, it becomes an absolute certainty that this provision of the policy in question contravenes this statute.

"The Legislature had some object in view in enacting this law. If it had in mind that a company could issue policies providing for payment of less than the full benefit in all cases and contingencies, merely by placing such pro-

visions on the physical face of the policy, then why pass the statute? The companies, in the absence of the statute, had that right already, and why this proviso? And further, if such was the intention of the Legislature, the act places it in the power of the companies, merely by incorporating such provisions on the physical face of the policy, to render the statute of no effect.

"On the other hand, if the Legislature had the intention to stop the collection of full premiums on 'catch' policies like this one, which practically prohibits full payment, by reason of the many vital organs covered, or if it had in mind that, notwithstanding such provisions, the company should nevertheless pay the full benefit, in all candor and common sense, we do not see how such intention could have been more clearly expressed. There can be no question, hypercritically or otherwise, as to the meaning of the words 'full benefit.'"

We therefore conclude that the court did not err in finding that the provisions in the policy which attempt to reduce appellee's recovery to one-half of the amount given on the face of the policy is in contravention of subdivision 3 of article 4742 of the Revised Statutes of Texas, *supra*.

Counsel for appellant has cited in their brief several authorities as supporting the contention of appellant that such clause as that in the policy sued on in this case, which provides for payment of less value than the amount insured on the face of the policy, is enforceable in this state, notwithstanding the provision of article 4742, herein quoted.

We do not think any of them support this contention, as none of them indicate even remotely that the states in which the decisions were rendered had any law similar to article 4742, R. S. 1911, and are therefore not applicable to the facts of this case.

[2] Appellant's third and fourth assignments of error insist that the trial court erred in concluding and holding that article 4742, R. S. 1911, renders null and void the provisions in the policy of insurance to the effect that—

"In the event of death of insured resulting from any pulmonary disease, or diseases of the heart, kidney or liver, which had its beginning during the first twelve months from the date of this policy, then the liability of the company shall be limited to one-half of the amount that would have been payable under this policy in consequence of death from any other disease"

—because said statute is unconstitutional; that it impairs the obligation of contract and takes away from the parties their right to contract, and therefore is in direct contravention of Article 1, § 10, of the Constitution of the United States; that it contravenes the Fifth and Fourteenth Amendments of said Constitution, which grants to all citizens their privilege and immunities, and prohibits any state from depriving any person of life,

liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law; that it also contravenes article 1, § 19, of the Constitution of the State of Texas.

Mr. Cooley, in his valuable work on Constitutional Limitations, says:

"The constitutionality of such laws, as a valid exercise of police power, has often been sustained, and indeed rarely questioned." Cooley, Const. Lim. 283 and 579.

We think that as a matter of public policy, and in the interest of the public welfare of the people, the Legislature under its police powers has the right under the Constitution of this state, and of the United States, to declare that insurance companies issuing life policies in this state shall not place in their policies a provision such as the one held by the court below to contravene the law of this state. See *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895.

"The police powers of this state extend to the protection of all lives, health, comfort and quiet of all persons and the protection of all property within the state, and the mere facts that a law necessary for the welfare of society, regulates trade or business, or to some degree operates as a restraint thereon, does not make it unconstitutional." 3 Cyc. 864.

The authorities cited are so conclusive as to the constitutionality of the third section of article 4742, R. S. of 1911, so often referred to in this opinion, that we deem it unnecessary to further comment on this point.

There appearing no error in the record, the judgment of the court below is affirmed. Affirmed.

#### RALEY v. SAN ANTONIO WATER SUPPLY CO. (No. 8579.)

(Court of Civil Appeals of Texas. San Antonio. June 15, 1921.)

**Waters and water courses** — 203(13)—Petition to restrain turning off water held insufficient.

A petition by a consumer for a decree restraining a water company from turning off the water from his houses for nonpayment of charges alleged to be illegal and excessive, and also for a construction of the contract, held insufficient to warrant relief; there being no definite allegations required by Rev. St. arts. 4643, 4649, showing injury would result from the threatened act, and no attempt by the pleader to set forth the contract.

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by James Raley against the San Antonio Water Supply Company. Action dismissed, and plaintiff appeals. Affirmed.

James Raley, of San Antonio, for appellant. Taliaferro, Cunningham & Moursund, of San Antonio, for appellee.

SMITH, J. James Raley, as plaintiff below, filed this suit against the San Antonio Water Supply Company. A general demurrer to plaintiff's petition was sustained, and, the plaintiff declining to amend, the suit was dismissed. This appeal results. The petition of the plaintiff below was as follows:

"Plaintiff says that he and defendant are residents of Bexar county, Tex., and defendant is a corporation duly incorporated by the state of Texas for the purpose of supplying water to the citizens of San Antonio (and plaintiff is one of such citizens), and duly chartered by said city by ordinance and by agreement between said defendant and said city as trustee for all the citizens thereof.

"Plaintiff built and owned a number of houses on block 10, city block 2249, on Gould and Salinas streets, and had connected them with defendant's large water main on Zarzamora street on Prospect Hill.

"At plaintiff's request defendant put in a meter on defendant's pipe on Gould street, and charges plaintiff illegal and extortionate bills for the rent of meter and the water used, to wit: For the first house supplied, 80 cents per month, and for each house supplied, 53 cents per month, and for rent of meter, 20 cents per month.

"Plaintiff alleges that the contract with the city provides that where a meter is put in the water company can charge 20 cents a month for the rent of the meter and 80 cents a month for 6,650 gallons of water used, and if more is used the company can charge 1.12 cents for each 100 gallons for such excess.

"Nowhere in the contract is 53 cents mentioned; and the contract further provides that no charge can be made for anything unless it is provided for in this contract.

"Plaintiff says that defendant has rendered bill for September and October, 1920, for three houses using water running through the meter, but not in excess of 6,650 gallons, and have charged 53 cents for each of two houses, and threaten to turn off the water unless these charges are paid.

"Plaintiff says he has tendered to defendant \$1 for each month, which is the correct bill, and it was refused.

"Plaintiff asks for a decree restraining defendant from turning off the water, and also for a construction of the contract and for general relief."

A temporary restraining order was issued in the case, but upon a hearing the court below held that the matters set up in the petition were not sufficient to entitle the plaintiff to an injunction, the temporary order was set aside, and upon his request the plaintiff was granted leave to amend; which he subsequently declined to do.

It will be observed that the prayer is simply that—

The "plaintiff asks for a decree restraining defendant from turning the water off, and also for a construction of the contract, and for general relief."

To say the least of it, the petition does not "contain a plain and intelligible statement of the grounds for" the relief sought by injunction, as required by article 4649, R. S. The allegations are vague and confused; so much so, in fact, as to be almost unintelligible, and the nature of the complaint and grounds for relief must be deduced from inferences rather than from definite statements. There is no attempt to show that injury to appellant, irreparable or otherwise, would result from the execution of the threat to "turn off the water," or that the threatened act would "tend to render judgment ineffectual" in the main case, an allegation required in article 4643. If appellant had any clear and definite grounds entitling him to an injunction, he should have amended and alleged them, as he was given an opportunity to do, at his request.

The contract appellant sought to have construed was not described by him. It was not attached to the petition, nor was a copy thereof, and the pleader did not attempt to set forth, or state even in general terms the provisions of it. The trial court was not advised as to who were the parties to the contract, or the purposes, terms, or effect of it, and there was nothing before the court to construe or determine.

If appellant had a cause of action for damages, he did not state it in his petition. He did not allege that he had been damaged or would likely be injured, or even that the threatened act of the appellee would result in injury to him. He stated no cause of action for any purpose.

The judgment is affirmed.

FLY, C. J., entered his disqualification, and did not sit in this case.

#### ELDRIDGE v. BARREDA. (No. 6584.)

(Court of Civil Appeals of Texas, San Antonio, June 8, 1921. Rehearing Denied June 29, 1921.)

#### 1. Fraud ⇐28—Purchaser in unrecorded deed entitled to damages on vendor's resale to innocent purchaser.

As between the vendor and purchaser in an unrecorded deed, title passes to the purchaser under Rev. St. 1911, art. 6824, and no act of the vendor can deprive the purchaser of right to recover damages from a fraudulent second sale of the land to an innocent purchaser.

#### 2. Judgment ⇐708—Inadmissible against one not party to former suit.

In suit by the purchaser of land for damages accrued through the fraudulent acts of the vendor in selling the land to another after selling it to plaintiff purchaser, judgment of foreclosure by defendant vendor in another case of a vendor's lien on land sold to a third party by the vendor was not admissible in evidence against the plaintiff, who was not a party to the lien suit.

#### 3. Fraud ⇐28—Vendor's appropriation of vendor's land by resale unjustifiable.

Even if no trust exists, where land is sold, and deed and release to the property delivered to the purchaser, and the vendor paid, the vendor cannot thereafter sell the land again to another party, the first purchaser's deed not having been recorded, without rendering himself liable in damages to the first purchaser; the first purchaser being under no obligation to speak to the vendor about the appropriation of his property.

#### 4. Fraud ⇐59(1)—Damage to purchaser defrauded by resale is value of land with interest.

The vendor of land, who sold a second time, the first purchaser not having recorded his deed, is liable to the first purchaser to pay the value of the land at the time it was sold to him, with 6 per cent. interest.

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Suit by W. S. Eldridge against C. P. Barreda. From judgment for defendant, plaintiff appeals. Judgment reversed, with instructions.

J. M. Mothershead, of Fort Worth, for appellant.

Seabury, George & Taylor, of Brownsville, for appellee.

FLY, C. J. This is a suit for damages instituted by appellant against appellee, alleged to have accrued through the fraudulent action of appellee in selling a certain tract of land to another which he had previously sold to appellant, but who had failed to record his deed of conveyance and was prevented from recovering the land because the last party to whom appellee sold the land was an innocent purchaser. Appellee answered by general demurrer and general denial. The court rendered judgment in favor of appellee.

The facts disclose that appellee owned 1,000 acres of land in Cameron county, a part of partition share No. 1, in the Espiritu Santo grant, and on February 12, 1912, in consideration of three promissory notes, each for \$11,000, payable in one, two, and three years, respectively, made, executed, and delivered to Samuel Spears, trustee, a warranty deed, with vendor's lien retained, to said land. In that deed was the recital:

"I will execute, acknowledge and deliver releases of the lien retained on the above-described land upon sale of any part thereof and as to the parts sold, in parcels of 20 acres or more, upon payment to me of \$35 per acre."

The land was conveyed to Spears in trust for Mrs. Meta Wedegartner of San Benito, Tex., to be held for her and conveyed to any person designated by her, and upon her assumption of the three notes given by Spears, as trustee to appellee, the trustee conveyed the land to Mrs. Wedegartner, May 9, 1912. Both of the deeds mentioned were duly recorded. On May 25, 1912, Mrs. Wedegartner entered into a contract with the San Benito Land & Water Company and W. S. Eldridge, appellant herein, whereby she conveyed to said appellant a parcel of land containing 39.06 acres out of the Espiritu Santo grant, being lot No. 2 of the "Iowa Gardens," as shown on a certain map of such gardens. The contract also contained an obligation on the part of the company to furnish water for irrigation purposes. Appellee released his vendor's lien on lot No. 2 to the trustee for Mrs. Wedegartner, which inured to the benefit of appellant. That release was made on August 26, 1912, but appellant placed none of his conveyances on record. On February 15, 1919, appellee, although having parted with all title to lot No. 2, sold and conveyed the same to F. H. Handley, who, it is admitted, was an innocent purchaser. Appellant has paid all amounts due by him on the purchase money of lot No. 2.

Under that testimony, which was not contradicted, appellee was liable to appellant for all damages arising from a sale by appellee to Handley of land already sold by him to appellant. That liability could not be avoided by any judgment afterwards obtained by appellee against Spears. He knew that the land had been sold by Spears to appellant, for in his release of the vendor's lien on lot No. 2 he recited that—

Spears had "conveyed 39.06 acres of land to W. S. Eldridge, being lot 2, delineated upon a map entitled 'Map of Iowa Gardens under Canal System of San Benito Land & Water Company,' and the sum of \$1,367.10 having been paid to me by said assignee."

[1] The first assignment of error is sustained. As between appellant and appellee the title to the 39.06 acres of land contained in lot No. 2 had passed to appellant, and no act of appellee could deprive appellant of the right to recover the damages from a fraudulent second sale of the land. Any other conception of justice and right should be brushed aside as untenable in any court where law and equity are extended to litigants. Upon what theory appellee was extended protection and shielded from the results of his unlawful act does not appear from this record. As said by this court in the similar case of Mit-

chell v. Simons, 53 S. W. 76, both the allegations and proof show that appellee had perpetrated a fraud upon the appellant by taking advantage of a failure to record the deed to him, and selling the land to another party who would, on account of lack of notice, be placed in the position of an innocent purchaser as to appellant, and thus deprive him of his land, and appellant is liable for the damages arising by reason of such fraudulent conduct. The doctrine of that case has never been questioned, but the case has been cited several times with approval in and out of the state. It is based on the statute. Article 6824.

[2] Over the objections of appellant, appellee was permitted to read in evidence a judgment of foreclosure by appellee in a case styled *Barreda v. Spears, Trustee, et al.*, of a vendor's lien on the 1,000 acres of land sold to Spears by appellee. Appellant was not a party to that suit, in which the judgment was obtained on December 9, 1914, and the land was sold to appellee. How this judgment could have any bearing upon the rights of appellant does not appear. The second assignment of error is sustained.

There were no pleas of limitation, laches, or stale demand. It is a plain case of a vendor selling a tract of land to one man, and being paid the purchase money, and then selling it to another because the deed to the first party had not been recorded. It is a plain case of an attempt to defraud the first vendee. No defense was really offered, and each and all of the assignments of error are sustained.

[3] The novel proposition is made that the deed and release to the property having been delivered to appellant, and appellee having received the full purchase price, no relation of trust existed between appellant and appellee, as the transaction became entirely executed. That academic proposition might be true or not, but it would not justify appellee in appropriating the property of another. He will not be permitted to escape from the consequences of selling the land of another and appropriating the proceeds by any such fine spun theory. It would not make any difference whether appellant neglected to record his papers because of reliance in the honesty of appellee or not, for, independent of such trust, appellee had no right, in law or morals, to appropriate the property of another to his own use and benefit.

Appellee fails also to understand that proof of the taking of another's property, with the intent to appropriate it to the use and benefit of the taker, is proof of fraud. If it had been personal property, it might have been given a harsher name in a court of criminal jurisdiction. The evidence clearly proved fraud.

Appellant was under no obligation to speak

to appellee about the appropriation of his property, or to inform him that appellant had bought the land and paid for it, and like most men, if not all men, under like circumstances, did not want some one else to appropriate it. He had the right, so far as appellee was concerned, to remain silent, and there is no rule, in all the broad realm of equity that appellee can invoke in behalf of his act in selling the same land twice and appropriating the purchase money each time.

[4] Appellee is liable to appellant, and should be made to pay the value of the land at the time it was sold to appellant, with 6 per cent. interest, and if this court had sufficient data upon which to determine that value, judgment would be rendered here in his favor for that amount.

The judgment will be reversed, with instructions to the district court to take no action except to ascertain the market value of the land per acre at the time that it was sold to appellant, and when that fact is ascertained to render judgment for that amount with 6 per cent. interest thereon per annum and all costs in this behalf expended.

### SEABOARD OIL & GAS CO. v. OKLAHOMA STATE BANK. (No. 9663.)

(Court of Civil Appeals of Texas. Fort Worth. June 4, 1921.)

#### 1. Appeal and error $\S$ 397—Notice of appeal in open court necessary to sustain jurisdiction.

Since Vernon's Sayles' Ann. Civ. St. 1914, art. 2084, provides that notice of appeal must be given by appellants in open court, and the notice shall be noted on the docket and entered of record, notice of appeal in open court is necessary to sustain the appellate jurisdiction.

#### 2. Appeal and error $\S$ 417(1)—Recitation in a supersedeas bond that an appeal was taken is not sufficient notice of appeal.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2084, providing that a notice of appeal must be given in open court, and entered on the docket and record, a mere recitation in the supersedeas bond filed 18 days after judgment that an appeal was taken is not a sufficient notice of appeal.

Appeal from District Court, Wichita County; P. A. Martin, Judge.

Action between the Oklahoma State Bank and the Seaboard Oil & Gas Company and others. From a judgment for the Bank, the Seaboard Oil & Gas Company appeals. Appeal dismissed.

Bullington, Boone, Humphrey & Hoffman, of Wichita Falls, for appellant.

W. B. Chauncey, of Wichita Falls, for appellee.

BUCK, J. [1] This is an appeal from a judgment of the district court of Wichita county in favor of the Oklahoma State Bank, and against the Seaboard Oil & Gas Company and George W. Sterling and J. J. Mathis. The judgment falls to show that any notice of appeal was given, nor does it otherwise appear in the record, except a recitation in the supersedeas bond that—

"The Seaboard Oil & Gas Company and George W. Sterling have taken an appeal to the Court of Civil Appeals," etc.

Article 2084, V. S. Tex. Civ. Statutes, provides that an appeal may be taken—

"by the appellants giving notice of appeal in open court within two days after final judgment, or two days after judgment overruling a motion for a new trial, which shall be noted on the docket and entered of record," etc.

Notice of appeal given in open court is necessary to sustain the jurisdiction of this court. *Beaumont v. Newsome*, 143 S. W. 941; *Western Union Tel. Co. v. O'Keefe*, 87 Tex. 423, 28 S. W. 945.

[2] We do not think a mere recitation in the supersedeas bond, filed 18 days after the judgment, that an appeal was taken, is sufficient to give this court jurisdiction, and under the authorities cited the appeal is dismissed for want of jurisdiction.

### MAGEE v. PALM et al. (No. 6600.)

(Court of Civil Appeals of Texas. San Antonio. June 22, 1921. Rehearing Denied July 2, 1921.)

#### 1. Injunction $\S$ 122—Petition held properly verified.

Where officer before whom affidavit attached to petition for an injunction certified that plaintiff swore that the facts stated in the petition were true, and followed that with the certificate, "Sworn and subscribed to before me, this 30th day of March A. D. 1921," the petition was properly verified, although plaintiff's signature was prefixed to the affidavit instead of following the same.

#### 2. Execution $\S$ 172(4)—Petition for injunction need not state in terms that injury will result.

A petition for an injunction restraining levy of an execution, showing that irreparable injury would result to the owner of the property by a sale under execution, was sufficient, though it did not state in terms that such injury would result.

#### 3. Appeal and error $\S$ 190(2)—Sufficiency of bond must be raised in trial court.

That bond furnished on granting of temporary injunction under Rev. St. 1911, art. 4654, was insufficient in amount presented no ground for reversal of the judgment, where appellant did not assail the bond in the trial court.

**4. Appeal and error —253—Objection to failure to properly verify petition waived by failing to except.**

Order of verification of a petition must be raised by exception in the trial court, and a failure to do so is a waiver of defect on appeal.

Appeal from Gonzales County Court; J. C. Romberg, Judge.

Suit by Melissa A. Palm and husband against J. C. Magee. From an order granting a temporary injunction, defendant appeals. **Affirmed.**

Cocke & Russell, of San Antonio, for appellant.

Carl & Swearingen, of San Antonio, for appellees.

FLY, C. J. This is a suit brought by Melissa A. Palm, joined by her husband, G. B. Palm, to restrain the levy of an execution, issued out of the county court of Gonzales county in which appellant was plaintiff and G. B. Palm was defendant, Melissa A. Palm not being a party to the suit, and the property about to be seized under execution being the separate property of Mrs. Palm. From the order of the court granting a temporary injunction this appeal has been perfected by appellant.

[1] The application is signed by Melissa A. Palm in propria persona, in fact she has signed it twice, describing herself in the first instance as plaintiff. It is reasonably deductible that the second signing was made with reference to the affidavit, the signature being prefixed to the affidavit, instead of following the same. The officer before whom the affidavit was taken certifies that Melissa A. Palm swore that the facts stated in the petition were true, and follows that with the certificate: "Sworn and subscribed to, before me, this 30th day of March A. D. 1921." The petition is properly verified. *Kohn v. Washer*, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28. As said by the court in the cited case:

"The statute provides that all affidavits 'shall be in writing and signed by the party making the same,' but 'as to the place of signature nothing is said.'"

In that case the signature of the affiant appeared below the signature of the notary public and his official designation. The name of Melissa A. Palm being signed to the petition, and the notary public having certified that she had subscribed her name and sworn to the same before him, the affidavit and verification were sufficient. As said in the similar case of *Chancey v. Allison*, 48 Tex. Civ. App. 441, 107 S. W. 605:

"The statute does not prescribe any form of affidavit to a petition for injunction, and when the petition, as in this case, is signed by the plaintiff, and there is appended thereto the

jurat of a proper officer certifying that it was subscribed and sworn to before him, the verification is sufficient."

[2] The petition shows that irreparable injury would result to the owner of the property by a sale under execution, and it was not necessary to state in term that such injury would result. If it were necessary for the petition to show that the petitioners had no adequate legal remedy, the allegations indicate that fact.

[3] This proceeding was not the one contemplated in Rev. St. 1911, article 4650, to restrain the execution of a money judgment or the collection of a debt, but is merely to prevent the execution creditor from seizing property not belonging to the execution debtor. The allegations of the petition bring it within the scope of article 4654, where the amount of the bond is left to the discretion of the court. However, if the bond should have been double the \$900 claim, that would present no ground for a reversal of this judgment. If appellant deemed the bond insufficient, he should have assailed it in the trial court, and the judge could have required another bond. *Downes v. Monroe*, 42 Tex. 307.

[4] No exceptions to the petition were filed in the trial court, on any ground, and it has been held that want of verification of a petition must be raised by exception in the trial court, and a failure to do so is a waiver of the defect. *Thouvenin v. Helzle*, 3 Tex. 57; *Collin County Trustees v. Stiff*, 190 S. W. 216.

The appeal is without merit, and the judgment is affirmed.

**CLUTTER v. WISCONSIN TEXAS OIL CO.**  
et al. (No. 6583.)

(Court of Civil Appeals of Texas. San Antonio. June 8, 1921. Rehearing Denied June 29, 1921.)

**1. Mines and minerals —77—In suit to cancel lease for discontinuing work, held error to overrule exception to part of answer setting up mortgage lien.**

In suit to cancel an oil and gas lease for discontinuing work, it was error to overrule exception to the part of defendant's answer setting up an outstanding mortgage lien on the leasehold land, there having been no ouster under it, or an impending ouster, and the lien not having been so pleaded as to entitle defendants to any relief on such account.

**2. Mines and minerals —77—Leases construed against lessee and forfeitures favored.**

On account of necessity to guard the rights of the landowner, oil and gas leases are construed strictly against the lessee, and forfeitures are favored.

3. Mines and minerals  $\S$  77—Breaches of lessee by failing to continue development leave lessor to remedy of suit for damages, or for specific performance or cancellation.

Breaches on the part of an oil and gas lessee by failing to continue the development of the land after finding gas thereon do not work a forfeiture, but leave the lessor to a remedy of suit for damages, leaving him also to the right of specific performance or cancellation.

4. Trial  $\S$  139(1), 178—Direction of verdict when there is any evidence in favor of party erroneous; evidence given its strongest probative value on motion to direct verdict.

The settled rule in respect to directing a verdict in favor of one of the parties on the evidence is to give to the evidence its strongest probative force in favor of the ruling, so, if there is any evidence in favor of the party against whom the instruction is given, the direction would be error.

5. Mines and minerals  $\S$  77—Evidence insufficient to show as matter of law that lessees had abandoned.

Evidence held insufficient to show as matter of law that defendant oil and gas lessees had abandoned their contract of lease with plaintiff, the lessor's successor, and would not fairly, honestly, and in good faith continue the further development of the property; the question being for the jury.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Suit by Joe Clutter against the Wisconsin Texas Oil Company and another. From judgment for defendants, plaintiff appeals. Judgment reversed, and cause remanded for new trial.

Barrett & Barrett and Douglas, Carter & Black, all of San Antonio, for appellant.

H. C. King, Jr., M. L. Roark, and W. H. Kennon, all of San Antonio, for appellees.

COBBS, J. As appellees accept the statement of the case made by appellant, we here copy the same:

Appellant, Joe Clutter, instituted this suit on January 14, 1920. The appellees are two corporations, Wisconsin Texas Oil Company and Wisconsin Texas Gas Company. Plaintiff sought to cancel an oil and gas lease held by defendants as lessees under assignment as follows:

Dated January 11, 1919, executed by Luciano Obayo and A. P. Barrett, as lessors, and George B. Mechem, as lessee, covering 300 acres of land fully described for a term of five years. The clauses of said lease contract which bear upon the issues in this cause are as follows:

"That the said lessors, for and in consideration of the sum of \$1 in hand paid by the said lessee, \* \* \* and of the covenants and agreements herein contained, does grant, demise, lease, and let unto the said lessee, successors and assigns, for the sole and only pur-

pose of mining and operating for oil, gas, and other minerals. \* \* \* The lessee agrees to commence a well or shaft within 12 months from this date, or pay at the rate of 50 cents per acre, in advance, for each additional year such commencement is delayed from the time above mentioned for the commencement of such well or shaft until completed; and it is agreed that the commencement of such well or of a mining shaft in merchantable ore or minerals shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease. \* \* \* The lessee shall continue the development of said land, if oil, gas, or other minerals are found in paying quantities in the first well drilled, by starting a new well within 60 days from the date on which the first well is finished and continue such development until there shall be a well or shaft for every 10 acres, or less, on said land. It is further agreed and understood that should water be found in any well on said premises, and the lessee should abandon such well as an oil, gas, or other minerals well, the lessors may, at their option, retain such well as a water well by paying the lessee the actual cost and carriage from San Antonio, Tex., of the casing contained therein necessary to maintain such well as a water well. The said lease contract contained the usual provision for payment by royalties of parts of the oil, gas, or minerals produced, and also provided that lessee might assign his rights."

Appellant alleged that on December 8, 1919, he became the owner in fee simple of the 300 acres of land covered by the lease contract; that Luciano Obayo and A. P. Barrett executed the lease contract as set out above; that the rights of Geo. B. Mechem under said lease contract were assigned to appellees under date of July 1, 1919; that a well known as Barrett No. 1 was begun on said land under said lease on or about March 1, 1919, and completed and another one started known as Barrett No. 2, which was completed about June 1, 1919; that gas in paying quantities was found in both of said wells; that since the completion of said second well the appellees have wholly abandoned all operations under said lease, and have not begun another well and have made no effort to market the gas from the two wells so finished; that the appellees are and were foreign corporations without permits to do business in Texas, and by reason thereof are not permitted by law to carry on the business necessary to operating under the terms of the lease contract, nor can they defend this suit under the law.

Appellees answered by general denial, and special answer as follows: That they have acquired the rights of Geo. B. Mechem under said lease; that thousands of dollars were spent under said lease in developing two wells; that the volume of gas found in said wells is sufficiently large to be in paying quantities, but that there is no market for such gas in that vicinity; that the lease contract provides that the commencement of a well in paying mineral shall operate as full liquidation of all rent under said lease for the full term thereof, and that by reason thereof the commencement of said wells satisfies the lease in full to January 10, 1924; that a large lien exists upon the lease-

ed premises, rendering it unsafe for appellees to proceed with development operations; that appellees have placed casing in the two wells upon the leased premises, and if appellant recovers herein appellees pray that they be adjudged to be entitled to remove said casing.

By trial amendment appellant set up the fact that he acquired the interests of A. P. Barrett in the lease contract.

By supplemental answer appellees also pleaded the right to remove the casing from the two wells upon the leased premises.

At the close of the testimony appellees filed a motion for an instructed verdict in their favor. This motion was granted, and a verdict was returned herein in favor of appellees under the charge of the court. Judgment was rendered upon said verdict that appellant take naught and that appellees go hence with their costs.

[1] We think the court erred, as complained in the first assignment, in overruling the appellant's exception to that part of the answer setting up an outstanding mortgage lien, because there was no ouster under it, or an impending ouster, or so pleaded that would entitle him to any relief because of that. *Thornton on Oil & Gas* (3d Ed.) vol. 1, p. 549, § 386.

Appellant's remaining exceptions to the answers are rather directed to matters of defense which arise in the case, not necessary to pass upon here, but will be considered in passing upon the entire case.

The real and more important question is: Does this record, under the facts, disclose a case for the cancellation of the oil lease as a matter of law?

[2] We shall lay out of sight in this discussion that ancient and highly commendable doctrine that forfeitures are not favored, for in such cases as this, involving the consideration of mineral, gas, or oil leases, forfeitures are very much favored; that is, they are most strictly construed against the lessee. It is a rule of necessity to guard the rights of the landowner, as well as the public interest, against some of the most stringent covenants, often not well understood, burdened with unexecuted and profitless leases, incompatible to speedy development of the land and an obstacle to the use and the alienation of property. *Cockrum v. Christy*, 223 S. W. 308; *McLaughlin v. Brook et ux.*, 225 S. W. 575; *Thornton on The Law Relating to Oil & Gas*, § 148; *Brown v. Vandergriфт*, 80 Pa. 142.

But, while that rule is true, a lessee who begins the work in good faith, performs a very material part of the contract and attempts to, and will, if permitted, carry out and perform his entire obligation, is entitled to consideration.

This contract has no provision that ipso facto works a forfeiture and gives the right of re-entry. It has this significant provision:

"And it is agreed that the commencement of such well or of a mining shaft in merchantable ore or minerals shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease."

This lease was for five years from January 11, 1919. It was argued by the parties that appellee began drilling upon the lease on or about March 1, 1919, and continued until two paying gas wells were produced, the second well being completed about the 1st day of June, 1919.

Appellee contends:

"The lessee was under no obligation under the contract to do anything at all in the way of development before the expiration of one year from January 11, 1919, the date of the contract, because the agreement provides: 'The lessee agrees to commence a well or shaft within 12 months from the date hereof, or pay at the rate of 50 cents per acre, in advance, for each additional year such commencement is delayed from the time above mentioned for the commencement of such well or shaft until completed.' This suit seeking cancellation of the lease was filed on January 14, 1920."

There were a couple of wells drilled on the tract of land and a pipe line on this tract running across on another tract and another well and casing. There is some evidence of other work done on the property.

The lease provides that lessee agrees—

"to deliver to the credit of the lessors, heirs or assigns, free of cost, in the pipe lines or other receptacles used by the lessee, the equal one-eighth part of all oil and one-tenth of all gas \* \* \* produced and saved from the leased premises. \* \* \* The lessee shall continue the development of said land, if oil, gas, or other minerals are found in paying quantities, in the first well drilled, by starting a new well within 60 days \* \* \* and continue such development until there shall be a well or shaft for every ten acres or less on said land."

Mr. Wolfe testified that the Barrett well No. 1 was drilled in three weeks to completion in the early part of 1919.

Mr. Rense testified that the Barrett No. 2 was completed about the middle of June, 1919.

Rense testifies that he left the well capped, and that he went back two or three times after its completion, the last time "about two months ago" (which would be about September, 1920) and found that:

"There was no work of any kind going on there; it was just as I had left it; there had been nothing done. At the time that I was out there on the occasions of these visits there was no operation going on. There was no gas being taken from this well. There was gas being taken from some wells, but these two wells were capped; they were kept capped up entirely."

Wolfe testified that after the Barrett No. 2 was finished all machinery was moved off



the lease herein involved. Defendants discharged all of their employees in September, 1919.

"As to whether there were any tools, machinery, or anything salable left on the lease, there was nothing left."

On several visits to the Barrett lease (the one in controversy here) since witness left the service of defendants:

"There was no machinery, no derrick, or anything on the Barrett lease at that time, nothing at all."

W. P. Ross, an employee of defendants, testified that defendants quit developing work in July, 1919. He was on the Barrett lease several times, and says:

"There was no drilling going on at the time I was out there that I could see."

Appellant testified that he acquired the 300 acres of land by deed on December 8, 1919, and that there has been no drilling up on the property by any one since then.

The lessee commenced operations as required within the stated period, and put down two wells in merchantable ore or minerals which, under the terms of the contract, satisfied the rent, and started the second well and completed it within the required time, but did not, as required, "continue such development until there shall be a well or shaft for every 10 acres or less on said land."

[3] This suit is to recover the land and cancel the lease because of abandonment, on the sole ground that appellees breached the contract containing the express terms that required the appellee to continue the development of the land. Of course, under all the authorities, including the common-law doctrine, such breaches do not work a forfeiture, but leave the party to the remedy of a suit for damages. They leave him also to the right of specific performance or cancellation. We find the whole subject of cancellation of oil lease contracts, having close connection to the matters involved in this case, interestingly discussed by Associate Justice Greenwood, who wrote the opinion for our Supreme Court in *Grubb v. McAfee*, 109 Tex. 534, 212 S. W. 467. Among other things said in that opinion, he stated:

"It is a recognized rule that additions ought not to be made to contracts by implication beyond that which is necessary. And we see no reason to doubt that full protection may be accorded the owner with respect to the enforcement of the implied covenant of the lessee to use due diligence in mineral development, without making a breach of the covenant a ground of forfeiture. In the first place, the party obligated to drill cannot abandon his contract without subjecting same to cancellation on that ground. And the power of a court of equity in decreeing specific performance is far-reaching, such power having been exercised in a proper case to compel either performance or abandon-

ment by a lessee of an oil lease, within a very few days. *Kleppner v. Lemon*, 176 Pa. 511, 35 Atl. 109; *Id.*, 198 Pa. 581, 43 Atl. 483."

Judge Greenwood is discussing a case in which contracts to complete are implied. Here the agreement to complete is made by express obligation. In the absence of a clause of forfeiture, the principle is the same.

After securing the wells on June 15, 1919, an abandonment was claimed because no gas was or had been marketed after that date or any effort made to utilize the same; also because no new well was started within 60 days after the completion of the second well and the development continued. To show there was no intention to abandon the lease, it is claimed the appellees were not required to do anything for a period of one year from the 11th day of January, 1919, but within three or four days after that date, and on the 14th day of January, 1920, this suit was instituted, notwithstanding the two wells had been completed. Here time was not of the essence of the contract. It is also claimed that the appellant who was not the original lessor purchased the lease with the express purpose of bringing this suit to cancel it and to secure the valuable rights thereunder. Appellees contend there was no intention to surrender the lease nor to long delay its development as required by the terms of the contract; that the appellee became financially embarrassed and had to sell the tools to get some money for temporary relief; that the two wells were properly finished, anchored, and capped with a pipe line connected to one of the wells through which they were using the gas or fuel oil in the operation of the cactus plant situated upon the Hamilton-Swain tract, where, a witness testified:

"The company had headquarters and houses on the Hamilton-Swain tract. They had a cook house and machinery of different kinds. It was the camp and headquarters for that general vicinity out there. I know as a fact that the Wisconsin-Texas Oil Company and the Wisconsin-Texas Gas Company maintained their offices on the Hamilton-Swain tract. There is nothing there now at the present time in the way of machinery or drills, but there is a shop and house still there. There is a machine out there to make a kind of cow feed out of the cactus plant. I don't know what it is; it is on the Hamilton-Swain tract."

It is contended that prior to appellant's purchase there was no complaint or demand made for appellees to proceed and continue with the development. Appellees, in partially completing the work, spent large sums of money, which would be entirely lost to them if not permitted to finish their contract. They liquidated all damages for rent for the entire rental term, as shown, and would suffer irreparable loss if not permitted to "con-

tiue" with this work to its completion. As seen from what we have said, which is based upon respectable authority, courts do not look with special favor to defaulters in oil lease contracts, but there is a well-settled principle of law that abandonment in any kind of contract involves an issue of fact, largely dependent upon the intent of the party. The intention to voluntarily abandon and relinquish the right must appear from the evidence. Such intention cannot in all cases be shown by a mere cessation of work for a certain period of time. We know, as said in *Grubb v. McAfee*, supra, that facts may be shown as evidence of the intention, as a matter of law, that the contract will not be completed, but we do not think they have that cogent effect here. In the *Grubb Case*, supra, supplies, machinery, etc., had been removed some nine years, and during which time no prospecting or drilling, or producing operations on the land was done, and when he abandoned it he refused to comply with his obligations. He did not deny that he intended to abandon the contract when he ceased work, and did not testify to any desire or purpose to resume operations. In this case the undisputed evidence shows that a material part of the contract was performed. Two producing wells were secured and capped. All the rent was paid; so the question is presented as a fact: Was that contract breached and abandoned to "continue such developments until there shall be a well or shaft for every 10 acres or less on said land"?

[4] The settled rule, in respect to directing a verdict in favor of one of the parties on the evidence, is to give to the evidence its strongest probative force in favor of the ruling, so, if there is any evidence in favor of the party against whom the instruction was given, it would be error. Such directed verdict can be proper only if under all the evidence and under all reasonable inferences therefrom, as a matter of law, the party against whom the instructed verdict was ordered was not entitled to recover. It may be further tested by saying it is a question "whether reasonable minds, viewing the evidence in its most favorable light for the appellant, could have returned a verdict in his favor. If so, the court erred in directing the verdict. If not, then the ruling of the court is correct."

[5] Applying these familiar rules to this case, we cannot say, as a matter of law, that the appellants had abandoned the contract, and would not fairly and honestly and in good faith continue the further development of the mineral properties. That was the real question at issue, which we regard as a jury question. *E. W. Hall et al. v. E. A. McClesky*, 228 S. W. 1005; *Hall et al. v. Roberts et ux.*, 228 S. W. 1008.

There were sufficient facts to go to the jury as to whether or not the contract was abandoned, and the court was not justified in this case under the evidence to take it away from them and direct their verdict as a matter of law. It was therefore error to so instruct the jury, and the judgment of the trial court, for that reason, is reversed, and the cause remanded for a new trial.

### MAYS et al. v. FIRST STATE BANK OF KELLER. (No. 9404.)

(Court of Civil Appeals of Texas. Fort Worth. May 28, 1921. Rehearing Denied July 2, 1921.)

#### 1. Principal and agent §177(1)—Notice to agent is notice to principal.

The principal is bound by the knowledge of the agent, that is, notice to the agent constitutes notice to the principal.

#### 2. Banks and banking §116(6)—Notice to cashier acting for self in taking notes not imputable to bank.

Where the cashier of a bank in taking title to certain notes was furthering his own interest and object and was not acting for the bank, it cannot be presumed that he would have notified the controlling officers of the bank of his own violation of the trust imposed in him by the parties transferring the notes, so that notice to him is not notice to the bank.

#### 3. Bills and notes §359—Bank which took notes in satisfaction of pre-existing indebtedness gave "value" and was holder in due course.

Bank which took notes in liquidation of its cashier's pre-existing indebtedness to the bank held a holder in due course, having given "value" within *Vernon's Sayles' Ann. Civ. St. 1914*, art. 582.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Value*.]

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Suit by the First State Bank of Keller against W. J. Mays and others. From judgment for plaintiff, defendants appeal. Affirmed.

John L. Poulter, of Fort Worth, for appellants.

Samuels & Brown, of Fort Worth, for appellee.

CONNER, C. J. In its final form this suit is one by the appellee, First State Bank of Keller, against W. J. Mays and Charles Mays upon two series of promissory notes. The first series consisted of six, payable in the sum of \$100 to W. J. Mays, or order, and given by Riley and Sarah Gonzales, as purchase money for a certain tract of land conveyed by W. J. Mays to them.

These notes were dated August 3, 1914, and the first one made to mature July 7, 1915, and the others yearly thereafter. The second series consisted of two, each payable to W. J. Mays, or order, in the sum of \$550, and executed by one J. W. Price as part of the purchase money of certain lots owned by W. J. Mays and conveyed to Price on the date of the notes, which was October 26, 1914. These notes matured July 1 and December 1, 1915, respectively.

Gonzales and wife and J. W. Price were made parties defendants and the plaintiffs sought, as against them and W. J. Mays, judgment with a foreclosure of the vendor's liens evidenced by the notes. The claim of Charles Mays originated after the claim of the plaintiff bank, and is wholly dependent upon the defense presented by the defendant W. J. Mays, and in our subsequent treatment of the case we will therefore make no further reference to Charles Mays.

There is but little, if any, controversy in the facts. Briefly stated, in September and October, 1914, the cashier of the plaintiff bank, one John Thomson Adams, appropriated certain moneys to his own use and thereby became indebted to the plaintiff bank in the sum of \$1,700. This defalcation having been discovered, the said cashier, on the 27th day of October, 1914, brought to and had entered upon the bank's books the promissory notes hereinabove described, in liquidation of his said indebtedness. The evidence shows that the bank officers and others, from time to time, passed upon and treated said notes as the property of the bank and as an extinguishment of the cashier's indebtedness, and the jury, in answer to a special verdict, so found. It is also undisputed that at the time of such deposit each of said notes was indorsed by W. J. Mays. It is also undisputed that at the time of such deposit of the notes and acceptance thereof by the plaintiff bank no officer other than said cashier had notice or knowledge of any defense to said notes, or of a vice or imperfection therein.

It further appears, however, both from the evidence, and from a special finding of the jury, that at the time of the delivery of the notes in question by J. Thomson Adams it was understood and agreed between them that said notes should be put up as collateral by the said Adams only to obtain a loan from R. G. Johnson, and that said notes should be used in no other way and for no other purpose; the testimony on the subject by W. J. Mays being to the effect that Adams, in whom he had confidence, approached him with the representation that he was about to lose a section of land in West Texas that he had purchased, for the want of \$1,700, and that to enable Adams to save his land he (Mays) had given the notes in question to him (Adams) with the direction to take

them to Mr. R. G. Johnson and use them as collateral security for a loan.

Upon the evidence and findings referred to, the court entered judgment in favor of the plaintiff bank against the makers and W. J. Mays, as indorser, for the amount due on the said notes, also foreclosing the vendor's liens as prayed for, and the defendant W. J. Mays has appealed.

Appellants first assign error to the refusal of the court to instruct the jury to find for the defendants, and thus state their theory of the case:

"We took the legal position in the court below and will endeavor to present the case in this court upon the theory that, when W. J. Mays sold the land belonging to him and took the notes in controversy as a part of the purchase price for his land, the notes were then his property, and that he had the legal right to enter into an agreement with Adams that the notes should be hypothecated to secure a loan of money to be paid on a section of land, so that the land would be available as an asset and available as a means of releasing the notes, so that they could be returned to their rightful owner, without losing his ownership of his said property, while in the hands of Adams, who undertook to violate his trust and misappropriate them, or in the hands of any one who wrongfully acquired them or took them with notice of the arrangement under which they were acquired from the owner. If the notes were acquired from W. J. Mays without consideration and for a specific purpose, which trust and agreement was violated by Adams, the duly elected cashier of the Keller State Bank, the bank could not then set up a superior title to the notes as against W. J. Mays, by acquiring the possession of the notes through the false and fraudulent acts and conduct of their duly elected agent and cashier, Adams, without assuming the knowledge possessed by its cashier of the means used in acquiring the notes from Mr. Mays. Mays parted with his possession of the notes without consideration. This is undisputed. The bank could not legally claim a superior title to the notes unless it could occupy the position of an innocent purchaser in due course of trade, for value, without notice of the circumstances under which they were acquired from Mays. This, we insist, the bank has not done under the record of this case."

[1] While it is a well-settled general rule of law that the principal is bound by the knowledge of an agent, or, otherwise stated, that notice to the agent constitutes notice to the principal, yet there are exceptions to the rule. The general rule is based upon the duty resting upon the agent to disclose to his principal all the material facts coming to his knowledge with reference to his agency, and a presumption that he has done this is ordinarily indulged. But it seems apparent to us, as it evidently did to the lower court, that the cashier of the plaintiff bank in acquiring the notes in question from W. J. Mays was not acting for the

bank. It does not appear that the bank was engaged in the general business of purchasing securities of the kind, nor that the cashier had been commissioned by the bank to secure either the notes in question or any other notes, unless, perhaps, notes given for moneys loaned out of the bank. On the contrary, it seems quite evident that in securing the notes as he did from W. J. Mays the cashier was acting in his own interest and to serve a particular purpose of his own, to wit, to therewith discharge his liability to the bank arising out of his misappropriation.

The author of *Ruling Case Law* (volume 21, p. 843, § 24) thus states the rule that we think should be applied here:

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

[2] Adams' authority as cashier was sufficient, doubtless, to pass title to the notes secured by him from W. J. Mays to the bank, by having them entered upon the bank's books as the bank's property and procuring the acceptance of the same, but in so doing he was furthering his own interest and object, and it cannot be presumed that he would have notified the controlling officers of the bank of his violation of the trust imposed in him by W. J. Mays. To have done so would doubtless have defeated the very purpose he had in view.

In 31 Cyc. pp. 1269 to 1270, it is said:

"A principal also has a right to receive money from an agent in payment of a debt due from the latter without inquiry as to the source from which it came; and if it is in good faith so received and applied by the principal, its subsequent retention after he learns that it was procured through an unauthorized transaction entered into by the agent in his name will not amount to a ratification of such transaction."

See, also, *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 264; *Texas Loan Agency v. Taylor*, 88 Tex. 47, 29 S. W. 1057; *Holmes v. Uvalde Nat. Bank*, 222 S. W. 640, and cases therein cited.

We think, therefore, that we must hold that the appellee bank is not affected by the vice, if any, occasioned by the cashier's (Adams') use of the notes otherwise than as authorized by W. J. Mays.

[3] We are of the opinion also that it must be held that the plaintiff bank is a holder of the notes in question in due course and for a valuable consideration.

In 2 *Williston on Contracts*, p. 2140, it is said:

"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Every element necessary to establish the appellee bank as a holder of the notes in question "in due course," as defined in the quotation, has been established in the case before us by the undisputed evidence, unless it can be said that the bank did not pay value therefor. Article 582, V. S. Tex. Civ. Statutes, provides that an assignee of negotiable instruments may sue in his own name, and if he obtains such instrument before its maturity, "by giving for it a valuable consideration, and without notice of any discount or defense against it, then he shall be compelled to allow only the just discounts against himself."

In *Williston on Contracts*, p. 2125, § 25, the author, in speaking of what "value" must be given by the transferee of negotiable instruments in order to constitute him "a purchaser for value or holder in due course," says:

"Value is any consideration sufficient to support a simple contract: An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

Chief Justice Hemphill, in *Greeneaux v. Wheeler*, 6 Tex. 515-527, has this to say on the subject:

"The rule that to support the holder's title, the transfer must be bona fide and for valuable consideration, was usually expressed, in the earliest cases, with the qualification that the notes must have been received in the usual course of trade. What is meant by the usual course of trade has been much discussed, and attempts have been made to limit the description to cases in which the holder has made an actual advance in money, or its equivalent, for the paper. In New York, it has been held that a note taken in payment of a precedent debt was not taken in the usual course of trade; and the holder would not have a valid title as against the real owner; nor could he resist an equitable defense, good between the maker and the payee. But the great weight of authority is that a transfer for a precedent debt is in the usual course of trade; and the holder must be treated as a bona fide holder for value. Judge Story, in the case of *Swift v. Tyson* (16 Pet. R. 1), reviews the New York cases and the whole doctrine. In his luminous opinion, he states that, assuming it to be true (which, however, may well admit of some doubt, from the generality of the language)

that the holder of a negotiable note is unaffected by the equities of the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business, for a valuable consideration before it becomes due, we are prepared to say that receiving it in payment of, or as security for, a pre-existing debt, is according to the known usual course of trade and business."

In 3 *Ruling Case Law*, p. 269, § 269, in discussing the subject, it is said:

"The prevailing view, however, has been that the indorsee of a bill of exchange or a promissory note, before its maturity, taking it as payment or security for a pre-existing debt, is to be deemed a holder for a valuable consideration, in the ordinary course of trade, and to hold it free from the latent defenses on the part of the maker."

In *Herman v. Gunter*, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632, it was said that one who acquired a negotiable note in payment of a pre-existing debt is a purchaser for value and in the usual course of trade. See, also, *Alexander v. Bank*, 19 Tex. Civ. App. 620, 47 S. W. 840, where it was held that the holder of a negotiable note acquired before maturity as collateral security for a pre-existing debt would be protected as an innocent holder, unless he had notice when he acquired it of the equity existing between the maker and the payee.

What we have said, we think, disposes of every material question presented by the assignment of error. They are all accordingly overruled, and the judgment is affirmed.

#### On Rehearing.

We think this case distinguishable from that of *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698, and that the case of *Hummel v. Bank*, 75 Iowa, 689, 37 N. W. 954, cited in footnote to first case, more nearly applicable to the case before us.

#### FIRST NAT. BANK OF BURKBURNETT v. SPROLES et al. (No. 9661.)

(Court of Civil Appeals of Texas. Fort Worth. June 4, 1921. Rehearing Denied July 2, 1921.)

**Pleading**  $\S$  422—Failure to attack petition for lack of verification prevents objection to testimony supporting that part of petition.

In a suit by a depositor to recover the difference between the amount of a raised check and the amount as the depositor wrote it, where the petition alleged forgery in raising the check, though *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1828, provides that when defendant sets up counterclaim plaintiff may plead thereto, and whenever defendant is required to plead any matter under oath plaintiff shall also plead

under oath, and article 3710 provides that in an action on an instrument in writing, when the instrument is set up, it shall be received in evidence without proof of execution, unless the party executing it shall deny it by written affidavit, the failure of defendant to except to the petition for lack of verification waives his right to object to testimony denying the execution of the check.

Appeal from District Court, Wichita County; P. A. Martin, Judge.

Action by J. C. Sproles and another against the First National Bank of Burkburnett, Tex. From judgment for plaintiffs, defendant appeals. Affirmed.

J. L. Lackey, of Wichita Falls, for appellant.

Carrigan Montgomery, Britain & Morgan and Bert King, all of Wichita Falls, for appellees.

DUNKLIN, J. J. C. Sproles, who was a depositor of the First National Bank of Burkburnett, Tex., drew a check on the bank payable to the order of F. A. Willimas for the sum of \$3.75. The check was afterwards so changed as to make it read that it was drawn for the sum of \$800, and after that raise it was presented to the bank and paid, and plaintiff's account with the bank was charged with the sum of \$800, instead of \$3.75. The raising of the check was a forgery.

J. C. Sproles, joined by his brother S. P. Sproles, who was also interested in the deposit in the bank in the name of J. C. Sproles, instituted this suit against the bank to recover \$796.25, the amount of excess paid by reason of the forgery. Plaintiffs recovered judgment for the amount sued for, and the defendant has appealed.

In their petition plaintiffs alleged the forgery by the raise of the amount of the check after J. C. Sproles had signed it. Defendant denied the raise, and alleged specifically that J. C. Sproles signed the check with the amount, \$800, written therein.

Based upon articles 1828 and 3710, V. S. Tex. Civ. Stats., appellant has assigned error to the admission of testimony offered by plaintiffs to prove the forgery over the objection that plaintiffs had not verified their allegations of forgery.

Article 1828, V. S. Tex. Civ. Stats., reads as follows:

"When the defendant sets up a counterclaim against the plaintiff, the plaintiff shall plead thereto under the rules prescribed for the pleadings of defensive matter by the defendant so far as the same may be applicable. And whenever under such rules the defendant is required to plead any matter of defense under oath, the plaintiff shall in like manner be required to plead such matters under oath when relied on by him."

Article 3710, reads:

"When any petition, answer, or other pleading shall be founded, in whole or in part, on any instrument or note in writing, charged to have been executed by the other party or by his authority, and not alleged therein to be lost or destroyed, such instrument or note in writing shall be received as evidence without the necessity of proving its execution, unless the party by whom or by whose authority such instrument or note in writing is charged to have been executed, shall file his affidavit in writing denying the execution thereof; and the like rule shall prevail in all suits against indorsers and sureties upon any note or instrument in writing."

Defendant did not except to plaintiffs' petition for lack of verification, and by reason of its failure so to do it waived any right to object to the testimony complained of, even though it could be said, but which we doubt, that the statutes were applicable to plaintiffs' allegations of forgery. *Ashcroft v. Stephens*, 16 Tex. Civ. App. 341, 40 S. W. 1036; *G., C. & S. F. Ry. Co. v. Jackson & Edwards*, 86 S. W. 47; *Oneal v. Weisman*, 39 Tex. Civ. App. 592, 88 S. W. 290.

We are of opinion further that the evidence introduced was sufficient to support the judgment of the trial court, which is now here affirmed.

#### HUBBARD v. HUBBARD. (No. 1226.)

(Court of Civil Appeals of Texas. El Paso.  
June 14, 1921.)

**Divorce**  $\S$ 287—Reversal of decree for plaintiff held to render moot defendant's appeal from interlocutory order of sale.

The reversal of a decree of divorce for plaintiff, with no motion for new trial, rendered ineffective an order for the sale of property for division, so that the question presented by defendant's appeal from an order dissolving an injunction staying such sale was moot, and the appeal will be dismissed.

Appeal from District Court, Eastland County; E. A. Hill, Judge.

Suit by Parilee Hubbard against J. M. Hubbard for divorce. Decree for plaintiff. From an order dissolving an injunction staying sale of property for division, defendant appeals. Appeal dismissed.

See, also, 231 S. W. 160.

Shepherd & Kelly, of Eastland, for appellant.

Turner & Seaberry, of Eastland, for appellee.

**WALTHALL, J.** This case presents an appeal by J. M. Hubbard from an order of the district court dissolving a temporary writ of injunction, in a suit by Parilee Hubbard against her husband, J. M. Hubbard, for di-

vorce and partition of certain properties described.

The trial court granted the decree for divorce, and, having found that some of the property (real estate) could not be equitably partitioned, ordered the property sold and the proceeds divided as directed. J. M. Hubbard perfected an appeal in the divorce proceeding and sought to have the sale and portion of the property restrained pending appeal. The trial court granted a temporary writ of injunction as prayed for, but on motion dissolved same, and this appeal is prosecuted from that order. On appeal this court set aside the decree for divorce and reversed and remanded the case. No motion for a new trial in the divorce proceeding having been filed in this court within the time required, the order of sale and partition of the property is without a judgment, and the question presented by this appeal has become a moot question.

It is ordered that the appeal be dismissed, at appellant's cost.

#### MATTHEWS v. DEASON et al. (No. 8573.)

(Court of Civil Appeals of Texas. Dallas.  
June 25, 1921.)

**1. Vendor and purchaser**  $\S$ 344—Party suing for breach must prove contract and tender of performance.

One suing for damages for breach of a contract to convey land must prove the contract alleged and a tender of full performance on his part.

**2. Vendor and purchaser**  $\S$ 344—Purchaser held not to have shown ability to perform agreement as to negotiating sale of second mortgage note.

Where it was part of a contract for the sale of land that the purchaser should negotiate a sale of a second mortgage note at a specified discount, evidence that a third person agreed to take the note at such discount, provided a guaranteed title to the property was furnished and tax receipts produced, did not show that the purchaser was prepared to carry out the agreement, where it was not shown that such guaranteed title or tax receipts were furnished, or that the third person was willing to buy the note without such guaranty or the production of such receipts.

**3. Vendor and purchaser**  $\S$ 350—Evidence held not to show purchaser could have made specified cash payment.

Where it was a condition of a contract for the sale of land that \$800 should be paid in cash, evidence that, when the purchaser told the vendor he was ready to carry out his part of the agreement, he had a check in his pocket, did not show that he could have performed the contract where the amount of the check or who drew it, or that the money could have been obtained on it did not appear.

4. Vendor and purchaser. **§344**—Purchaser suing for breach must show tender, and not mere statement of readiness to carry out contract.

One suing for breach by a vendor of a contract to convey land was bound to show a tender on his part, and it was not sufficient to show that he informed defendant he was ready to carry out his part of the agreement.

5. Vendor and purchaser. **§349**—In purchaser's action for breach, allegations and testimony held not to correspond.

Where plaintiffs, suing for defendant's breach of a contract to convey land, alleged that as part of the contract he was to execute a second mortgage note for \$2,000 bearing interest at the rate of 8 per cent., and providing for attorney's fees, and payable in equal monthly installments, while the testimony showed that the agreement was that plaintiff was to negotiate a sale of the second mortgage note for \$1,600, and pay that amount to defendant in full settlement of the note, the allegations and the testimony did not correspond.

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by S. Y. Matthews against J. T. Deason and others. From a judgment for defendants, plaintiff appeals. Affirmed.

M. M. Parks, of Dallas, for appellant.

Burgess, Burgess, Chrestman & Brundidge, of Dallas, for appellees.

TALBOT, J. This is the second appeal in this case. 200 S. W. 855. The appellant sued originally to compel specific performance of an alleged contract to convey a lot of land in the city of Dallas and to enjoin the threatened sale thereof by the sheriff of said county. On the former appeal the case was reversed and remanded for a new trial. By a second amended petition filed January 2, 1920, the appellant abandoned his suit for specific performance and now seeks simply to recover damages for alleged breach of contract to convey real property. He alleges in substance that in October, 1914, appellees sued him upon a note for about \$2,200, besides interest and attorney's fees, given by him in part payment for certain real property situated in Dallas, Tex., and secured by a second lien upon said property; that a note for \$4,000, secured by a first lien on the same property was recognized in that suit; that appellees sought to foreclose their second lien and have the property sold in payment of the judgment rendered thereon; that he consented to judgment being rendered against him in appellees' favor, for amount sued for, with foreclosure of lien and sale of the property, upon condition that after appellees bought the property in at sale under the judgment they would reconvey the property to him, the terms not then being agreed upon; that afterwards the terms were

agreed upon in substance; that appellant would secure an extension of the \$4,000 first lien note, for a period of three years, and appellant would execute to appellees a note for \$2,000, secured by a second lien on the property, said note bearing interest from its date at the rate of 8 per cent. per annum, and providing for 10 per cent. attorney's fees, to be dated May 6, 1915, and payable in equal monthly payments of \$65 each month, beginning June 1, 1915, and one on the 6th day of each month thereafter until said note was paid, principal and interest, and that appellant would execute another note in favor of appellees in the sum of \$350, secured by lien upon said property, and due in six months from the 6th day of May, 1915, to be paid one-half in merchandise, and the further payment by appellant to appellees of the sum of \$800 in cash, upon the performance of which obligations on the part of appellant he alleges appellees agreed to reconvey said property to him. He further alleges that he tendered performance on his part by tendering appellees one note for \$2,000, another for \$350, and \$800 in cash, having partly performed the contract by paying \$100 as consideration for the extension of said \$4,000 note, which was extended by the holder thereof, but that appellees refused to reconvey said property to him, to his damage in the sum of \$4,000, with legal interest thereon from April 10, 1915. He alleges in paragraph 7 of his petition that he was to pay a total of \$7,250 to redeem the property, and lays his damages at \$4,750, and also claims further damages by reason of loss of rent of the property at \$65 per month, totaling \$2,500. On June 2, 1920, the case was tried, and at the conclusion of the evidence the court peremptorily instructed the jury to return a verdict for the appellees. The appellant presented a motion for a new trial, which was overruled, and he appealed.

The single assignment of error complains of the action of the court in directing the jury to return a verdict in favor of the appellees, and the proposition asserted is:

"There was evidence to support the plaintiff's case of such probative force as to leave room for ordinary minds to differ as to the conclusion to be drawn from it, the evidence making on the whole a prima facie case entitling appellant to recover if the jury found the evidence preponderated in favor of appellant, and the court was unauthorized, under this state of the evidence, to take the case from the jury by peremptorily instructing a verdict for appellees."

If the evidence is of the character asserted in the proposition of the appellant, it would be our duty to reverse the case, but, after a careful reading of the evidence, we are constrained to disagree with the appellant in his interpretation of it.

[1] It devolved upon the appellant to prove

the contract alleged and a tender of full performance on his part of its terms. This, we think, he failed to do. He testified that there was a second mortgage lien of \$2,000 upon the property which he had to handle; that he was to pay Deason \$2,400; that he was to pay him \$800 cash, and get the second mortgage of \$2,000 cashed at \$1,600, which made \$2,400, and that in addition thereto he was to give Deason his note for \$350, \$175 of which Deason was to take out in trade, he being a merchant, and the other \$175 he was to pay in 20 days; that there was a first lien note of \$4,000 on the property, the payment of which he assumed; and that he was to get that note and lien extended for three years. He further said that his agreement with the appellees was that, when he got the note and lien for \$4,000 extended, paid the \$800 in cash, and got the \$2,000 note negotiated, and executed the \$350, they were to deed back to him the lot and premises. Touching the tender or offer to perform his part of the contract, the appellant said:

"I went to Mr. Deason's office and told him I was ready to carry out my agreement, offering to make the \$350 note and get the \$2,000 note negotiated and to pay the \$800 in cash. I had the \$800 right then with me, and the notes were to be drawn."

[2] But he fails to prove that he had or was prepared to raise and pay according to the agreement the \$1,600 on the \$2,000 note. He shows that at his instance R. H. Burt obtained a written agreement from R. H. Clem, which was introduced in evidence, to take the \$2,000 note at a discount of 20 per cent., provided a guaranteed title to the property upon which the lien existed for the payment of said note was furnished by the Stewart Title Guaranty Company, and provided tax receipts showing payment of taxes were produced without cost to him. But there is a total absence of testimony tending to show that such "guaranteed title" or the tax receipts were so furnished to Clem or that he was willing to buy the \$2,000 note or advance thereon \$1,600 without such guaranty of title and the tax receipts showing payment of taxes. While appellant testified that he could have gotten the \$1,600 from some one else, it is undisputed that he relied upon Clem to furnish the same, and that he never made any effort to comply with the conditions imposed by Clem as a prerequisite to his carrying out the agreement to take the note for \$1,600.

[3] In addition to failing to show that he ever had the \$1,600, or that he had made any definite arrangement to get it, he failed to

show that he at any time had the \$800 in cash, which he was to furnish himself. He said he did not have the \$800 in cash, which he was to furnish, in his pocket when he called on Deason and said he was ready to carry out his arrangement, but that he had a check in his pocket. The amount of this check or who drew it, or that the money could have been obtained on it, does not appear. Nor does it appear that the appellant had executed and actually tendered the note of \$350 covered by the alleged agreement to reconvey.

[4] There is nothing in the record to indicate that, had the appellant made a sufficient tender in law to perform his part of the contract, a compliance therewith on the part of the appellees would have been refused, and it was essential to appellant's recovery in this case that such tender on his part be shown. It was not sufficient for his recovery that he simply show, as was in effect done, that he informed the appellees that he was ready to carry out his part of the agreement.

[5] But, apart from the foregoing, the testimony offered in support of the appellant's right to recover did not correspond, at least in part, with the alleged contract to reconvey. As hereinbefore shown, the appellant alleged that, in addition to the other things he was to do in order to obtain a reconveyance of the land in question, he obligated himself to execute his certain promissory note in the principal sum of \$2,000, payable to the appellees herein, bearing interest from its date at the rate of 8 per cent. per annum, and providing for 10 per cent. additional as attorney's fees, to be payable in equal installments of \$65 each month, the first being payable on the 1st day of June, 1915, and said note to be and constitute a second lien upon said land. The testimony to establish this part of the alleged agreement was to the effect that there was a second mortgage lien (referring to the \$2,000 note he was to execute) which he was to execute, negotiate, and get cashed at \$1,600, and pay the appellees the said \$1,600 in full settlement of the \$2,000 note, which, aside from the interest provided for in the note, would be \$100 less than appellees were to receive, under the contract alleged, in consideration of the reconveyance, considering the note collectable for its full amount, which, in view of the security for its payment, was contemplated and fully expected.

We conclude the trial court correctly held that the evidence was insufficient to authorize a recovery by the appellant, and the judgment will be affirmed.

Affirmed.



**MEDINA OIL DEVELOPMENT CO. v.  
MURPHY et al. (No. 6568.)**

(Court of Civil Appeals of Texas, San Antonio. May 28, 1921. Rehearing Denied June 27, 1921.)

**1. Tenancy in common — One cotenant cannot give valid oil lease to specific portion of tract.**

One cotenant owning an undivided one-half interest in a large tract of land cannot give a valid oil lease to a stranger which covers a specified portion of the tract, since he cannot convey a distinct portion of the estate by metes and bounds.

**\*2. Partition — Amendment of statute authorizing partition by mineral lessors did not change character of remedy.**

Act March 28, 1917 (Acts 1917, c. 105 [Vernon's Ann. Civ. St. Supp. 1918, art. 6096]), amending Rev. St. art. 6096, so as to authorize partition of mineral lands, whether held in fee or by lease, while it enlarged the purpose of the former statutes so as to give a right to partition to those not theretofore entitled to partition, did not change the nature of the partition, or render inapplicable the decisions construing the statute before its amendment.

**3. Partition — Oil lessee cannot compel partition as against cotenants in fee.**

Under Rev. St. art. 6096, even since its amendment by Act March 28, 1917 (Acts 1917, c. 105 [Vernon's Ann. Civ. St. Supp. 1918, art. 6096]), to permit partition of mineral lands held by lease, partition can be compelled only by cotenants holding a title of the same nature, so that the lessee under an oil lease granted by one of two tenants in common cannot compel a partition against the cotenants of his lessor.

**4. Partition — Lessee from one cotenant of specified portion cannot compel partition of entire tract.**

Even if an oil lessee of a cotenant could compel partition, he is not entitled to such relief where his lease was executed by an owner of an undivided one-half interest in the tract to be partitioned, but described a specified portion thereof as covered by the lease, since one cotenant cannot select a portion to be set off by him in partition, and the lessee acquired no interest except in the described portion.

Appeal from District Court, Medina County; R. H. Burney, Judge.

Suit for partition by the Medina Oil Development Company against J. E. Murphy and others. From a judgment dismissing the suit, when plaintiff declined to amend its petition after demurrer thereto was sustained, plaintiff appeals. Affirmed.

De Montel & Fly, of Hondo, for appellant. Hertzberg, Kercheville & Thomson, of San Antonio, for appellees.

SMITH, J. This is a partition suit brought by the Medina Oil Development Company against J. E. Murphy and wife and Jack M. Fusselman. A general demurrer to plaintiff's petition was sustained, the plaintiff declined to amend, the suit was dismissed, and this appeal results. The petition discloses, in short, that Fusselman and the Murphys each owned the fee-simple title to an undivided one-half of four tracts of land in Medina county, aggregating 1,951 acres, and that Fusselman, without the joinder of the Murphys, gave the company a five-year oil and gas lease on a part of two of the tracts, specifically described and embracing 1,000 acres.

[1] In its petition the plaintiff below asked, primarily, that the 1,000 acres covered by the lease from the Murphys be set aside in their entirety to the use of the lessee for the purpose of operating thereon under the terms of the lease. The effect of such judgment would be to give to the lease the same full vitality that it would have had if the Murphys had joined Fusselman in its execution. Such relief could not be granted. As to his cotenants, the Murphys, the lease executed by Fusselman was void, and without any force whatever to in any manner bind the Murphys. In *McKey v. Welch*, 22 Tex. 396, Chief Justice Wheeler, discussing this very question, said:

"It appears to be well settled, and upon good reason, that one joint tenant, or tenant in common, cannot convey a distinct portion of the estate, by metes and bounds, so as to prejudice his cotenant; for, to give effect to such alienations, as against the cotenants of the grantor, would be to create new tenancies in common, in distinct tracts or parcels of the estate, held in common, to the injury of the cotenants. As one tenant in common has no right, on partition, to select any particular portion of the land, and insist on having his part set off in that specific portion, so he cannot convey such a right to his grantee. \* \* \* 'One joint tenant, or tenant in common,' says Kent, 'cannot convey a distinct portion of the estate by metes and bounds, so as to prejudice his cotenants, or their assignees, even though it may bind him by way of estoppel. As against the cotenants, such a deed is inoperative and void.' 4 Kent's Com. 368."

The main contention of appellee is for a partition of "the oil and gas rights" of the property "as owned" by all the parties, "and the part of said land upon which plaintiff is entitled to the oil and gas rights be set aside and designated, and plaintiff be given the exclusive right and privilege to use the same under the terms and conditions of its said oil and gas lease," this being the language of the prayer for alternative relief. Appellant relies upon Article 6096 of the Statutes, as amended by Act March 28, 1917 (Law 1917, c. 105 [Vernon's Ann. Civ. St.

Supp. 1918, art. 6096]), as authority for the action to compel partition. The article as amended reads:

"Any joint owner or claimant of any real estate or of any interest therein or of any mineral, coal, petroleum, or gas lands, whether held in fee or by lease or otherwise, may compel a partition thereof between the other joint owners or claimants thereof in the manner provided in the succeeding articles of this chapter."

[2] The act of 1917 amended article 6096 only to the extent of inserting therein the additional words, "or of any mineral, coal, petroleum or gas lands, whether held in fee, or by lease or otherwise," and it may be said, therefore, that the constructions placed by the decisions upon the provisions of the original article are applicable alike to the provisions of the amended article, in so far as they announce and apply the general principles governing partition or the character of ownership of the estate subject to partition. In the original article the right to partition was given only to joint owners of real estate, or of any interest therein, while the amended article enlarges the purpose of the law so as to give the right of partition, not only to joint owners of real estate, or of any interest therein, but as well to joint owners of any oil or gas lands, "whether held in fee, or by lease or otherwise." It will be observed that the right to partition is given, under the new as well as the old statute, only to joint owners of the property sought to be partitioned. As we understand the rule to be in Texas as well as in all the other states, perhaps, unless the plaintiff in a partition proceeding has an equal right to possession, he cannot compel partition. *Tieman v. Baker*, 63 Tex. 641. A joint owner of the fee, or of any interest in the fee, may compel partition of the land, and in this way have his portion of the fee or interest therein segregated from all the other portions, and given over to his exclusive use and enjoyment. This is true because the owners of that interest have the equal or joint right to possess, the estates of all are of equal dignity, and the interest of each owner is in kind, and capable of partition. The partition is of the possession, and not of the title. As was said by Justice Stanton, in the *Tieman v. Baker* Case, *supra*:

"The very purpose of partition is to enable one holding or entitled to hold with others an *undivided possession*, to sever that possession and right, and thenceforth to hold an *exclusive possession* of a specific part of the property, *which before partition all the co-owners had the equal right to possess.*" (Italics ours.)

[3] In our opinion, the lessee here cannot compel the lessor, the owner of the fee, and his cotenants, to partition. The estate of leasehold here differs from and is of less dignity than, and is subservient to, the es-

tate of freehold; the two estates are by no means common, or of a kind. The lease held by appellant in terms limits appellant to the right to go upon the leased premises for the "sole and only purpose" of exploring and drilling for and producing, saving, and removing oil and gas, and the uses incident to that purpose. It conveyed only a particular and very limited estate in land whereof the grantor held the general estate. It did not convey the exclusive dominion of any part of the premises so as to make the lessee a tenant in common, or joint tenant, of the owner of the fee. In 30 Cyc. 178, it is said that:

"It is indispensable that the property sought to be partitioned be held in cotenancy. A parcel of land may be so held that it would require a conveyance from many persons to vest an estate in fee in the whole thereof in any one, and one or more of the persons having interests in the property may be anxious to separate that interest and turn it into an estate which he can transmit and enjoy free from the conditions and paramount rights to which his present estate or right is subject, as where one person owns the ground and the other the buildings or other improvements thereon, or one owns the lower and the other the upper story of a house, or one owns the property and the other is entitled to an easement or other right therein. In all such cases there can be no compulsory separation. To any judicial proceeding seeking such separation it is sufficient answer, although several estates exist and are vested in many persons, none of such estates is held in cotenancy. Plaintiff in the proceeding must fail, no matter what his interest in the property may be, if that interest is not the interest of a cotenant."

[4] There is another, and we think sufficient, reason for holding that the plaintiff below was not entitled to partition as prayed for. The lease in question covered only 1,000 of the 1,951 acres owned jointly by the Murphys and Fusselman. Partition of the entire 1,951 acres is here sought. In no event would appellant be entitled to a partition of land not covered by his lease, which includes only 1,000 acres specifically described. It does not embrace the remaining 951 acres, or any part thereof. Appellant obtained no interest, by lease or otherwise, in the 951 acres, and cannot obtain an interest therein by floating his lease down upon it by partition. As was said by Chief Justice Roberts in *Arnold v. Cauble*, 49 Tex. 527:

"A partition is a distribution of land between persons who are part owners, and cannot be made to operate as a conveyance of land to one of the parties to the suit who had no interest in or title to the particular portion which was given to him in the division."

Appellant asserts that a life tenant may compel partition with the reversioner or remainderman, and that by the same authority it, as the owner of the lease here involved, may force partition with the lessor and

the lessor's cotenant. *Morris v. Morris*, 45 Tex. Civ. App. 60, 99 S. W. 872, is cited as authority for the contention that a life tenant may compel partition, and it is in fact so held in that case, the decision being based upon the opinion in the case of *Tleman v. Baker*, supra. The only question directly decided in the latter case was that *Tleman* could not compel partition of a tract upon the whole of which he held a life estate, the reason given by the court for so holding being that, even without partition, "such a title and estate would give to the plaintiff the right to possess the entire lot." It is said, incidentally, in that opinion, that if the life estate extended only to a portion of the tract there involved, "We have no doubt that, as against the owner of the life or other estate in the residue of the lot, the plaintiff would be entitled to partition; for the statute declares that 'any joint owner or claimant of any real estate, or of any interest therein, may compel a partition thereof' etc." The opinion then expresses a serious doubt if that can be done, however, saying:

"And it may be that in such case, with the owners of the entire estate, including reversions or remaindermen, before the court, the property might be sold, if necessary, to secure to the holder of only a life estate his exclusive and specific interest. This, however, is not entirely clear. \* \* \*

"When the right to possess the entire property exists in one holding a life estate, if such person has no other estate, no right to partition exists; for it could confer no benefit, as no higher estate can be acquired by partition."

It is finally suggested by the court, however, that if the plaintiff there had a part interest in the fee, as well as a life estate upon the whole tract, he could force partition, not because he owned the life estate, but because he owned the fee. On this point the opinion proceeds:

"If, however, the appellee has the right to the possession of the entire lot during the life of *Matilda Tieman*, \* \* \* and owns in fee simple an undivided one-half of the lot, then he is entitled to have the property partitioned, for this may be necessary to that use and enjoyment of his interest in the property which as owner of the fee he is entitled to." (Italics ours.)

So it is not at all clear that the owner of a life estate only may compel partition in Texas. The general rule in this country is that such owner has not that right. *Chickamauga Trust Co. v. Lonas*, 139 Tenn. 228, 201 S. W. 777, as annotated in L. R. A. 1918D, 451 et seq. But if, under the decisions of this state the owner of the life estate may compel partition, it is only because of the fact that as such owner the life tenant is

entitled to the possession of the property. He is entitled to the exclusive possession against every other person, and for every purpose, except, perhaps, to waste or destroy. Here appellant obtained no such right of possession. From one of the joint tenants he obtained no rights; from the other he obtained only the right, so far as one cotenant could grant it, to go upon a specifically described portion of the land for the "sole and only purpose" of exploring and drilling for oil and gas, and the usual easements incident thereto, and to appropriate a part of the oil or gas it might produce in such operations upon the land specifically described.

Appellants suggests that, if it be held that partition in cases like this was not authorized by the amendment to article 6006, then the enactment was futile, and the purpose of it thwarted. We may say, without at this time expressly so holding, that perhaps the purpose of the amendment was to give to joint owners of mineral leases, or of the estate in minerals (where such estate has been separated by conveyance or reservation or exception from the estate in the surface), the right to compel partition with the other joint owners of such lease or estate; so that, if two or more persons together own a mineral lease, or the estate in the mineral deposits, and quarrel among themselves over the management or operations, one may compel a partition with the others and procure a segregated portion whereon he may manage and operate according to his own notions, and without interference from his former joint owners, subject, of course, and without prejudice, to the rights of the owners of the general estate in the land. This right of partition, however, if in fact created by this act, is an innovation, and had not before been permitted here or elsewhere, for the rule seems to have been universal that such rights are incapable of partition. The reason for this rule seems to be that there can be no definite sale and delivery of oil or gas in place because of their fugitive nature, since they are supposed to percolate restlessly about under the surface of the earth, even as the birds fly from field to field and the beasts roam from forest to forest; so that when production occurs all the oil or gas may have accumulated under the subdivision of one partitioner, and a gross inequality results. It is not for us, however, to question the wisdom or further construe the act in question. We do not think it was contemplated by that act to authorize the partition prayed for by appellant, and we so hold.

The judgment of the court below should in our opinion be affirmed, and it is so ordered. Affirmed.

**ILLINOIS TORPEDO CO. v. ELLIS.**  
(No. 9652.)

(Court of Civil Appeals of Texas. Fort Worth.  
June 11, 1921.)

1. Master and servant  $\Leftrightarrow$ 278(20)—Evidence held not to support theory that master informed servant oil well was in good condition for shooting.

In an employee's action for injuries sustained in shooting an oil well for third parties, plaintiff's own testimony held not to justify recovery on the theory that defendant negligently informed him that the well was in good condition for shooting.

2. Trial  $\Leftrightarrow$ 350(6), 352(1)—Charge submitting issue of negligence in furnishing nitroglycerin squib held too general.

In an employee's action for injuries sustained in shooting an oil well with nitroglycerin, where the only question for the jury was that of defendant's negligence in furnishing a leaky squib to hold the nitroglycerin, an issue whether defendant was negligent in furnishing plaintiff the kind and character of squib and weight he was furnished was calculated to impress the jury with the idea that they could consider dangerous characteristics of the squib other than its leaky condition, and could consider the weight suspended to the squib, especially where the charge was in general language, and the court should have submitted the issues whether the squib was leaky, whether defendant was negligent in furnishing it in that condition, whether its leaky condition caused the accident, and whether defendant should reasonably have foreseen an accident of that character.

3. Master and servant  $\Leftrightarrow$ 286(19)—Negligence in furnishing nitroglycerin tube held question for jury.

In an action for injuries sustained by an employee while shooting an oil well, in which he alleged negligence on the part of the employer in furnishing him a leaky tube for nitroglycerin, where he testified that the explosion could not have occurred unless some of the nitroglycerin was on the outside of the tube, and that it could not get on the outside of the tube unless the tube was leaky, because he had thoroughly washed it, a peremptory instruction was properly refused.

Appeal from District Court, Wichita County.

Action by W. M. Ellis against the Illinois Torpedo Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Weeks, Morrow, Francis & King, of Wichita Falls, for appellant.

E. W. Napier, of Wichita Falls, and Ed Yarbrough, of Electra, for appellee.

DUNKLIN, J. The Illinois Torpedo Company has appealed from a judgment in favor of W. M. Ellis for \$7,200 as compensation for personal injuries sustained by plaintiff by

reason of an explosion of nitroglycerin while plaintiff was preparing to "shoot" a well in the Burkburnett oil field, and which explosion, according to plaintiff's allegations, was the proximate result of defendant's negligence.

Plaintiff was an employee of the defendant, who maintained an office in the town of Electra, some 14 miles distant from the place of the accident. He had been handling nitroglycerin for about 30 years, and had been engaged for 10 years in shooting wells by using that explosive. Men who engage in the business of shooting wells are called "shooters," and defendant had other shooters employed at Electra besides plaintiff, at the time of the accident. The shooting of a well consists in exploding nitroglycerin at the desired spot inside the well, and shooting in some instances is resorted to in order to so break a joint in the metal casing as to permit its removal from the well. Nitroglycerin is first poured into a metal tube, called an electric squib, and the squib, with its contents, is then lowered into the well by means of a wire running over a pulley to the desired depth where the explosion is to take place. The nitroglycerin is exploded by electricity passing through the wire that is attached to the squib. The squib used on the occasion in controversy was about 2 feet long and about 2 inches in diameter, and into it was poured about one quart of nitroglycerin, weighing one pound. The tube or squib, empty, weighed four or five pounds, and after being filled it was so lacking in weight as to necessitate the suspension of a metal weight about the size of a window weight, to the lower end of the tube and hanging two feet below it, in order to hold the tube to the center of the casing, and thus avoid friction with the sides. The casing in the well in controversy was  $6\frac{5}{8}$  inches in diameter, thus leaving a space between the outer side of the tube and the inside of the casing of about 2 inches. As a further precaution against friction between the tube and the wall of the casing, the tube was equipped on its outer side with a wire screen to hold it clear of contact with the casing. The four stiff wires constituting the screen are pressed down against the squib until it is ready to be lowered into the well, at which time they are stretched out sufficiently to touch the casing and thus hold the squib clear of contact with the casing.

On the day of the accident defendant's manager, in charge of its office and business in the town of Electra, received an application from the persons in charge of the well at Burkburnett to shoot it. The manager thereupon selected plaintiff to do the work and gave him a card so notifying him. Defendant kept on hand at its place of business in Electra a supply of empty electric squibs

for use by those whose duty it was to use them, and whenever such an employee was directed to do such work it was left to him to select a tube suitable for that purpose. When plaintiff was told by the manager to go and shoot the well, of his own volition, he selected a tube that another shooter had left in a car. There were other tubes in what was called the shell house at defendant's place of business, near by, but he thought that one suitable and safe. In the shell house there was also provided a simple method, with which plaintiff was familiar, of testing a tube by the use of water, to determine whether or not it would leak, but plaintiff did not make such a test, because, after he had inspected the tube, he was satisfied it would not leak. If a tube leaks nitroglycerin, that fact renders its use exceedingly dangerous, because, if any of the liquid is on the outside of the tube, any friction with it will cause an explosion of the entire contents. A jar of the tube will also cause such an explosion. Plaintiff planned to shoot the well by means of electricity to be passed through the wire to which the tube was attached, when the tube had reached the desired spot in the well.

The allegations of negligence, contained in plaintiff's petition and upon which his suit was based, were as follows:

"Plaintiff further alleges that at the time and place of said accident defendant did not use the proper care and caution, skill and diligence as it should have done for the protection of the plaintiff, but, on the contrary, it was negligent and unskillful in preparing said nitroglycerin tubes for plaintiff to use in shooting said well and furnished plaintiff with a leaky tube which defendant knew was unsafe, and that plaintiff was informed by defendant's agents, servants, and employees that the well he was to shoot was in good condition when in fact it was not, and the casing was not in its proper place in said well, and when the leaky tube struck the misplaced casing, a friction was created which caused the explosion and caused plaintiff's injuries."

[1] It was customary before shooting a well and before letting down the squib to first let down some object to see whether or not the hole was free of obstructions, such as mud or collapsed casing. Plaintiff testified as follows:

"I did not run anything in the well to find its condition. I supposed they did; they told me the well was O. K. I supposed the men in charge of it did it. I don't know the names of the men in charge—the rotary men. They were not working for the Illinois Torpedo Company. They were working for the company for which we were going to shoot the well. When I went there, I inquired, and the people for whom I was going to shoot the well told me the hole was in good shape. They were the only ones that told me. \* \* \* Nobody was there to tell me how to do that at all. I was left to do it the way I thought proper, and I didn't run any-

thing in the hole. This nipple they put in looked O. K. I did not know the condition of the casing from below the nipple, only the men that worked there said it was all right. I did not know how much mud it had in it, nor do I know the thickness of the mud. I do not know how close the mud was to the top of the hole."

The evidence of plaintiff himself, just quoted, was sufficient, of itself, to refute any right of recovery upon his allegation that defendant negligently informed him that the well was in good condition for shooting. With that issue eliminated, the only other issue of negligence relied on by plaintiff was the alleged negligence of defendant in furnishing him a leaky tube with which to do the shooting.

[2] The court gave to the jury the following instructions:

"While the plaintiff was in the employ of the defendant and shooting wells for the defendant, it was the duty of the defendant to exercise ordinary care to furnish him with reasonably safe appliances and to exercise ordinary care in the use of reasonable precautions to make his employment as safe as it could reasonably be made, considering the inherent dangerous nature of the work, and any failure upon defendant's part to exercise this care would be negligence.

"Issue No. 1: Was the defendant company guilty of negligence, as that term has been defined to you, in furnishing the plaintiff the kind and character of squib and weight he was furnished, at the time of the explosion?"

With all other issues of negligence eliminated from plaintiff's case, except that of the furnishing to him a leaky tube, the court should have submitted: First, the issue whether or not the tube so furnished was in fact in a leaky condition; second, whether or not the defendant was guilty of negligence in furnishing the same to plaintiff in that condition; third, whether or not the leaky condition of the tube was the cause of the accident; and, fourth, whether or not in the light of the attending circumstances the defendant should reasonably have foreseen an accident of that character as a probable result of furnishing the tube to plaintiff in that condition. The manner in which the issue was submitted by the court, read in connection with the preceding general instruction relative to the duty which defendant owed to the plaintiff, was calculated to impress the jury with the idea that in determining the issue of defendant's negligence they could consider dangerous characters of the squib other than its leaky condition. Furthermore, the issue submitted expressly permitted the jury to take into consideration the weight suspended to the squib in determining whether or not the defendant was guilty of negligence, when the plaintiff's petition contained no allegation of negligence in that respect. Those errors in the court's charge were pointed out in objec-

tions made thereto by the defendant when the charge was submitted. For that error in the court's charge the judgment must be reversed, and the cause remanded. *T. & P. Ry. v. Bigham*, 90 Tex. 223, 38 S. W. 162.

[3] We overrule the further assignment to the action of the trial court in refusing defendant's request for an instructed verdict, which request was based upon the contention that, as a matter of law, the evidence introduced was wholly insufficient to support a verdict in plaintiff's favor. The plaintiff testified that it would have been impossible for the explosion to occur unless there was some of the nitroglycerin on the outside of the tube, and that there was no way for the same to get on the outside of the tube except that the tube was in a leaky condition, since he had thoroughly washed the outside of the tube before filling it with nitroglycerin.

In view of that testimony, considered in connection with other circumstances, we do not believe the trial court would have been warranted to give a peremptory instruction for a verdict in defendant's favor.

But, for the reason noted, the judgment is reversed, and the cause is remanded.

#### **KUHLMAN et al. v. DICKSON et al.** (No. 9626.)

(Court of Civil Appeals of Texas. Fort Worth. May 7, 1921.)

#### **1. Limitation of actions** $\Rightarrow$ 58(6)—Limitation ordinarily does not run against enforcement of assessment until validly levied.

Limitation against enforcement of a certificate of special assessment against property for street paving ordinarily does not run until a valid assessment has been levied, and, in the absence of express statutory provisions to the contrary, until the municipality has the right to proceed to enforce the assessment.

#### **2. Limitation of actions** $\Rightarrow$ 87(3)—Limitation runs in favor of nonresident who remains without state until period completed.

Limitation runs in favor of nonresidents who shall remain without the state until the period of limitation has been completed, and, once begun, continues to run after the party returns to the state.

Appeal from District Court, Tarrant County; R. E. L. Roy, Judge.

Suit by F. M. Kuhlman and another against Jas. T. Dickson, executor, and others. From judgment for defendants, plaintiffs appeal. Affirmed.

Ike A. Wynn and Herbert Hedick, both of Fort Worth, for appellants.

J. C. Terrell and W. W. Wilkinson, both of Fort Worth, for appellees.

BUCK, J. On June 11, 1920, Kuhlman & Blue filed this suit against Jas. T. Dickson, executor of the estate of Mrs. Jennie H. S. Roe-Tufts, and Mrs. B. Strache, on the following promissory note, executed by the husband of Mrs. Tufts:

"\$149.45. July 24, 1914.

"October 1st, after date, for value received, I promise to pay to Kuhlman & Blue, or order, one hundred forty nine and  $\frac{49}{100}$  dollars at Fort Worth, Texas, to bear interest at the rate of 8 per cent. per annum from July 30, 1914, and further hereby agree that, if this note is not paid when due, to pay all costs necessary for collection, including 10 per cent. for attorney's fees. [Signed] Mrs. J. H. S. Tufts, by S. Tufts, Jr., Attorney in Fact. [Signed] S. Tufts, Jr.

"This is given in recognition and extension of assessment lien for paving on Texas street adjacent to lot 2, block 19, Jennings West Add., Fort Worth, Texas."

Mrs. Strache had purchased the lot on which plaintiffs sought a foreclosure from Mrs. Tufts. J. P. Casey, vendee of Mr. and Mrs. Strache, was later made a defendant. The plaintiffs pleaded that this note was given in recognition and extension of assessment lien for paving lot No. 2, block No. 19, Jennings West addition to the city of Fort Worth. Jas. T. Dickson, executor, answered by a general demurrer, a general denial, a plea of non est factum, and a plea of coverage, and a plea of limitation of two years, four years, and ninety days, the last limitation plea being founded on article 3449, V. S. Tex. Civ. Statutes, providing that the owner of a claim rejected by the executor or administrator may file suit thereon against the executor or administrator within ninety days after such rejection and not thereafter. Mrs. Strache adopted the answer of Jas. T. Dickson, executor, and J. P. Casey answered by a general demurrer, a general denial, and a plea of limitation of two years, four years and ninety days, and also by a plea of innocent purchaser.

The cause was tried before the court without the intervention of a jury, and judgment was rendered for defendant, and the plaintiffs have appealed.

The court filed his findings of fact and conclusions of law, which, in effect, were that the plaintiffs had entered into a contract with the city of Fort Worth to pave Texas street from Jennings avenue to Penn street; that the special assessment for paving in front of Mrs. Tufts property was made and levied against David Evans, as the owner of the property; that said paving was not completed as a whole, inasmuch as one block of the street was left unpaved, and that the property abutting thereon was not homestead property, and was not exempt from assess-

ment against the same and the lien created to secure the payment thereon; that at the time of such paving Mrs. Tufts was a married woman and living in California, and had so lived and resided in said state from the spring of 1911, and that she returned to Texas in the summer of 1916; that no assessment was ever levied against Mrs. Tufts, and that no legal assessment or lien was created against said property; that the note signed by Mrs. Tufts' husband and in her name was not authorized by Mrs. Tufts, and that the property against which the lien was sought to be enforced was the separate property of Mrs. Tufts; that Mrs. Tufts paid, in February, 1915, \$52.52 on this paving; that in the summer of 1916 Mrs. Tufts returned to Texas, where she lived until her death, January 17, 1918; that Jas. T. Dickson qualified as executor of her estate April 23, 1918; that on March 3, 1920, the claim herein sued upon was presented to the said executor for allowance or rejection, and that he rejected the same on March 9, 1920, and that same was returned to plaintiffs' attorney by mail on March 13, 1920, and that on June 11, 1920, the plaintiffs instituted their suit; that no legal or binding assessment was ever made against Mrs. Tufts or her property, but that said claim and lien cast a cloud on the title of the property, and that defendants were entitled to have said cloud removed; that plaintiffs' claim is barred by the statute of four years' limitation, and is barred by the failure to institute their suit within ninety days after the rejection of the same by the executor.

[1.2] The evidence shows that at the time certificate of special assessment against Mrs. Tufts' property was issued, on, to wit, January 28, 1913, that Mrs. Tufts was not a resident of the state of Texas, but had resided in California since 1911; that she established her residence in California in the spring of 1911; that the paving of Texas street was completed on July 30, 1912. We think that the statute of limitation of four years applies. Limitation does not ordinarily run until a valid assessment has been levied, and the period of limitations does not run, in the absence of express statutory provisions to the contrary, until the municipality has the right to proceed to enforce the assessment. *Taxation by Assessment*, by Page & Jones, p. 1852, § 1168. Certainly, in the absence of a statute to the contrary, limitation would not begin to run until the work was completed, and the amount assessed due by the property owners. The ordinance was passed authorizing the assessment against the property owners whose property abutted on the street ordered to be paved on May 3, 1911. Assuming that the statute of limitation began to run at the time

of the issuance of the certificate of special assessment on, to wit, January 28, 1913, it was nearly four years before Mrs. Tufts died. At the time the cause of action accrued Mrs. Tufts, having abandoned her residence in Texas, was living in California. Limitation runs in favor of nonresidents who shall remain without the state until the period of limitation has been completed, and certainly, once begun, would continue to run after the defendant has returned to the state. *Lynch v. Ortleib & Co.*, 87 Tex. 590, 30 S. W. 545; *Wilson v. Daggett*, 88 Tex. 375, 31 S. W. 618, 53 Am. St. Rep. 766; *Snoddy v. Cage*, 5 Tex. 106; *Love v. Doak*, 5 Tex. 343; *Moore v. Hendrick*, 8 Tex. 253; *Glenn v. McFaddin*, 143 S. W. 234. Hence we believe that the judgment below must be affirmed on the statute of limitation of four years, irrespective of the other reasons given by the trial court in his findings of fact and conclusions of law.

Judgment affirmed.

#### TUCKER et al. v. IMPERIAL OIL & DEVELOPMENT CO. et al. (No. 9645.)

(Court of Civil Appeals of Texas. Fort Worth. May 28, 1921.)

1. Husband and wife §276(2)—Surviving husband's authorization to manage community property as administrator cannot be collaterally attacked on ground of defective bond.

In suit by children against their father, as administrator of community property, to set aside an oil and gas lease made by him as such administrator, they could not claim that the county court was without jurisdiction to make the order authorizing him, as surviving spouse, to control, manage, and dispose of the community estate by reason of the fact that the bond given by him was conditioned merely that he "shall well and truly perform all the duties required under said appointment," instead of the condition required by *Vernon's Sayles' Ann. Civ. St.* 1914, art. 3598; for the quoted condition was a substantial compliance with the statute, and, in any event, in view of article 3602, the order could not be collaterally attacked because of a defect in the bond, that being a mere irregularity.

2. Courts §36—Presumption of jurisdiction attaches to judgments of county court.

The county court being a court of general jurisdiction in probate matters, the same presumptions will be indulged to support its judgments as against collateral attacks as will be indulged to support the judgment of any other court.

3. Husband and wife §276(6)—Surviving husband's authorization to control and dispose of community estate authorized his oil and gas lease.

The authority granted a surviving husband to control, manage, and dispose of the entire

community estate of himself and his deceased wife included the right to make an oil and gas lease, whether the right conveyed thereby was a vested interest in the title or an option to acquire such an interest by complying with the terms of the lease.

**4. Appeal and error §1011(1)—Conflicts in the evidence are for the trial court.**

A conflict in the evidence is within the province of the trial court to determine.

**5. Appeal and appear §500(1), 1071(6)—No error shown in failure to file findings and conclusions; record must show that request for finding was presented to court.**

No error was shown in respect of the trial court's failure to file findings of fact and conclusions of law, in compliance with appellant's motion therefor, where, although such motion appeared in the transcript and also the fact that it was filed on the last day of the term of court during which the judgment was rendered, it was not shown by bill of exceptions or otherwise that the request for such findings was ever brought to the attention of the trial judge, and, furthermore, from the record, containing a full statement of facts agreed to by the parties, it did not appear that appellants had been injured by reason of such failure on the part of the trial judge.

Appeal from District Court, Stephens County; G. O. Bateman, Judge.

Suit by Jasper Tucker and others against the Imperial Oil & Development Company and others. From judgment for defendants, plaintiffs appeal. Affirmed.

Mackey & Ritchey, of Breckenridge, for appellants.

Shepherd & Kelly, of Eastland, for appellees.

\*DUNKLIN, J. A tract of 161 acres of land situated in Stephens county was the community property of W. D. Tucker and his wife, Jennie Tucker, who died intestate on October 15, 1906. After her death, and on February 18, 1907, W. D. Tucker filed a petition in the county court of Stephens county, in which county he resided, and in which county Mrs. Jennie Tucker died, praying for the appointment of appraisers to appraise the community estate of the petitioner and his deceased wife, coupled with a prayer that the petitioner be appointed community administrator of said estate. On the same day three appraisers were appointed by the judge of said court, two of whom, together with the petitioner, filed in the county court an inventory and appraisalment of the community property of the petitioner and his deceased wife, and also a list of claims belonging to said estate, all duly verified in accordance with the statutes. The inventory and appraisalment listed the tract of land above mentioned as belonging to said community estate. On the same day the petitioner also

filed a community administrator's bond and oath, but the bond was in the sum of \$750 only, which was the value at which the tract of land above mentioned was appraised. The inventory and appraisalment also included personal property appraised at \$140, and claims due the estate in the sum of \$175. On the same day the county judge, in vacation, made an order which was entered on the minutes of the court reading as follows:

"On this the 18th day of February, A. D. 1907, came on to be considered the report of the inventory, appraisalment, and list of claims of the community estate of Jennie Tucker, deceased, and surviving husband, W. D. Tucker, made by J. B. Lucius and J. J. Day, who have heretofore been appointed by the court to appraise said community estate, and, the court having examined the same, it is ordered by the court that said report be, and it is hereby, in all respects approved, and the same, together with this order, is ordered recorded upon the minutes of this court, and the said W. D. Tucker, as the survivor of said community estate, is hereby authorized to control, manage, and dispose of said community estate in accordance with the provisions of the Revised Statutes of this state."

On March 25, 1918, W. D. Tucker, acting for himself and as survivor of the community estate of himself and his deceased wife, Jennie Tucker, executed to J. A. Thurman what is commonly known as an oil and gas lease upon the tract of land above mentioned, the lease being also signed by Mrs. May Tucker, a second wife of W. D. Tucker. The lease stipulated that it was to run for a period of five years from its date and as much longer as either oil or gas shall be produced from the land in paying quantities. The lease recited a cash consideration paid of \$905, and contained the further stipulation that, if operations for the drilling of a well were not commenced on the land on or before March 25, 1919, then the lease should terminate, unless the lessee should on or before the date pay or tender to the lessor the sum of \$161, which should operate as a rental for 12 months from and after that date and continue the lease in force during that period, and that by the payment of a like sum for each year the lease could be continued in force for the full period of 5 years from its date without the commencement of drilling operations. The lease also bound the lessee to pay certain royalties in the event oil or gas should be found in paying quantities, and it also contained a stipulation making it assignable in whole or in part, and giving the assignee of any particular portion the right to continue the lease in force as to his portion by complying with the terms of the lease so far as applicable to his particular part. Thereafter J. H. Thurman, the original lessee, assigned one-fourth of the lease, and



(333 S.W.)

the portion so assigned was again assigned to different persons.

At the time W. D. Tucker executed the lease there were no valid community debts existing against the community estate of himself and his former wife, Jennie Tucker.

At her death Mrs. Jennie Tucker left surviving her six children, namely, Jasper, Lizzie, Eva, Della, Ervin and Ernest. Thereafter Eva married Roy Segrest, and after her marriage departed this life intestate and childless. The rest of the children, joined by Roy Segrest, instituted this suit against W. D. Tucker and the original lessee, J. H. Thurman, and his assignee and subsequent assignees, to cancel the lease executed by W. D. Tucker, mentioned above; the two daughters, Lizzie and Della, being also joined by their respective husbands, and Ernest Tucker, a minor, suing by Jasper Tucker, as next friend.

Upon the trial of the case, before the court without a jury, judgment was rendered denying to the plaintiffs the right to cancel the lease, but awarding to the minor plaintiff a personal judgment against his father, W. D. Tucker, for the sum of \$80 as his proportionate part of the rentals collected on the lease. From that judgment all the plaintiffs have prosecuted this appeal.

Upon the trial it was agreed that all the rentals provided for in the lease had been paid in accordance with its terms, and, according to the testimony of W. D. Tucker, Jasper Tucker, one of the plaintiffs, requested him to execute the lease; that he executed it for a fair price paid therefor, and after executing it he divided the proceeds thereof among all the plaintiffs except the minor plaintiff, Ernest Tucker, to whom he is ready to pay over his proportionate part; that he executed the lease in good faith, believing at the time that he had authority to do so, and that his act in so doing was for the best interest of the estate.

The bond filed by W. D. Tucker reads as follows:

"Know all men by these presents that we, W. D. Tucker, as principal, and J. B. Lucius and S. W. Lauderdale, as sureties, are held and firmly bound unto the county judge of Stephens county, and his successors in office in the sum of seven hundred and fifty dollars, conditioned that the above bound W. D. Tucker who has been appointed community administrator by the county court of said county of the estate of Jennie Tucker, deceased, shall well and truly perform all the duties required under said appointment.

W. D. Tucker.

"J. B. Lucius.

"S. W. Lauderdale.

"Approved the 18th day of Feb. 1907.

"A. J. Powers, County Judge,

"Stephens County."

Article 3598, V. S. Tex. Civ. Statutes, relating to the administration of community

property by the surviving spouse, reads as follows:

"The surviving husband shall, at the same time he returns the inventory, appraisement and list of claims, present to the court his bond with two or more good and sufficient sureties, payable to and to be approved by the county judge, in a sum equal to the whole of the value of such community estate as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one-half the surplus thereof after the payment of the debts, with which the whole of such property is properly chargeable, to such person or persons as shall be entitled to receive the same."

[1] One of the contentions made by appellants in their pleadings, and by different assignments of error, stated briefly, is that the county judge was without jurisdiction to make the order authorizing W. D. Tucker, as surviving husband, to control, manage, and dispose of the community estate of himself and his deceased wife, by reason of the fact that the bond given by him was not in the terms required by the statute just quoted, the condition of the bond being that W. D. Tucker "shall well and truly perform all the duties required under said appointment," while the condition of such a bond, as required by the statute, is that the survivor "will faithfully administer such community estate, and pay over one-half the surplus thereof after the payment of the debts with which the whole of such property is properly chargeable, to such person or persons as shall be entitled to receive the same." In other words, it is insisted that the bond given was not a substantial compliance with the provisions of that article of the statutes, and that a compliance with this provision was a necessary requirement to confer jurisdiction upon the county judge to enter an order authorizing the survivor to control, manage, and dispose of the community property.

[2] It will be noted that this is a collateral attack upon the order of the county court mentioned. The county court being a court of general jurisdiction in probate matters, the same presumptions will be indulged to support its judgments as against collateral attacks as will be indulged to support the judgment of any other court. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825; *Alexander v. Barton*, 71 S. W. 71; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

In the case of *Jordan's Ex'rs v. Imthurn*, 51 Tex. 276, it was held that the giving of a bond by a community survivor in a sum far less than the value of the community property did not render void a deed of trust on land subsequently executed by the survivor, acting as administrator of the community estate, and that that objection was not avail-

able on a collateral attack made upon the proceedings. The court used the following language:

"It was an irregularity to have taken a bond for an amount less than the appraised value of the property, but, in our opinion, not sufficient, under the circumstances, to have rendered the proceedings void. The giving of the bond by the surviving husband and its approval by the clerk, was in the nature of a judicial proceeding, which should not be held void on a collateral attack. It seems to have been given and accepted in good faith; to have been acted upon and acquiesced in by all parties interested; and no direct proceedings taken to avoid it and have a new or additional one given."

In *Linskie v. Kerr*, 34 S. W. 765, it was held that the fact that one surety instead of two had signed the administrator's bond did not render the order of the court predicated thereon void and subject to collateral attack. See, also, *Townsend v. Willis*, 78 Fed. 850, 24 C. C. A. 369.

We are of the opinion further that the bond above mentioned was in substantial compliance with the statutory requirements, and that the liability of the bondsmen was none the less by reason of the fact that the bond was not in the exact language of the statute quoted. Furthermore, article 3602, V. S. Tex. Civ. Statutes, relating to administration of community estates, reads as follows:

"Any person interested in such community estate may cause a new appraisal to be made of the same, or a new bond may be required of the survivor for the same causes and in like manner as provided in other administrations."

We believe that the enactment of that statute, of itself, implies an intention on the part of the Legislature that a former appraisal or bond which was not in compliance with statutory requirements should not, for that reason, render former proceedings void; in other words, the enactment of that statute seems to imply that a defective bond or appraisal should be treated as an irregularity capable of being cured by a new appraisal or bond. If the Legislature had understood or intended that a defective bond would render the proceedings void for want of jurisdiction, it could hardly be supposed that the statute would have been enacted permitting the amendment of the bond, without requiring, at the same time, the filing of a new petition, a new appraisal, and the entering of a new order of the court authorizing the surviving spouse to control, manage, and dispose of the property, as was done originally. For other authorities showing, in a general way, the presumptions indulged to support the legality of the transactions by the survivor of the community estate, acting under appointment by the

probate court, see opinion by this court in *Tholl v. Speer*, in cause No. 9536, 230 S. W. 453, not yet [officially] published, and other decisions there cited.

[3] The lease in controversy conveyed valuable property rights that belonged to the community estate, and the authority granted by the court to W. D. Tucker to control, manage, and dispose of the entire estate, included the power to dispose of that property right, whether that interest was a vested interest in the title or an option to acquire such an interest by complying with the terms of the lease. The contention made by appellants that the removal of oil and gas from the land would be to commit waste, and that W. D. Tucker, who is the owner of an undivided one half interest in the property, would not be authorized to grant to another the right to commit waste as against the title to the remaining half of the property, which was vested in the plaintiffs, is predicated upon the erroneous assumption that the authority to execute such a lease was not included in the power granted to the survivor to control, manage, and dispose of the community estate.

[4] As noted, W. D. Tucker testified that all of the plaintiffs except his minor son, Ernest, shared the funds paid to him as a consideration for the lease, and that one of the plaintiffs, Jasper Tucker, had advised him to make the lease. That testimony would support a finding that the plaintiffs who had thus participated in the proceeds had thereby waived their right to a cancellation of the lease, at all events. The fact that that testimony of W. D. Tucker was controverted by testimony of some of the plaintiffs would tend only to create a conflict in the evidence, which it was within the province of the trial court to determine. *Old River Co. v. Barber*, 210 S. W. 758; *Barkley v. Stone*, 195 S. W. 925.

[5] Error also has been assigned to the failure of the court to file findings of fact and conclusions of law, in compliance with appellants' motion therefor. We find such a motion in the transcript, and that it was filed on the last day of the term of court during which the judgment was rendered, but it is not shown by bill of exception or otherwise that the request for such findings was ever brought to the attention of the trial judge. Furthermore, the record before us contains a full statement of facts agreed to by the parties, and it does not appear that appellants have been injured by reason of such failure on the part of the trial judge. *Kemp v. Everett*, 59 Tex. Civ. App. 899, 126 S. W. 897; *Boyette v. Glass*, 140 S. W. 819; *Dunlap v. Broyles*, 141 S. W. 289; *Demetri v. McCoy*, 145 S. W. 293.

For the reasons indicated, the judgment of the trial court is affirmed.

**PITTMAN & HARRISON CO. et al. v. BOAT-  
ENHAMER. (No. 9639.)**(Court of Civil Appeals of Texas. Ft. Worth.  
April 30, 1921.)**Appeal and error** §755 — Statute dispensing with briefs does not apply to appeal from judgment refusing permanent injunction.

Vernon's Sayles' Ann. Civ. St. 1914, art. 4645, providing, among other things, that the Court of Civil Appeals may hear the appeal from grant or denial of a temporary injunction on the bill and answer, and such affidavit and evidence as may have been admitted in the trial below, and that neither appellant nor appellee is required to file briefs, does not apply to an appeal from a judgment refusing a permanent injunction.

Appeal from Clay County Court; E. W. Coleman, Judge.

Suit by the Pittman & Harrison Company and others against J. P. Boatenhamer. From judgment refusing plaintiffs a permanent injunction against defendant, plaintiffs appeal. Appeal dismissed.

Harney & Shaw, of Sherman, and W. G. Eustis, of Henrietta, for appellants.

Wantland & Dickey, of Henrietta, and L. W. Parrish, of Washington, D. C., for appellee.

**BUCK, J.** This is an appeal from a judgment refusing Pittman & Harrison Company and other plaintiffs a permanent injunction against J. P. Boatenhamer. Boatenhamer, in a former suit, on, to wit, January 9, 1918, secured a judgment for \$500 damages against the appellants here. An appeal was taken from this judgment, and the Court of Civil Appeals for the Seventh District affirmed the judgment. See Pittman & Harrison Co. v. Boatenhamer, 210 S. W. 972. The application for writ of error was dismissed by the Supreme Court for want of jurisdiction. On the trial of the suit for damages Pittman & Harrison Company impleaded J. C. Hunt, of Wichita county. Hunt filed his plea of privilege to be sued in the county of his residence, which plea was not controverted, and the court sustained the plea, and in so far as it affected Hunt transferred the cause to Wichita county, but proceeded to try the issues between the plaintiff and Pittman & Harris Company in Clay county. In the instant suit plaintiff sought to enjoin Boatenhamer from having execution issued on the former judgment.

On a former day of this term we overruled appellants' motion to advance, since it did not appear that this appeal was from a judgment refusing a temporary injunction, but was an appeal from a judgment refusing a permanent injunction. Article 4644, V. S. Tex. Civ. Stats., as amended Acts 26th Leg.

p. 22. Appellant has filed no briefs in this court. Article 4645, providing, among other things, that the Court of Civil Appeals may hear the appeal on the bill and answer, and such affidavit and evidence as may have been admitted in the trial below, and that neither appellant nor appellee is required to file briefs, does not apply to an appeal from a judgment refusing a permanent injunction. Hence the appellants have failed to comply with the rules with reference to preparing a case for this court, and their appeal is dismissed for want of prosecution.

**DUGGER et al. v. ALLEN et al. (No. 9649.)**(Court of Civil Appeals of Texas. Fort Worth.  
May 28, 1921.)**Judgment** §256(2) — Cannot be entered on special verdict omitting to find on a material issue.

In action for fraudulent representations inducing plaintiffs' purchase of a worthless oil lease, where the case was submitted on special issues and the jury found that the representations were made, but failed to return an answer on the issue whether they were false, it was error to enter judgment for defendants, the verdict as a whole not being susceptible of being construed as a finding that the representations were not false.

Appeal from District Court, Wichita County; W. E. Fitzgerald, Judge.

Action by W. L. Dugger and another against H. A. Allen and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Carrigan, Montgomery, Britain & Morgan, of Wichita Falls, and John McGasson and S. P. Ross, both of Waco, for appellants.

Bullington, Boone, Humphrey & Hoffman, of Wichita Falls, for appellees.

**CONNER, C. J.** This suit was instituted in the district court of Wichita county by W. L. Dugger and E. M. Strange against H. A. Allen, Wm. Frank, and H. F. Wurtz, to cancel a certain contract entered into by and between the plaintiffs and defendants. It was alleged that said contract had been entered into upon the part of the plaintiffs by reason of false and fraudulent representations and concealments made by the appellee H. A. Allen. It was further alleged, in substance, that by the terms of the contract the plaintiffs purchased of the defendants, through the said H. A. Allen, a certain oil lease on a certain five-sixth acre of land located in what is known as the Van Cleave tract in Wichita county, and for which the plaintiffs paid \$12,000, and gave their promissory note for the further sum of \$8,000. The prayer was for

the cancellation of the note and for the recovery of the \$12,000. The plaintiffs further sought to recover the sum of \$30,000 as damages suffered, in ways alleged by reason of said false and fraudulent representations.

The false representations and concealments, as alleged, and in so far as pertinent and here necessary to state them, are, in substance, that H. A. Allen represented that said five-sixths acre was absolutely proven oil land; that it was located between two tracts of land of the same size owned by the defendants, and that the said Allen represented that he had made a fifty-fifty drilling contract upon the said two adjoining tracts, and would have wells sunk upon them at once; that the defendant Allen concealed the fact that a dry hole had been drilled close to and adjoining the tract so leased by the plaintiffs. The plaintiffs alleged that these representations were false, and made the necessary allegations of their reliance thereon, etc.

The defendants Allen and others answered by a general denial, special denials, and pleaded over for a recovery on the \$8,000 note.

The court submitted the case to a jury upon special issues, which, together with the answers of the jury thereto, are as follows:

"Issue No. 1: Find whether or not the defendant H. A. Allen at the time that the contract for the purchase of the acreage in question was made, represented to the plaintiffs the following facts:

"(a) That he had a contract for the drilling of a well on a portion of the 2½ acres on one side of this acreage. Answer: Yes.

"(b) That he could and would let a contract for the drilling of a well on the other side of this acreage. Answer: Yes.

"(c) That the acreage offered for sale was absolutely proven territory. Answer: Yes; but not absolutely proven territory.

"(d) That the Johnson well was an oil well. Answer: No; but the Johnson well was on the sand.

"Issue No. 2: Find whether or not a dry hole had been dug or abandoned on land adjoining this acreage at the time plaintiffs and defendants entered into their contract. Answer: No.

"Issue No. 3: If you answer issue No. 1, or any section thereof, in the affirmative, then find whether or not said representations were false. Answer: —.

"Issue No. 4: If you have answered issue No. 1, or any section thereof in the affirmative, then find whether or not said representations were material. Answer: Yes.

"Issue No. 5: If you have answered issue No. 1 or any section thereof in the affirmative, then find whether or not the plaintiffs relied upon said representation. Answer: Yes.

"Issue No. 6: If you have answered issue No. 1 or any section thereof in the affirmative, or if you have answered in the affirmative to issue No. 2, then find whether or not said representations or concealments, if any, induced the plaintiffs to enter into said contract. Answer: Yes.

"Issue No. 7: Find whether or not the plaintiffs would have entered into said contract but for said representations, if any, or said concealments, if any. Answer: No."

Upon the verdict so rendered, the court entered a judgment for the defendants, and plaintiffs have appealed.

Error is assigned to the action of the court in entering a judgment because of the failure of the jury to answer issue No. 3, and this presents the vital question in the case. We think that this issue embodies very essential elements of plaintiffs' right to recover, if any they had. Had this issue been answered in the affirmative, a recovery by the plaintiffs would have been authorized under the other findings. But with a negative answer, the plaintiffs necessarily would fail.

The case of *Paschal v. Acklin*, 27 Tex. 174, was one submitted to a jury upon special issues. The jury failed to find upon one of the issues held to be material, and the Supreme Court reversed the judgment of the trial court because of the failure mentioned.

In *Moore v. Moore*, 87 Tex. 293, 8 S. W. 235, our Supreme Court said:

"A special verdict is defective, and must be set aside, which does not find all the facts put in issue by the pleading, although the evidence may establish beyond any controversy the existence of the facts not found."

The court further said in the same case:

"This is equally true of a general verdict. In the leading case of *Patterson v. United States*, 2 Wheaton, 221, Mr. Justice Washington, in delivering the opinion of the court, says: 'The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious: It results from the motive and end of pleading. Whether the jury find a general or a special verdict, it is their duty to find the very point in issue, and, although the court in which the cause is tried may give force to a general finding, so as to make it harmonize with the issues, yet if it appears to that court or to the appellate court that the finding is different from the issue or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict.' It may be said that there is a more cogent reason for the rule than that laid down in the passage just quoted. It is the right of the parties to have the jury pass upon all of the facts controverted by the pleadings, and when they have omitted to do this, however clear and undisputed the evidence upon the issues not found, the court cannot render judgment without usurping in part the functions of the jury, and thereby render judgment infringing a right guaranteed by the Constitution and laws."

See, also, *Ablowich v. Greenville Nat. Bank*, 95 Tex. 429, 67 S. W. 79, 881; *Garlitz v. Nat. Bank*, 152 S. W. 1151; *Kendrick v. Polk*, 225 S. W. 826; *Choate v. Railway Co.*, 91 Tex.

406, 44 S. W. 69; Payne v. Ellwood, 163 S. W. 93.

In the case last cited, Mr. Chief Justice Huff, of the Amarillo Court, states the rule undoubtedly established by all of our authorities. He says:

"In jurisdictions where the practice obtains of entering judgment non obstante veredicto, the general rule is that a motion by the plaintiff to enter such a judgment will only be entertained when the verdict is for the defendant upon the facts as present no defense. \* \* \* In Texas, it is made the duty of the court to enter its judgments in conformity with the verdict, whether it be correct or not. When a jury has been demanded by either party, he is entitled to have every material issue made by the pleading and the evidence submitted to the jury, and the trial court cannot enter a judgment upon a verdict which fails to pass upon the material issue submitted to the jury, unless it be in case of a special verdict, which is provided for by statute."

The general rule, as above stated, is not controverted by the appellees, but they here defend the action of the court for reasons embodied in the judgment, to wit:

"The court further finds that answer to special issue No. 3 is not necessary for rendition of judgment in this cause in favor of the defendants against the plaintiffs, in that uncontroverted evidence shows that affirmative answers to special issue No. 1, subdivision (a), were true, and that the answers to subdivisions (c) and (d), special issue No. 1, are in effect negative answers thereto."

If we could accept the answers referred to as a sufficient negative answer to issue No. 3, we would be quite ready to agree with the court that the judgment for defendants was authorized. For, if in effect, the verdict as a whole can be properly construed as a finding of the jury that the material representations alleged and relied upon by the plaintiffs were false, as alleged, then it would be immaterial that issue No. 3 had not been specifically answered. See *Sears v. Sears*, 45 Tex. 557; *Coons v. Lain*, 168 S. W. 981; *Sellers v. Railway Co.*, 208 S. W. 398.

It is undoubtedly true that the representations embodied in subdivisions (a) and (b) of issue No. 1 were shown by the evidence to be true, and not false, as alleged by the plaintiffs. But, inasmuch as the issues were submitted, the truth or falsity of the representations therein embodied were for the jury, and not for the court, the plaintiffs having the right to have the jury pass upon the credibility of the witnesses and weight to be given to their testimony. Nor do we think that the answer of the jury to subdivision (c) is a plain answer that the acreage offered for sale by H. A. Allen, for himself and associates, was represented to be "absolutely proven territory," as alleged, and that such representation was false. In this respect, the issue in

effect was, Did H. A. Allen represent to the plaintiffs that the acreage offered for sale was "absolutely proven territory?" The answer of the jury to this question was "Yes; but not absolutely proven territory." The answer in a sense is contradictory; the affirmative "yes" would mean that H. A. Allen did so represent. The following words, however, "but not absolutely proven territory," tends to a contrary conclusion, indicating perhaps, that Allen represented that the acreage in question was good oil land, but that he by no means undertook to give absolute assurance that oil would be found beneath the surface, and this conclusion is in harmony with appellees' evidence on the subject. The plaintiffs were entitled to a plain answer by the jury to the question of whether Allen represented the land to be absolutely proven territory. One or more of them so testified, and the issue was for the jury and should have been answered in language not susceptible of misconstruction; and such an answer should also have followed issue No. 3, for plaintiffs' evidence undoubtedly tended to show that not only did H. A. Allen represent the acreage in question as absolutely proven territory, but also that such representation was false, and both of these allegations were material issues in the case.

The answer of the jury to subdivision (d) of issue No. 1 may perhaps be correctly interpreted as a negative answer to the issue submitted in that subdivision, viz.: Whether H. A. Allen represented the Johnson well an oil well. The jury answered, "No; but the Johnson well was on the sand." We think it quite probable that by that answer the jury meant to find that Allen did not represent that the Johnson well was an oil well, but only that the Johnson well was on the sand, particularly in view of the fact that the evidence seems almost undisputed that that was the extent of Allen's representation on that subject. But we think the court should have required the jury to give a plain answer to the particular issues submitted, and not have permitted them to undertake in addition thereto to find other terms of representation.

Appellants present a number of other assignments, but we think none of them present reversible error or require of us extended discussion. The evidence seems to scarcely raise the issue requested by appellants and referred to in their ninth and tenth assignments of error. The plaintiffs alleged that the defendants had concealed from them the fact that a dry hole had been dug or abandoned on land adjoining the acreage in question. But as stated, the evidence fails to show with any degree of probative force that Allen concealed any material circumstance in this connection, and the jury in answer to issue No. 2 expressly found that no dry hole had been dug or abandoned on land adjoining

the acreage in question at the time plaintiffs and defendants entered into their contract. The fact that such a dry hole or abandoned well appeared in the subsequent development of the territory was not available to the plaintiffs as any part of their cause of action. Moreover, nothing in the evidence indicates that there was any relation of special confidence between the parties. Nor does the evidence seem to have raised the issue referred to in the eleventh, twelfth, and thirteenth assignments of error which the plaintiffs requested the court to submit. The plaintiffs alleged that the defendants represented that "a well would be drilled at once on the adjoining tracts," but the evidence of the plaintiffs themselves, as we interpret it, is to the effect only that Allen represented that he had made a fifty-fifty contract for drilling on one of the adjoining tracts, and could and would make a like contract on the other; and the evidence seems to be without dispute that he in fact had made the contract, as alleged, and soon thereafter made the other as he contemplated. The fact that such contracts were later abandoned by the drillers, because the surrounding territory had proven to be unproductive, cannot be material.

Other requested instructions do not appear to be material, and we accordingly conclude that all assignments of error not presenting the question first discussed are overruled. But for the reasons assigned in the beginning, the judgment below is reversed, and the cause remanded.

### HOUSTON & T. C. R. CO. v. LEWIS et al. (No. 700.)

(Court of Civil Appeals of Texas. Beaumont.  
June 13, 1921. Rehearing Denied  
June 29, 1921.)

**Indemnity** — Contract by landowner to indemnify railroad for loss for damage to stock held to apply to damage only on land specified.

Where defendant's testator contracted to indemnify railroad company for loss from killing stock owned by tenants of testator, and by the testator, if the railroad company would leave the right of way through a tract of land owned by the testator unfenced in order that part of the right of way might be cultivated, the contract applies only to the stock of testator and tenants of the land mentioned, and does not apply to stock belonging to a tenant living on other land of testator.

Appeal from District Court, Robertson County; W. C. Davis, Judge.

Action by Tony Lewis against the Houston & Texas Central Railroad Company, which filed a cross-action against Mrs. R. J. White,

whose executor, Stone White, was substituted in her stead. From judgment for the executor in the district court, on appeal from justice court, defendant appeals. Affirmed.

A. P. McCormick, of Waco, Perry & Woods, of Franklin, and Baker, Botts, Parker & Garwood, of Houston, for appellant.

J. Felton Lane, of Hearne, for appellees.

**HIGHTOWER, C. J.** This suit was filed by Tony Lewis in one of the justice courts of Robertson county, against appellant railroad company, seeking to recover damages for the alleged negligent striking and killing of a milch cow belonging to Lewis by the train and cars of appellant. Appellant answered by general denial, and then specially alleged that prior to the date of striking the cow it had made and entered into a written contract with one Mrs. R. J. White, who was the owner of a farm through which appellant's railroad track ran, by the terms of which contract Mrs. White had bound and obligated herself to indemnify appellant for any damages sustained by herself or any of her tenants on her farm for any stock killed or injured by appellant's trains, and appellant prayed that Mrs. White be made a party to the suit, and that, in the event judgment should be recovered by Lewis against it, then it prayed judgment over against Mrs. White under the terms of said claimed contract. Mrs. White answered by general demurrer and general denial. The case was tried in the justice court, and resulted in a judgment in favor of Lewis against appellant for \$75, that being the market value of the cow shown to have been killed, and, further, that appellant take nothing on its cross-action against Mrs. White. From this judgment, appellant appealed to the district court of Robertson county (the county court having no jurisdiction), and in that court the death of Mrs. White was suggested by appellant, and her executor, Stone White, was made a party in her stead, and the same relief prayed against him as was prayed against Mrs. White.

Upon trial in the district court, without a jury, judgment was rendered in favor of Lewis against appellant for \$85, found to be the value of Lewis' cow, and no recovery was allowed appellant as against said executor, Stone White. From that portion of the judgment denying appellant recovery over against the executor of Mrs. White, it has appealed to this court.

The trial judge filed findings of fact and conclusions of law. Among other findings, unnecessary to mention here, he found that the written contract between appellant and Mrs. White, on which recovery over against the executor was sought by appellant, had no application to Lewis' cow, and therefore

afforded no right in appellant to a recovery against said executor.

The claimed contract of indemnity relied upon by appellant is as follows:

"The State of Texas, County of ———.

"This agreement, this day made and entered into by and between the Houston & Texas Central Railroad Company, hereinafter styled the first party, and Mrs. R. J. White, hereinafter styled second party, witnesseth:

"The second party owns in fee simple a certain tract of land about 8 miles from the town of Hearne, in Robertson county, Texas, being 1,360 acres of the G. A. Mixon survey, said land having been acquired by said party from ——— under deed dated ——— day of ———, said deed being duly recorded in the Deed Records of Robertson county, Texas; and

"Whereas, the first party owns a tract of land 50 feet in width through the said tract of land first referred to and uses for the purpose of maintaining and operating its railroad thereon; said tract of land being ——— feet in width on each side of the center line of track of the first party and extending from station ——— to station ——— of said first party's line of railroad; and the first party being desirous of fencing its said track or tracks and property extending through second party's said tract of land, so as to prevent any and all damages to said land and the killing of stock by said railroad; and

"Whereas, the second party being desirous that the track or tracks and property of the first party above described, be not fenced, is willing to protect the first party from any loss or damage to stock, belonging to second party, his tenants and those over whom he has control, occasioned by being struck by engines, cars, etc., belonging to the first party, and to waive any rights to claim for such damage to live stock, except in regard to crossings, which shall be treated and considered as though the remainder of the right of way was fenced.

"Whereas, the party of the second part, in the cultivation of said land may cultivate portions of the property of the first part, within the distance of 25 feet from the center of the track, agrees that limitation shall not apply to the right of way in cultivation and unfenced, nor any claim be made for any penalties nor for damages to crops on the property of the first party.

"Therefore, in consideration of the fact that the party of the second part is willing to enter in writing into such agreement with the party of the first part (which agreement is hereby entered into and executed) to relinquish and waive all rights to damage to party of the second part as above specified the party of the first part hereby agrees not to build a line or lines of fence along the boundaries of its said property, as is customary, and as was intended.

"This agreement shall continue in effect until it is terminated by either party giving to the other thirty days' notice in writing of his intentions to terminate, and until so terminated shall be binding upon the parties hereto and their successors in title.

"This agreement made and executed this 8th day of March, A. D. 1917."

The undisputed facts, as reflected by the record in this case, are, substantially, as follows:

Tony Lewis, whose cow was killed, was a tenant of Mrs. R. J. White, and was residing upon and cultivating a portion of a 440-acre tract of land owned by Mrs. White in Robertson county, known as the Armstrong tract. Lewis kept his cow upon this tract of land where he resided, and this Armstrong tract constituted no part or portion of the 1,360-acre tract of land of the G. A. Mixon survey specifically mentioned and designated in the written contract which we have above copied, nor was said Armstrong 440-acre tract in any way connected with said 1,360-acre tract. Appellant's line of railroad was not fenced where Lewis' cow was killed, and the point where she was killed on appellant's track was not opposite the 1,360-acre tract mentioned in the written contract, but quite a distance from the nearest point of said 1,360-acre tract. Lewis, as a tenant of Mrs. White, had no connection whatever with the 1,360-acre tract of land mentioned in the written contract, and his cow that was killed did not stray from that tract upon appellant's right of way.

It is the contention of appellant that the written contract between itself and Mrs. White, above copied, when properly construed, compelled Mrs. White to indemnify it against the recovery of Lewis in this case, appellant contending that the contract, read as a whole, manifests clearly an intention on the part of the parties to it to include and cover any and all land and any and all tenants upon land owned by Mrs. White through which appellant's railroad was constructed, regardless of where such lands not mentioned in the contract might be situated. If such construction of the contract is the proper one, then the district judge was in error in denying recovery in favor of appellant against Mrs. White's executor. We have concluded, however, that appellant's contention on this point cannot be sustained. The contract, when carefully read, relates particularly and exclusively to the 1,360-acre G. A. Mixon tract therein mentioned. The primary purpose, perhaps, actuating Mrs. White in the execution of the contract was the right given her under the terms thereof to cultivate a portion of appellant's right of way extending through that named tract, and, in consideration of that privilege, she agreed to indemnify appellant against any damages for stock killed at any point on said tract of land by appellant's trains passing through that tract of land, whether owned by herself or her tenants, and further agreed not to claim limitation against appellant as to any portion of its right of way opposite that tract that might be cultivated by her. This is the clear and proper interpretation,

in our opinion, of the written contract, and we think the trial judge was correct in not giving it the construction contended for by appellant. Had it been intended by the parties to the contract that other tracts or surveys of land than that specifically mentioned in the contract should be included and covered thereby, it is but reasonable to suppose that the parties would have used language aptly expressing that intention. We are unwilling to adopt appellant's contention in the face of the express language used by the parties to the contract, and hold with the trial judge that this contract gave no right of recovery in the nature of an indemnity over against Mrs. White's executor.

The judgment will be affirmed.

### SLAY et al. v. GÖSE et al. (No. 9620.)

(Court of Civil Appeals of Texas. Ft. Worth. May 14, 1921.)

1. Executors and administrators §329(2)—Homestead of surviving wife could not be subjected to debts other than secured purchase-money notes.

Land, having been the homestead of the surviving wife of the owner, and his estate being insolvent, could not be subjected to the payment of any of the debts of the deceased husband other than purchase-money notes secured by vendor's lien and deed of trust executed to extend the maturity of the notes.

2. Mortgages §334—Power of sale in deed of trust coupled with an interest, and survives death of grantor.

The power of sale, given in a deed of trust to secure payment of a debt, is a power coupled with an interest, which continues in force after the death of the grantor, and a sale and deed made by the trustee in accordance with the powers given him by the instrument after the death of the grantor are valid and effective to pass title to the land conveyed, except in so far as the sale may interfere with due execution of an administration of the estate of decedent to pay such preferred claims as may have existed at the time of sale.

3. Mortgages §591(2)—Foreclosure of lien by sale cuts off equity.

The foreclosure of a lien by sale by the trustee named in a deed of trust in accordance with the terms of the instrument and in accordance with the statutes regulating such sales has the effect to cut off any equity of redemption previously existing in the grantor.

4. Mortgages §594(5)—Junior lienor after purchase on foreclosure may redeem from prior liens.

The holder of a junior lien, after he has purchased the property under foreclosure of his lien, has the right to redeem the property from prior liens by paying the amount of the prior lien debts.

5. Husband and wife §276(6)—Sale of decedent's property by surviving wife passed no title to equity of redemption.

Sale of her deceased husband's mortgaged property by the surviving wife under the community administration did not pass title to any equity of redemption, where neither the surviving wife nor her children had any equity of redemption to sell, on account of a junior lienor's having foreclosed, while the purchaser at the sale under the deed of trust paid off a senior lien on the property, thus redeeming the property and acquiring all rights of the surviving wife and children.

Appeal from District Court, Wise County; F. O. McKinsey, Judge.

Suit by S. M. Gose and others against F. J. Slay, Jr., in which J. J. Ingram intervened. From a judgment for plaintiffs, defendant and intervener appeal. Affirmed.

R. E. Carswell, of Decatur, for appellants. McMurray & Gettys, of Decatur, for appellees.

DUNKLIN, J. This suit was instituted by S. M. Gose in the form of an action of trespass to try title against F. J. Slay, Jr., to recover title to three tracts of land situated in Wise county, the first tract consisting of 64 acres, the second tract of 20 acres, and the third tract of 117 acres. The defendant filed a disclaimer of title to the first two tracts. He also filed a plea of not guilty as to the third tract, and, in connection with that plea, alleged that he was in possession of that tract as a tenant of J. J. Ingram, whom he prayed to be made a party defendant. Thereupon J. J. Ingram filed a plea of intervention, alleging that he was the landlord of defendant Slay, who was holding possession of the third tract as his tenant, and he prayed for permission to intervene and defend the suit as the owner of said third tract, and as to that tract he answered the plaintiff's petition by a plea of not guilty. He also filed a cross-action in the form of trespass to try title against the plaintiff to recover that tract, but disclaimed title to the first two tracts. Judgment was rendered in favor of the plaintiff for the recovery of title to all three of the tracts; the judgment for the first two tracts being rendered upon the disclaimers of title filed by the defendant and the intervener. Judgment for the third tract was rendered upon the findings of fact and conclusions of law filed by the trial judge, who tried the case without the aid of a jury, and which findings and conclusions are as follows:

#### "Findings of Fact.

"(1) By deed dated November 29, 1917, T. G. Williams conveyed to F. Slay, Sr., the land in controversy, the consideration being a cash



payment and the notes in controversy, to wit: One for \$2,000, payable to T. G. Williams, January 1, 1918, with 8 per cent. interest, and the other three notes for \$286.65 each, bearing 8 per cent. interest, payable in one, two, and three years from date to J. M. Scott and S. M. Gose, and stipulated to be a second lien to the lien to the \$2,000 note, both sets of notes being secured by vendor's lien stipulated in the deed.

"(2) Said \$2,000 note was assigned to the Bonner Loan & Investment Company, of Dallas, Tex., and by their deed of trust dated December 6, 1917, said F. Slay, Sr., and wife renewed and extended said note and lien by new note to said company due November 1, 1924, at 6 per cent. interest per annum, payable annually, and stipulated that failure to pay any installment of interest when due should mature said debt, said deed of trust also containing the usual power of sale by the trustee therein named or substitute trustee.

"(3) Said three notes for \$286.65 each were secured by trust deed executed at the same time as the notes, naming a trustee and containing the usual power of sale, and stipulating that, upon failure of making of note to pay any of said notes or annual interest due thereon, the trustee, at request of the legal holder of the notes, should sell said land.

"(4) Said Slay, Sr., died intestate, 2d day of December, 1918, without having paid anything on any of said notes, and about three months thereafter, before any administration, at the request of said Scott and Gose, one of said \$286.65 notes being past due and unpaid, the trustee duly advertised and sold said land at public outcry, in pursuance of the terms of the junior trust deed, and same was bid in by said Scott and Gose, and deed made to them accordingly, said sale and deed being of date January 7, 1919.

"(5) The land in controversy was the homestead of Slay, Sr., at the time of his death, he being the head of a family, and left surviving him a wife and several minor children, and at his death he and said family were occupying said land as a home; and his estate was insolvent, and there was no necessity for an administration on his estate, the only property he owned being said land and about five head of horses and mules, upon which there was a chattel mortgage and all of which, except two head, which the widow claimed as exempt she turned over to the owner of said chattel mortgage prior to said trustee's sale of the land.

"(6) On the 1st day of January, 1920, after said trustee's sale, Bettie Slay, widow of said Slay, Sr., applied for and there was issued to her, as community survivor, by the probate court of Wise county, letters of administration, and she duly made bond and qualified and filed inventory and appraisal of the estate, and she thereafter, as such survivor in community, conveyed the land in controversy to J. J. Ingram, one of the defendants herein, by deed dated 2d day of January, 1920, the consideration being the payment of Ingram of \$200 in cash, the surrender of an account of medical services against said Slay estate amounting to \$30, and the assumption by him of all the purchase-money notes against said land, as above set out.

"(7) Shortly thereafter said Ingram offered

to pay off and satisfy all said indebtedness, and was financially able to do so, and would have done so, but said Gose and Scott refused to permit him to pay off same, claiming that title to the land had vested in them by the trustee's sale aforesaid.

"(8) The \$2,000 note and lien were duly assigned by said Bonner Loan & Investment Company to the International Fire Insurance Company, and thereafter, on January 7, 1920, Republic Insurance Company sold and assigned said note and lien to plaintiff S. M. Gose, said conveyance reciting that by an act of the Legislature it had consolidated with and had succeeded to all the rights and property of said International Fire Insurance Company, which recitation was the only evidence that Republic Insurance Company owned or had the right to convey said note and lien.

"(9) Prior to the transfer to Gose set out in the preceding paragraph, Scott and Gose had paid off the installments of interest due on said \$2,000 note.

"(10) After the \$2,000 note had been assigned to plaintiff Gose, defendant Ingram again offered to pay off and discharge all sums of money due on said note and on the three \$286.65 notes, and was amply able to do so, and would have done so, but said plaintiffs refused to permit him to pay said notes, and, having appointed a substitute trustee, duly advertised and sold said land under the power in the trust deed securing said \$2,000 note, and became the purchasers at said sale, and the substitute trustee executed to them a deed accordingly.

"(11) I find that the defendant Ingram had no personal or actual notice of the sale made as aforesaid under said \$2,000 deed of trust; that the substitute upon advice of plaintiff's attorney began said sale at exactly 10 o'clock a. m.; that Ingram's attorney, without knowledge that said land had been advertised or that said sale was to occur, happened to be present at the time, and upon inquiry ascertained the fact that said sale was about to be made; said Ingram wanted to pay off all said indebtedness, and would do so if the trustee would suspend the sale for 30 minutes to enable him to see Ingram and get the money, but the trustee refused the request and proceeded with and made said sale. I find that Ingram could and would have paid the money and satisfied all the indebtedness against said land within the 30 minutes asked for by his attorney.

"(12) I find that there is now due on all said notes the principal, interest, and attorney's fees stipulated therein, and that plaintiffs are the owners and holders thereof.

#### "Conclusions of Law.

"(1) I conclude that the sale under the \$2,000 note and deed of trust was void as against defendant Ingram.

"(2) I conclude that the sale of the land in question under the junior deed of trust was valid, and conveyed to plaintiffs all the title and equity of redemption of the estate of said Slay, Sr., and that the deed by Bettie Slay as community administrator conveyed no title to Ingram, and that plaintiffs should recover title and possession of the land sued for.

"F. O. McKinsey,  
"Judge 43d Judicial District."

[1] None of the findings of fact have been challenged by appellant except the statement contained in the fifth paragraph of such findings, to the effect that there was no necessity for an administration of the estate of F. J. Slay, Sr., which statement was but a conclusion drawn from the statement of other facts contained in that paragraph. We think there is no merit in this contention. Prior to the sale of the land under the deed, and prior to the attempted community administration, the surviving wife had already discharged a debt owing by the decedent, which was secured by a chattel mortgage on five head of horses and mules by surrendering of said animals and reserving two, which she claimed as exempt property, and which under the law was so. And as the land in controversy was the homestead of the surviving wife and the estate was insolvent, it could not be subjected to the payment of any of the debts of the decedent other than the purchase-money notes, which were secured by a vendor's lien and deed of trust executed to extend the maturity of the notes. *Hoefling v. Hoefling*, 106 Tex. 350, 187 S. W. 210; *Am. Bonding Co. v. Logan*, 106 Tex. 308, 186 S. W. 1132; *Speer's Law of Marital Rights*, § 596, p. 794, and section 509, p. 819; *Zuernemann v. Von Rosenberg*, 76 Tex. 527, 13 S. W. 485.

[2, 3] In the well-considered case of *Weiner v. Zweib*, 105 Tex. 262, 141 S. W. 771, 147 S. W. 867, it was held that the power of sale given in a deed of trust to secure the payment of a debt is a power coupled with an interest, and continues in force after the death of the grantor, and that a sale and deed, made by the trustee in accordance with the powers given him by the instrument, after the death of the grantor are valid and effective to pass title to the land conveyed, except in so far as such sale may interfere with the due execution of an administration of the estate of the decedent for the payment of such preferred claims as may have existed at the time such sale is made. Many authorities are discussed in that opinion sustaining that ruling, and we think the same is now the settled law of this state. It is well settled that the foreclosure of a lien by sale, by the trustee named in a deed of trust in accordance with the terms of the instrument and in accordance with the statutes regulating such sales, has the effect to cut off any equity or redemption theretofore existing in the grantor.

#### Authorities.

[4] It is also true that the holder of junior lien, after he has purchased the property under a foreclosure of his lien, has the right to redeem the property from prior liens by paying the amount of such prior lien debts.

*McDonald v. Miller*, 90 Tex. 309, 39 S. W. 89.

[5] Under these authorities, it cannot be seriously questioned that the equity of redemption, existing in F. J. Slay, Sr., and his wife, who survived him, and also his children, was foreclosed by the first sale under the deed of trust, and that the purchaser Gose thereunder had the right to pay off the senior lien, and thus redeem the property from that lien. He did pay off said senior lien, and, having done so, he acquired all the rights of the surviving wife and her children, as well as the rights of all persons holding any lien upon the property. The sale by the surviving wife under the community administration did not pass title to any equity of redemption, since neither the surviving wife nor her children had any equity of redemption to sell. When Ingram purchased under such sale he acquired no further right than the right to pay off the senior lien, and by such payment to become subrogated to the rights of the senior lien holder. But even if he had discharged said senior lien and had thus become subrogated to the rights of that holder, such a proceeding would not have deprived Gose of the right to redeem the property from the lien by paying the amount due thereon to Ingram, instead of paying it to the holder of the lien.

For the reasons stated, the lower court's findings of fact and conclusions of law are adopted as the findings and conclusions of this court; all assignments of error are overruled and the judgment is affirmed.

#### HATFIELD v. HATFIELD et al. (No. 9564.)

(Court of Civil Appeals of Texas. Fort Worth.  
April 2, 1921. Rehearing Denied  
May 7, 1921.)

1. Appeal and error  $\S$ 242(3)—Defendant who did not invoke ruling on exception to petition cannot successfully urge it.

Though special exception was addressed to the petition, where defendant failed to invoke any ruling thereon by the trial court he cannot successfully urge it in the Court of Civil Appeals.

2. Evidence  $\S$ 158(27)—Testimony admissible in suit to quiet title over objection affidavit of defendant and wife best evidence.

In suit in trespass to try title to recover land, where a defense was that the property was the homestead of defendant husband and his wife at the time deeds of trust were executed by them under which plaintiff derains title, and that by reason of such fact both of the instruments were without legal effect, testimony of the attorney before whom their affidavit was made as notary that the affidavit of defendant and his wife correctly gave what they said at the time, and testimony of another witness corroborating the attorney, was admissible

over the objection that the affidavit itself was the best evidence.

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Suit by T. B. Hatfield and others against T. A. Hatfield. From judgment for plaintiffs, defendant appeals. Judgment affirmed.

S. D. Goswick, of Mineral Wells, for appellant.

Ritchie & Ranspot, of Mineral Wells, for appellees.

DUNKLIN, J. T. B. Hatfield instituted this suit against T. A. Hatfield in the form of trespass to try title to recover a tract of land. Judgment was rendered for the plaintiff, and the defendant has appealed.

[1] A special exception was addressed to the petition, but the defendant failed to invoke any ruling thereon by the trial court, and therefore he cannot successfully urge it in this court, as he has attempted to do. Nor did he invoke any ruling upon his general demurrer to the petition. However, we have examined the petition and find it sufficient as against a general demurrer.

[2] Plaintiff deraigned title through a sale and deed by a trustee named in a mortgage executed by the defendant and his wife on the land, the deed of trust bearing date December 22, 1909, and the trustee's deed, made thereunder, bearing date May 2, 1911. One of the defenses urged was that the property was the homestead of defendant and his wife at the time the deed of trust was executed, and by reason of that fact both of those instruments were without legal effect. After defendant had introduced his testimony tending to support that defense, plaintiff introduced an affidavit made by the defendant and his wife contemporaneously with the execution of the deed of trust, to the effect that the property was not then their homestead; that they had abandoned the same as their place of residence, and had established their home in the state of Oklahoma. According to the testimony of defendant and his wife, they signed the affidavit without knowing its contents. In rebuttal of that testimony plaintiff introduced W. H. Penix, the attorney who prepared the deed of trust and acted as attorney for the beneficiary who loaned defendant the money secured by the instrument. The attorney testified, in effect that the affidavit was made before him as a notary, and that its contents correctly represented what was stated by defendant and his wife at the time, and the facts stated therein were detailed to witness by the defendant and his wife. W. F. Smith, who was present at the time, also fully corroborated the testimony of Mr. Penix. Clearly the testimony of both of these witnesses was admissible over the objection

that the affidavit itself was the best evidence.

The case was tried before the court without a jury; the evidence was sufficient to show title in plaintiffs, both by recorded deed and by virtue of the statute of limitation of five years, and no assignments of error are presented challenging the sufficiency of the proof to warrant the judgment on either of those issues.

Accordingly, all assignments are overruled, and the judgment is affirmed.

### LEATH v. LEATH et al. (No. 9657.)

(Court of Civil Appeals of Texas. Fort Worth.  
June 4, 1921. Rehearing Denied.  
July 2, 1921.)

1. Husband and wife ⇨274(4)—Allegations of fraudulent sale of community property held sufficient, though no sale to defraud wife alleged.

In a suit for partition of community property of plaintiffs' father and deceased mother, plaintiffs were entitled to an accounting by the father for the amount sacrificed by him on a sale of a part of such property, a few days before his wife's death, at a price below its market value, for the purpose of cheating plaintiffs out of their rights therein, though it was not specifically charged that the sale was made for the purpose of defrauding the wife, the allegations of their complaint being substantially to that effect, the jury in answer to special issues having found in their favor on such issue, and that the wife was insane when she joined in such conveyance, and the court having found that the property was sold for \$1,995 less than its market value.

2. Appeal and error ⇨907(3)—Where no statement of facts, judgment presumed sustained by evidence.

In the absence of a statement of facts, it must be presumed that the judgment, except as to the pleadings and findings of the court and jury, was sustained by the evidence.

3. Husband and wife ⇨274(4)—No error in awarding partition of community estate and decreeing that defendant, who fraudulently sold part thereof, pay entire indebtedness.

Where a husband, joined by his insane wife, a few days before her death, conveyed a part of their community property for much less than its market value for the purpose of defrauding their children, there was no fundamental error in awarding a partition on complaint of the latter, and decreeing that the husband pay the entire indebtedness of the estate, in view of further findings that he owed the children, as their half of the community property converted by him, only the balance remaining after crediting him with the amount of such indebtedness, and there was no partition of the homestead, his possession of which was left undisturbed, and no rights of creditors other than the children were affected by the decree.

Appeal from District Court, Clay County; H. F. Weldon, Judge.

Suit by O. B. Leath and others against J. O. Leath. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wantland & Dickey, of Henrietta, and Fitzgerald & Hatchitt, of Wichita Falls, for appellant.

Taylor, Allen & Taylor, of Henrietta, for appellees.

**DUNKLIN, J.** Plaintiffs, the children of J. O. Leath and his deceased wife, Mrs. Nannie Leath, instituted this suit against their father for a partition of property belonging to the community estate of their father and mother. From a judgment in favor of plaintiffs the defendant has appealed.

In their petition plaintiffs alleged that while their mother was on her death bed and a few days before her death the defendant, knowing that she was about to die, sold a tract of land belonging to the community estate far below its market value, for the fraudulent purpose of thereby cheating plaintiffs out of the rights in said property which plaintiffs would soon inherit from their mother. The amount so sacrificed by said sale was alleged and plaintiffs prayed that defendant be held to an accounting therefor in the partition of the estate so sought.

[1] Although it was not specifically charged that defendant made the sale for the purpose of defrauding his wife, the allegations were substantially to that effect. Accordingly we overrule appellant's assignments of error presenting that objection to the pleading, that there was no allegation of an intention to defraud the wife in the absence of which plaintiffs could not complain.

Furthermore, in answer to special issue, the jury found in plaintiffs' favor on that issue of fraudulent sale; also that Mrs. Nannie Leath was insane at the time she joined with her husband in the conveyance. And the trial judge further found, in effect, that defendant sold the property for \$1,995 less than its market value.

[2] The record before us contains no statement of facts, in the absence of which it must be presumed that the judgment in all other respects was sustained by the evidence.

[3] Nor do we perceive any fundamental error in awarding a partition while there was outstanding and unpaid indebtedness against the community estate, and decreeing that defendant Leath should pay the same. According to further findings defendant still owed plaintiffs \$1,834.28, as their half of the community property converted by him, after crediting him with the amount of said indebtedness so charged to him, and defendant's possession of the homestead of 200 acres

of land being undisturbed, and there being no partition of the homestead. We fail to understand why the equities between the parties could not thus be adjusted, no rights of creditors other than plaintiffs being affected by the decree.

The judgment is affirmed.

## STEPHENS v. KANSAS CITY LIFE INS. CO. (No. 9608.)

(Court of Civil Appeals of Texas, Fort Worth.  
April 23, 1921. Rehearing Denied  
May 28, 1921.)

1. Appeal and error  $\S$ 1029 — Assignments immaterial where no other judgment proper under undisputed evidence.

Where, under undisputed evidence, no other judgment than the one rendered was proper, all assignments of error are immaterial and should be overruled.

2. Sales  $\S$ 85(3)—No recovery for failure to purchase real estate loans on honest advice of attorneys to whose opinions contract stipulated to be subject.

In an action for breach of a contract to purchase real estate loans secured by first lien bonds, where the evidence was undisputed that defendant might exercise its judgment freely as to the title, regularity of the proceedings and value of the securities of all loans offered by plaintiff, and that the loans rejected were refused, because of some question as to title or as to the value of the land or security offered, though the titles to all such loans had been approved by plaintiff's attorneys, and the values of the lands were equal to or in excess of those agreed on, the report of defendant's attorneys or inspectors tending to a contrary conclusion was conclusive, in the absence of allegation or proof they were made in bad faith; the merits of an honest opinion actually given by the attorney for a party, to whose opinion as to the title to or legal status of things to be purchased such party stipulates his contract to purchase shall be subject, not being subject to review.

3. Sales  $\S$ 384(2)—Measure of damages for failure to purchase real estate loans stated.

The measure of damages for breach of a contract to purchase real estate loans secured by first lien bonds, where plaintiff elected, not to resell the bonds for defendant's account, but to retain them as his own, is the difference in the contract price and market value thereof, not in the county wherein the lands were located, but at the place where and time when the bonds were to be delivered, so that, in the absence of evidence as to the state of the market at such place and time, plaintiff cannot recover.

4. Trial  $\S$ 351(2)—Seller of real estate loans cannot recover lost profits where submission of such issue not requested nor omission thereof objected to.

In an action for breach of a contract to purchase real estate loans, though the pleadings

were broad enough, and the evidence sufficient to authorize the recovery of profits as damages, plaintiff could not recover such lost profits where he made no request for the submission of such issue and did not object to the omission thereof from the issues submitted by the court.

Appeal from District Court, Shackelford County; W. R. Ely, Judge.

Suit by W. H. Stephens against the Kansas City Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Snodgrass, Dibrell & Snodgrass, of Coleman, for appellant.

Cockrell, Gray, McBride & O'Donnell, of Dallas, for appellee.

CONNER, C. J. The appellant, W. H. Stephens, instituted this suit in the district court of Shackelford county to recover of appellee, the Kansas City Life Insurance Company, the sum of \$2,875.73, with interest at the legal rate from July 2, 1918, upon an alleged breach of contract on the part of the insurance company to purchase from the plaintiff certain real estate loans specifically described in his petition. The case was submitted upon 28 special issues. Upon the findings thereon judgment was rendered for defendant, and plaintiff has appealed.

The pleadings of the parties presented the issues submitted, and those issues, with the answers of the jury, may be thus briefly stated in narrative form, viz:

That Fred W. Fleming, chairman of the board of the Kansas City Life Insurance Company, made a contract with appellant, as alleged in his petition, but that he was without authority, or apparent authority, to do so, and that the contract had not been ratified by the company, but that the insurance company had held out to the plaintiff that the said Fleming had authority. The jury further found that the insurance company had breached its contract and also answered "No" to the following special issue:

"Did the plaintiff, W. H. Stephens, diligently perform his obligations and agreements under the contract entered into between himself and the Kansas City Life Insurance Company, through Fred W. Fleming, chairman of its board, as alleged in plaintiff's petition?"

In the view that we have taken of the case, we think it unnecessary to indicate the remaining issues and findings.

[1] Appellant has presented numerous assignments of error, including an assignment which alleges misconduct on the part of the jury, but we have concluded that all assignments are immaterial and should be overruled, on the ground that under the undisputed evidence no other judgment than the one rendered was proper.

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[2] The evidence shows without dispute that appellant's method of business, in so far as pertinent to the case before us, was to make loans upon real estate in Texas, securing the same by real estate bonds made first liens, bearing interest at the rate of 6½ per cent., and also take interest coupons at the rate of 1½ per cent., secured by a second lien upon the land; that the bond bearing the 6½ per cent. would be forwarded to the appellee company, which, if the loan was approved, would return to appellant the face value of the bond with accrued interest, appellant retaining the interest coupons for the 1½ per cent., which represented his profit in the transaction. Appellant alleged that he had secured an agreement with the insurance company through Fred W. Fleming, chairman of its board of directors, to take loans of the kind, aggregating from \$50,000 to \$100,000, and that the loans specified in his petition had been so secured and forwarded to the insurance company, which had wrongfully rejected them.

Appellee, by pleadings and evidence, denied that any specific agreement of the kind alleged had been made; the chairman, Fred Fleming, testifying in effect that he had merely indicated or stated a willingness to accept loans of the kind to the extent stated.

However, we think that evidence, both in behalf of the appellant and in behalf of the appellee, is without dispute, to the effect that the insurance company was to have full privilege to exercise its judgment freely as to the title, regularity of the proceedings, and value of the securities of all loans offered by appellant, and that the loans specified in the plaintiff's petition, and which were rejected by the insurance company, were refused on the ground either that there was some question made as to title, or as to the value of the land, or the security offered. Appellant's evidence tended to show that the titles to all the loans presented by him and rejected by the company had been approved by his attorneys, and also that the values of the lands upon which the liens to secure the loans had been taken were equal to or in excess of the 50 per cent. agreed upon or contemplated between the parties. but there was no allegation and no proof that the reports of appellee's attorneys or inspectors, which tended to a contrary conclusion, were made in bad faith, and, unless so made, the conclusion on those subjects by the officers of the insurance company to which these matters were submitted was conclusive. We had occasion to consider the question in the recent case of R. M. Grant v. City of Mineral Wells (No. 9528) 230 S. W. 854, not yet [officially] published, where may be found numerous authorities on the subject. We there approved the following quotation of the rule as given by the Supreme Court of Ne-

braska in the case of *Thurman v. City*, 64 Neb. 490, 90 N. W. 253:

"Where a party stipulates that his contract of purchase shall be subject to the opinion of his attorney as to the title to or legal status of the thing, to be purchased, the plain purpose being to make his act dependent upon the personal opinion of his legal adviser, the sole requirement is that such legal adviser in fact pass upon the subject and give his honest opinion, and the merits of an honest opinion actually given are not subject to review;" "and his decision is conclusive, provided he really passes upon the question and reaches a conclusion honestly, whether his conclusion is right or wrong."

See, also, the case of *San Antonio v. E. H. Rollins & Sons*, 127 S. W. 1166; *Amarillo v. Slayton*, 208 S. W. 967; *U. S. Trust Co. v. Guthrie*, 181 Iowa, 992, 165 N. W. 188; and the numerous other cases cited in *Grant v. City of Mineral Wells*.

[3] For yet another reason it would seem that the judgment must be affirmed. In appellant's pleadings it was alleged that he had elected, not to resell for appellee's account as he might have done, but to retain as his own the securities which appellee rejected, and he apparently selected as his measure of damage the difference in the market value of such securities in Shackelford county and what appellee agreed to pay therefor. No other measure was called for in the issues submitted to the jury, nor did appellant request the submission of any issue which would have enabled the court to apply any other measure. If, therefore, the securities involved be treated as personal property, as appellant treated them, then, under the facts as so pleaded and submitted, appellant's measure of damage, if any, was the difference in the contract price and the market value at the place where and at the time when they were to be delivered by the terms of the contract, to wit, in Kansas City, Mo., and not in Shackelford county, Tex. Mr. Williston, in his recent work on *Contracts* (volume 3, § 1378), thus summarizes the rule in cases where a buyer of goods under an executory agreement refuses to accept them, viz.:

"The measure of damage is the difference between the contract price and the market price of the goods at the time when and at the place where the contract should have been performed."

The text is supported by numerous authorities cited in a footnote and accords with our own cases. See *Weiden v. Tex. Con. Meat Co.*, 65 Tex. 487; *Wolert v. Arledge*, 4 Tex. Civ. App. 692, 23 S. W. 1052.

If the foregoing observations are correct, appellant's case must fail for want of proof. No evidence whatever was offered as to the state of the market in Kansas City, where, by the terms of the contract, the securities were to have been delivered. For aught that the evidence shows, appellant could have sold the securities on the open market in Kansas City at the time of their rejection for more than appellee agreed to give for them, assuming, of course, that they were as unobjectionable as appellant contends they were.

[4] It is insisted that appellant also prayed to recover profits as damages. His pleadings are doubtless broad enough, and possibly the evidence sufficient to authorize such relief, but, as already noted, he made no effort to have this element of damage determined by a request for the submission of an issue directed to the question of profits. Nor were the issues submitted by the court objected to on the ground that the issue of profits was ignored. In other words, it seems apparent from the whole record that appellant elected to rely on a difference in value and contract price as a measure of damage. Moreover, the profit most reasonably to be contemplated was the 1½ per cent. interest represented by the interest coupons and secured by the second mortgage. This represents the direct or proximate profit appellant would have received had appellee accepted the securities, and this profit he has not lost, having elected to retain the securities as his own. It is also suggested that appellant is at least entitled to nominal damages, but this contention cannot be supported. If the verdict of the jury is to be accepted, appellant himself did not comply with his part of the agreement, and therefore could in no event complain of appellee's breach. If, on the other hand, the verdict of the jury be entirely rejected because of misconduct on the jury's part, or because the findings are conflicting, as urged, then the undisputed proof shows, as already noted, that appellee had the privilege of rejecting for reasons deemed sufficient by its managing officers.

We therefore for the reasons indicated, overrule all assignments of error, regardless of the proper determination of the questions therein presented, and affirm the judgment.

**WARE v. JONES et ux. (No. 6561.)**

(Court of Civil Appeals of Texas. San Antonio. May 11, 1921. On Motion for Rehearing, June 8, 1921. Rehearing Denied June 29, 1921.)

1. Trusts  $\Leftrightarrow$  92½ — Agreement that conveyance was in trust to pay off liens and debts does not violate statute.

Where plaintiff, for a valuable consideration, induced defendants to convey to him all real estate owned by them in trust to pay off liens and debts against the property, he became a trustee for defendants, and the arrangement did not violate the statute of frauds.

2. Trusts  $\Leftrightarrow$  233—One to whom land was conveyed in trust liable for value of land sold.

Where defendants conveyed land to plaintiff in trust to pay off liens and debts against the property, and plaintiff accepted the trust and sold part of the lands, he was liable to defendants for the value of the lands so converted.

3. Judgment  $\Leftrightarrow$  256(1)—Must be responsive to pleadings and facts found by jury.

Where none of the parties complained of the findings of the jury, the court could enter no other judgment than one responsive to the pleadings and the facts found by the jury, and could substitute no other findings therefor.

4. Homestead  $\Leftrightarrow$  188 — Where party taking conveyance in trust to pay debts had been overpaid, one whom he failed to pay could not foreclose on homestead.

Where defendants conveyed land, including their homestead, to plaintiff in trust to pay off liens and debts, and plaintiff, by reason of sales of the land, was owing defendants more than was necessary to discharge all the debts owed, including a lien created subsequent to the creation of the homestead, the holder of such lien who intervened in a suit was not entitled to a foreclosure on the homestead; the plea of homestead asserted against plaintiff's foreclosure likewise operating to defeat him.

5. Parties  $\Leftrightarrow$  47 — Voluntary Intervener held bound by the issues pleaded.

In a suit to recover land or, in the alternative, for enforcement of a vendor's lien, one who voluntarily intervened and asserted a lien in his favor was governed by the issues pleaded, especially where he adopted defendants' plea that the property was a homestead.

**On Motion for Rehearing.**

6. Appeal and error  $\Leftrightarrow$  1175(6) — Judgment rendered on reversal when requested by both parties.

Where, on reversal of a judgment, both parties accept the facts found and upon their request that judgment be rendered, the judgment will be reformed and rendered instead of remanding the case.

Appeal from District Court, Tarrant County; Ben M. Terrell, Judge.

Suit by G. W. Ware against J. R. Jones and wife, in which William Capps interven-

ed. From a judgment granting insufficient relief, plaintiff and defendants separately appeal. Reversed and rendered.

William F. Young, of Fort Worth, for appellant Ware.

John L. Poulter, of Fort Worth, for appellants Jones.

McCart, Curtis & McCart, of Fort Worth, for appellee Capps.

COBBS, J. This suit was filed by appellant, G. W. Ware, against appellees, Jones and wife, in which William Capps intervened, who will be designated hereinafter as intervener. The suit was brought against appellees for land, claiming title thereto by reason of a warranty deed from appellees, dated December 20, 1912, and by special warranty deed from R. N. Beavers, dated 27th day of November, 1918, and, in the alternative, prayed for judgment on an alleged vendor's lien note for \$2,820 against appellees, attorney's fees, court costs, and foreclosure, which vendor's lien was originally retained by Mrs. H. J. Capps, assigned to appellant to secure an indebtedness, and for foreclosure of tax lien. One defense of appellees was that they were husband and wife and the land sued for in Kennedy's addition had been their homestead, where they had been living since September 10, 1908; that the alleged deed of December 20, 1912, sued on was intended to be and was a mortgage to secure appellant in the payment of certain sums of money advanced and to be advanced to them or for their account; that appellees, Jones and wife, were then the owners of various tracts of land in Texas, against which there existed liens and abstracted judgments, which appellant advised should be sold under foreclosure of the liens and obligated himself to buy in for appellees' benefit, with the privilege to them of redeeming each tract at cost of foreclosure sale, together with the amount of appellant's debt against said land to be held and sold for the best available price; that the land in controversy, situated in the city of Fort Worth, was of the value of \$10,000, and three other separate tracts of farm lands, aggregating 235 acres, situated in Tarrant county, valued at \$100 per acre, on which date (of the deed) they were indebted to appellant for borrowed money in the sum of \$1,957, and indebted to John W. Floore on the city property—the homestead in controversy—the sum of \$2,820 and accrued interest; and there were several judgment liens abstracted, an apparent lien which created a cloud upon the title to their said property; that each of the said three tracts, so incumbered for small amounts, was reasonably worth the sum of \$17,945.64, more than all the incumbrances thereon; that appellant, after the sale and purchase of several tracts, refused to al-

low appellees to redeem the same, but conveyed the same to other parties, thus repudiating the agreement and breaching the trust to their damage in the sum of \$17,945.64, being the difference between the amount paid out by appellant with the interest thereon and the real value of the lands, for which they prayed judgment. They also prayed judgment for all the unsold land held by appellant under the trust agreement, which would include the homestead.

William Capps, intervener, came in and set up claims for \$1,249.50, which he averred were secured by prior liens on the following property conveyed under said deed of appellees to appellant, to wit: On the 39.8 acres of the W. W. Wallace 200-acre survey in Tarrant county and lot 8 and part of lot 9, block 1, Kennedy addition, city of Fort Worth—part of appellee's homestead. Intervener sought to hold appellant for the payment of said sum through and by virtue of appellant's agreement with appellees to discharge all such outstanding indebtedness, and to foreclose intervener's prior lien on said land which included the homestead. The appellant filed necessary exceptions, denials, and responsive pleadings thereto.

The case was tried before a jury on special issues. To the first, second, and third issues submitted, the jury found that the deed from J. R. Jones and wife to G. W. Ware, dated December 20, 1912, was not intended as an absolute conveyance, but merely to secure appellant, Ware, for the debts due said Ware by said Jones and to pay off and satisfy all debts then owing on the property in controversy by appellees, and in reply to the fourth issue found that appellant agreed with appellees to buy in and hold for appellees the 40-acre, 65-acre, and the 125-acre tracts of land described in the pleadings. Then, in reply to special issue No. 5, they found (a) the reasonable market value of the 40-acre tract to be \$100 per acre, and (b) the reasonable market value per acre of the tract known as the 65-acre to be \$100 per acre, and (c) the reasonable market value per acre of the tract known as the 125-acre tract to be \$100 per acre. There was no issue submitted or findings as to the value of the 39<sup>8</sup>/<sub>10</sub> acres or of the homestead tract unless it was the 40-acre tract.

These findings the appellant adopted by making a motion requesting the court to enter a judgment in his favor for the amount of the principal, interest, and attorney's fees due on the \$2,820 note dated June 23, 1910, and for the amount of taxes with interest thereon which had been paid by him on the property in Kennedy's addition, with a foreclosure of his vendor's lien reserved in favor of Mrs. H. J. Capps, and foreclosure of his equitable lien for taxes on said property, both first and superior to the claims of in-

tervener Capps, and appellees take nothing by their cross-action and be taxed with costs.

Intervener Capps likewise adopted the findings of the jury by making a motion to the court to enter a judgment thereupon for his debt, with foreclosure, which motion was granted and judgment entered thereupon in his favor by the court.

The appellees do not complain of the findings of the jury. It is remarkable that in a three-cornered contested fight like this we find all the parties satisfied with the jury's findings, but the two parties to the original suit, appellant and appellees, are complaining of the judgment of the court entered thereupon. Nor did any of the parties submit other issues than those submitted by the court, or complain of any of those. Appellant asked two charges, hereinafter referred to, requesting instructed verdict along the line of his motion, which was refused. So we are relieved of any consideration of facts other than those found and approved by all the parties. The question now arises, What judgment should be entered thereupon? The trial court entered the following judgment: That intervener recover from appellees the sum of \$1,249.50, with interest at the rate of 10 per cent. per annum, with his costs, and a foreclosure of a lien on lot No. 8 and the north 100 feet of lot No. 9 in block No. 1 of Kennedy's addition to the city of Fort Worth, and also against 39<sup>8</sup>/<sub>10</sub> acres, W. W. Wallace, 2,000 survey. Such foreclosure and sale were superior to appellant's or appellees' claim. In favor of appellant against appellees a judgment was rendered for \$2,820 on the H. J. Capps note, dated June 23, 1910, with interest thereon at the rate of 10 per cent. per annum from and after the 20th of December, 1912, together with 10 per cent. attorney's fees, and judgment for taxes, with interest thereon at the rate of 10 per cent. per annum, with foreclosure on the lands inferior only to the lien of the intervener; further, that appellant recover from the appellees \$6,065.32, together with interest from and after date at 10 per cent. per annum, and to recover from them the further sum of \$1,214.92, amount of taxes paid on said land, with 10 per cent. interest per annum from date. The foreclosure was then decreed on all those certain tracts of land situated in Tarrant county, being lot No. 8 in block No. 1, and 50 by 100 feet off the north end of lot 9 in said block No. 1, in Kennedy's addition to the city of Fort Worth.

It was then decreed that appellees recover title to lot 8 in block No. 1, and 50 by 100 feet off the north end of lot No. 9 in block No. 1, Kennedy's addition to the city of Fort Worth, subject to the intervener's lien, and then subject to the lien and debt of appellant; that appellees take nothing against appellant; that intervener recover all his



costs against appellant and appellees, and that appellant recover all costs against appellees.

The court overruled appellant's requested instructions Nos. 1 and 2, each for a verdict against intervener and appellees for lot No. 8 and west half of lot No. 9, block No. 1, of Kennedy's addition to the city of Fort Worth. While there was no issue submitted to the jury in respect to the homestead right, the evidence was undisputed that it was and has continued to be appellees' homestead for some 12 years, and prior to the creation of the liens, except for the original \$2,820 note, which the appellant was to pay off with the other liens as part of the consideration of the deed.

Each party has filed separate elaborate briefs, based upon various assignments of error, not in any way attacking a finding or single ruling of the court except as to the judgment of the court based upon the jury's finding. Hence, while we shall consider and pass upon each assignment and every proposition of law presented, we will take the findings of the jury as conclusive and then determine what disposition shall be made of this appeal.

[1] Upon a lawful agreement, for a valuable consideration, the appellant induced the appellees to convey to him all the real estate owned by them described in Tarrant county, in trust to pay off the liens and debts against all of said property, including the lien on their homestead, describing the same. By means of such deed the appellant became the trustee of appellees, and such an arrangement was not an offense against the statute of frauds. In *Stafford v. Stafford*, 29 Tex. Civ. App. 75, 71 S. W. 985, it is held:

"That a deed absolute on its face, with contemporaneous parol agreement that it shall operate only as security for the debt of the maker, is a mortgage, is a proposition too well settled to require citation of authorities in its support. The right to establish this contemporaneous agreement by parol is a doctrine established by courts of equity, the law courts formerly refusing to assume the power to hear such proof."

This opinion is most instructive on the entire subject. The question is so well settled as to need no further citation of authorities. So we pass from the contention that the agreement was in violation of the statute of frauds. The jury has found that the deed, though absolute on its face, was a mortgage, to which finding there is no dissenting voice. The jury found, in effect, as appellees plead:

"That on the 20th day of December, A. D. 1912, they owned by a fee-simple title and were possessed of three certain tracts of land situated in Tarrant county, as follows: One tract of 125 acres, incumbered for \$3,800; one tract of

65 acres, incumbered for \$1,300; and one tract of 40 acres, incumbered for \$800 to Mr. Floore and for \$575 to Mr. Capps, and that same aggregated 230 acres reasonably worth \$100 per acre or a total of \$23,000, and that the full amount of indebtedness was only \$6,495."

The appellees' cross-action sets up for their relief the right to redeem the property acquired and to be acquired by appellant by paying off the sums paid for the land. That right, now, would only apply to those portions, including the homestead, not sold or purchased by appellant, under the terms of the agreement. As the appellant agreed to pay off all debts against appellees' property, he did not pay off the debt of intervener, which is secured upon certain other property described in the deed yet unsold, and which he was obligated to pay off, which includes the homestead, upon which the court decreed a foreclosure in favor of intervener.

[2, 3] The appellant accepted the trust and sold part of the lands and is liable to appellees for the value of the lands that were converted. The court could enter no other than a judgment responsive to the pleadings, the facts, and the findings of the jury thereupon, and could substitute no other findings for them. *Bain v. Coats*, 228 S. W. 571.

Further, the prayer of the appellees is twofold; they seek to recover the title and possession of all unsold lands described and to remove all clouds therefrom and to recover the sum of \$8,000, with interest from May 4, 1915, together with rents; in the alternative, for the full sum of \$17,946.64, with lawful interest per annum from the respective dates that plaintiff took possession and converted the same to his possession.

[4, 5] In respect to the homestead, no issue was submitted as to its value, and as to it, under the findings of the jury, there was found against appellant more than was necessary to discharge all the debts that appellees owed, including the obligation owing to intervener, thereby leaving the homestead free. The intervener, whose claim was not paid by appellant, was not entitled to a foreclosure on the homestead, as it was protected by the law against him, and the plea of homestead asserted against appellant's foreclosure likewise operated to defeat his. He came voluntarily into this case and was governed, just as he found the case, by the issues pleaded; besides that, he adopted appellees' plea, which was an adoption of the plea that the property was a homestead, therefore protected against the claim of intervener, too, whose lien was void as against the homestead right.

No issue was submitted to the jury as to the homestead question, presumably because that issue was not disputed. No issue was submitted as to that portion of the land which appellees claim as the separate property of Mrs. Jones.

We cannot render the judgment that should be rendered, in the present state of the pleadings and issues, which render the matters to be decreed uncertain. Article 1628, R. S.

The judgment is reversed, and the cause remanded for a new trial.

#### On Motion for Rehearing.

Appellees have filed a motion for rehearing and request that, instead of remanding this case, it "be reversed and a proper judgment rendered by this court," and the appellant presents his reply thereto and therein "requests this court to reconsider their judgment reversing and remanding this case, and now reverse and render judgment denying intervenor any recovery and granting appellant judgment for the amount due on this note, interest, and attorney's fees, and the amount of principal and interest to which he is entitled on account of having paid appellees' land taxes." Intervener files no motion.

There is no complaint by either party as to any question passed upon or ruling made by this court in the disposition of this case, except that both parties demand the rendition of the judgment here rather than that it be returned for another trial; neither party having complained of the findings of the jury, except that the court below should not have submitted the issues submitted, but they accept the facts found as conclusive, and complain that the trial court improperly submitted certain issues which were not material and entered an erroneous judgment thereon.

[6] The same difficulty, almost, presents itself now, as before, as to what judgment should be entered. As both parties accept the facts found and upon them request that the judgment be here rendered, we will therefore set aside that part of the judgment remanding the case so as to grant a rehearing to both parties as requested by them, and will here reform and render judgment. As it is conceded by both parties that there is no question raised or dispute made about the homestead rights of appellees, the judgment therefore will be that the appellees' right, possession, and title be quieted in them and they are adjudged to recover their homestead, being lot 8 and a part of lot 9

in block 1 of Kennedy's addition to Fort Worth, Tarrant county, Tex., and be quieted in their title and possession therein, and appellant take nothing therein; that appellant be quieted in the right, title, and possession of all the other land sued for or in controversy in this suit, and as to that the appellees take nothing.

Now, for the purpose of making clear the basis upon which we adjudge the personal judgment in favor of appellees against appellant, we restate the facts stated in the opinion, as follows:

"Appellant is entitled to recover, as principal, interest, and attorney's fees due on the \$2,820 notes, the sum of \$6,065.32, and the further sum of \$1,214.92, as taxes paid on said property, as decreed in the former judgment, and being a total of \$7,280.24; that intervenor Capps recover of appellant the sum of \$1,249.50, which, when paid by appellant, should be charged back against appellees, Jones and wife.

"On the 20th day of December, 1912, appellees owned in fee simple, and delivered to appellant, a total of 230 acres of farm lands reasonably worth the sum of \$23,000, which was then incumbered (outside of the Capps debt, which is above provided for) for the total sum of \$5,900, all of which was thereafter disposed of by appellant, and the proceeds converted to his own use and benefit.

"Deducting the sum of \$5,900 from the value of the land, to wit, \$23,000, leaves a balance due appellees from appellant the sum of \$17,100.

"Now, take the amount of appellant's lien against the city property (appellees' homestead), to wit, \$7,280.24, plus the intervenor's (Capps') debt, \$1,249.50, making a total of the sum of \$8,529.74, which, if taken from the sum of \$17,100, the amount found to be due appellees from appellant on their cross-action, would leave the sum of \$8,570.26 due appellees, after a full settlement between all the parties."

The personal judgment therefore rendered here in favor of appellees against appellant is, as stated, for the sum of \$8,570.26, with interest from the date of the judgment. This judgment, however, includes the sum of recovery of intervenor Capps for the sum of \$1,249.50, which recovery shall be for his use and benefit, and if paid direct to him by appellant shall be credited on said judgment.

The judgment of the trial court is therefore reversed and here rendered as hereinbefore set forth.

**POUND et al. v. LAWRENCE, Jr.**  
(No. 1234.)

(Court of Civil Appeals of Texas. El Paso.  
June 9, 1921. Rehearing Denied  
June 30, 1921.)

**Monopolies**  $\Leftrightarrow$  17(1)—Agreement with promoters not to sell the promoted stock at less than promoters' price held violation of Anti-Trust Act; "commodities."

Plaintiff owned stock in an oil company which he desired to sell at 75 cents per share. Defendant promoters were selling stock in the company at \$1 per share, and agreed with plaintiff that if he would not sell his stock for 60 days, so as to maintain the price at \$1 per share, they would guarantee him 90 cents a share for it. *Held*, the guaranty agreement was unenforceable by plaintiff, being a violation of the Anti-Trust Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 7796, 7799), prohibiting, among other things, a combination to fix the price of any commodity, as shares of stock are within the meaning of the term "commodities," which is a broader term than merchandise, and which, in referring to commerce, may mean almost any article of movable or personal property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commodity.]

Walshall, J., dissenting.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Action by C. H. Lawrence, Jr., against George H. Pound and others. From judgment for plaintiff, defendants appeal. Reversed and dismissed.

Lea, McGrady, Thomason & Edwards, of El Paso, for appellants.

S. T. Jeffreys, Fred C. Knollenberg, and N. J. Morrison, all of El Paso, for appellee.

**HARPER, C. J.** This suit was brought by appellee, C. H. Lawrence, Jr., against appellants, George H. Pound, H. R. McDowell, and J. O. Crockett, stockholders in George H. Pound & Co., a corporation dissolved prior to the institution of the suit, to recover of them individually the sum of \$1,440, which he alleges to be due and owing to him under a contract for 1,600 shares of stock of the American Oil & Refining Company, at 90 cents per share. To charge defendants individually, he alleges that defendants are the owners and holders of practically all of the stock of said corporation, and that they had not fully paid for their shares of stock in the corporation, and plaintiff seeks to have defendants pay over the said unpaid amounts to have same held to meet the debts of the corporation.

The pertinent portions of the petition stating the cause of action, and from which

the matters in controversy presented here arise, are as follows:

"(3) That on the said 23d day of January, 1920, the said George H. Pound & Co., as said corporation, was then and there more especially engaged in and in charge of the promotion and sale of the shares of stock of the said American Oil & Refining Company to their customers and to the public generally, at and for the price of \$1 per share, and for which services in so promoting and selling the said shares of the said American Oil & Refining Company, as plaintiff is informed and believes and so charges the facts to be, it, the said George H. Pound & Co., obtained and received from the said American Oil & Refining Company large sums of money as commission on said sales.

"(4) That the said defendants were also the owners and in control of practically all of the capital stock of the said American Oil & Refining Company, and the officers and managers of the said George H. Pound & Co., as well as the said American Oil & Refining Company, and that in truth and in fact the said George H. Pound & Co. was then acting as the underwriter and sales agent of the said American Oil & Refining Company, and that the said corporation and the said American Oil & Refining Company were practically one and the same company, managed and controlled by the same officers, manager, and directors.

"(5) That at said time, to wit, on the 23d day of January, 1920, this plaintiff was able, ready, and willing to sell on said date, and intended to sell the said 1,600 shares of stock of the American Oil & Refining Company owned by him as aforesaid, at and for the price of 75 cents per share; and at said time and at said date there were purchasers who were ready, able, and willing to purchase the said 1,600 shares owned by him, aforesaid, at and for the price of 75 cents per share, and that on said date and at said time he intended to sell, and he could have sold, the said 1,600 shares owned by him as aforesaid at and for the said sum of 75 cents per share net, and without the payment of any commission on said sale.

"(6) That George H. Pound and the defendants learned of plaintiff's intention and purpose to sell the said 1,600 shares owned by him as aforesaid, at said price of 75 cents per share, and they, the said defendants, knowing and believing that the sale by the said plaintiff of said shares at said price of 75 cents per share would tend to embarrass and hinder the said George H. Pound & Co. in their sale of said stock at \$1 per share, and would depreciate the price of the stock then owned and controlled by the said George H. Pound & Co., agreed with said plaintiff that in consideration of said plaintiff forbearing and refraining from selling his said 1,600 shares of stock at said price of 75 cents per share and withholding the same from sale at said price, it, the said George H. Pound & Co., guaranteed to the said plaintiff that he, the said plaintiff, within 60 days from said date, would receive, and agreed that it, the said George H. Pound & Co. would, within 60 days from said date, pay unto the said plaintiff, the sum of 90 cents per share for the said

1,600 shares owned by the said plaintiff aforesaid; and thereupon this plaintiff, in consideration of the said agreement on the part of the said George H. Pound & Co., and acting upon the said agreement and guaranty, did refrain and forbear from selling any of his said 1,600 shares of stock."

The defendants answered by general demurrer and general denial. The case was submitted to the jury on one special issue, viz.:

"Do you find from a preponderance of the evidence that it was agreed in substance by and between George H. Pound, acting in behalf of George H. Pound & Co., and the plaintiff, C. H. Lawrence, Jr., that in consideration of the said C. H. Lawrence, Jr., forbearing and refraining from selling 1,600 shares of stock of the American Oil & Refining Company at a price of 75 cents per share, George H. Pound & Co. would, within 60 days from January 23, 1920, pay unto the said Lawrence the sum of 90 cents per share for said 1,600 shares aforesaid? Answer yes or no."

The jury answered the question in the affirmative.

Judgment was rendered for the plaintiff for the amount sued for, viz. \$1,440.

Appellants present two assignments of error. The first assignment is directed to the overruling of the general demurrer; the second assignment claims error in rendering judgment for plaintiff on the ground that the pleadings and the evidence show that the alleged agreement on which the suit is based is illegal, void, and contrary to public policy, being in violation of the Texas Anti-Trust Act, as found in articles 7796 to 7799, Vernon's Sayles' Texas Civil Statutes.

The two assignments present the same questions, and will be considered together.

Appellee Lawrence testified:

"I am acquainted with George H. Pound. I saw him on or about the 23d day of January, 1920, in my place of business. \* \* \* At that time I was the owner of 1,600 shares of stock in the American Oil & Refining Company. On that date I had an opportunity to sell my 1,600 shares of stock at the price of 75 cents per share. \* \* \* Stock of the American Oil & Refining Company at that time was being sold for \$1 per share. \* \* \* (Pound) said he did not like to have me sell my stock because it would hurt their sales, as they were promoting the stock, and selling other stock for \$1 per share, and he wanted to know if we could not come to some kind of an agreement so I would hold my stock and not sell it. I told him I would if he would guarantee me \$1 per share. We were speaking of stock in the American Oil & Refining Company. \* \* \* I told him I was willing to knock off 10 cents per share if he would make me a guaranty, guaranteeing me 90 cents per share, and I would hold the stock for the time he wanted, and then he stated 60 days; said if I would hold the stock 60 days that he would pay me 90 cents per share, or, if I demanded the money before that

time, they would try to sell it and give me the money; but they guaranteed me 90 cents per share within 60 days, and agreed to pay me that within 60 days. I relied upon that agreement at that time. At that time I agreed to refrain from selling my stock upon his representation and agreement. \* \* \* I waited 60 days for him to pay the 90 cents per share. \* \* \* I had several opportunities to sell the stock. I cannot mention their names, several parties. \* \* \* He was to have 60 days in which time I was to make no effort to sell my stock. \* \* \* After the 23d day of January I made no effort to sell the stock at all."

Is the agreement pleaded and proved inhibited by the provisions of title 130, c. 1, Rev. Civ. Statutes of Texas because it constitutes a trust or "conspiracy against trade"?

Article 7796 of said chapter defines a trust as a "combination of capital, skill or acts, by two or more persons \* \* \* for either, any or all of the following purposes:

- "1. To create or which may tend to create, or carry out restrictions in trade or commerce. \* \* \*
- "2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities. \* \* \*
- "3. To prevent or lessen competition in the \* \* \* sale or purchase of merchandise, produce or commodities. \* \* \*
- "4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise \* \* \* shall be in any manner affected, controlled or established.
- "5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell \* \* \* any article or commodity \* \* \* or by which they shall agree in any manner to keep the price of such article or commodity \* \* \* at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity \* \* \* between \* \* \* themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale \* \* \* of any such article or commodity \* \* \* whereby its price \* \* \* might be \* \* \* affected."

Article 7799 of same chapter reads:

"Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal."

We think that from the whole record, pleadings and proof recited above (1) that the appellee and appellant were owners of shares of stock in the appellant company; (2) that both desired to sell upon the market; (3) that they entered into an agreement whereby appellee agreed not to sell his shares of stock for 60 days for the purpose of maintaining the price of such shares, both of appellee and appellants, at \$1 per share; and (4) that

such agreement was in violation of the letter of those portions of the statute above quoted, and therefore void.

It is the contention of appellee that the buying and selling of shares of stock in a corporation is not "trade," or "commerce," or "aids to commerce," within the meaning of the Texas Anti-Trust Statute; and that the terms "merchandise," "produce" and "commodities," as used in the statute, do not apply to mere evidence of property or value, such as shares of stock, but only to articles of trade and commerce of prime necessity commonly bought and sold in the market by merchants. If they are either they come within the statute.

We have concluded that shares of stock are within the meaning of the term "commodities." The Supreme Court of this state, in *Queen Insurance Co. v. State*, 86 Tex. 265, 24 S. W. 397, 22 L. R. A. 483, said that—

The word commodity "is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale; and we think that this was the meaning intended to be given to it by the Legislature in the statute in question. This clearly appears by the context."

The word "commodity" is a broader term than merchandise, and in referring to commerce it may mean almost any article of movable or personal property. *Shuttleworth v. State*, 35 Ala. 415; *State v. Henke*, 19 Mo. 225. A share of stock in a corporation, while itself not the tangible property of the corporation, yet it is a tangible thing, perceptible to the touch, a thing capable of being possessed and owned, and while incorporeal in its nature, it is personal property, a thing subject to barter and sale, mortgage and pledge, liable to attachment and execution like other personal property, and a subject of conversion. *Hewson v. Peterman Mfg. Co.*, 76 Wash. 602, 136 Pac. 1153, 51 L. R. A. (N. S.) 398, Ann. Cas. 1915D, 346, the Supreme Court of the State of Washington said that it is established by the great weight of authority that corporate stock is goods, wares, and merchandise within the meaning of the statute of frauds of that state, which provides:

"No contract for the sale of any goods, wares or merchandise, for the price of \$50.00 or more shall be good and valid, unless the purchaser shall accept and receive part of the goods, \* \* \* or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made or signed by the party to be charged thereby, or by some person \* \* \* by him lawfully authorized."

To the same effect is the holding of the Supreme Court of Massachusetts in *Tisdale v. Harris*, 37 Mass. (20 Pick.) 9. In *People v. Federal Security Co.*, 255 Ill. 561, 99 N. E.

683, the Supreme Court of Illinois held that the word "commodities" was broad enough to include stocks and bonds, and that a corporation engaged in buying and selling stocks and bonds is engaged in a mercantile pursuit or business.

The next counter proposition urged by the appellee is:

"That it is not necessary for him to base the validity of the contract upon this ground, for, conceding that such shares of stock are such commodities as to be included within the statute, the contract pleaded does not come within the meaning of the statute, because it was merely an agreement upon the part of Lawrence to sell and George H. Pound & Co. to buy his 1,600 shares at 90 cents per share, but Pound & Co. was not prohibited from selling all or any part of its stock to any person at any price."

The vice in the agreement pleaded and proved is that the appellee agreed not to sell for 75 cents per share at the time, and not for any price for 60 days, because he by so doing would injure the sales of Pound & Co. of its stock at \$1 per share. Thus it clearly appears that he made the agreement for a twofold purpose, to secure an increased price of his own shares and to accommodate Pound & Co., or assist them in keeping all shares of stock up to at least the value of \$1 per share, and it is noted that Lawrence nowhere alleges or testifies to any agreement to sell to Pound & Co. in all events, but agrees not to sell for 60 days upon the guaranty. We take it the term "guaranty," in the connection used, simply means the assurance from Pound that he by so doing should have at least 90 cents per share. So not being bound to sell to Pound & Co. at the end of 60 days, he then would have been at liberty to sell his 1,600 shares for any price more or less than 90 cents per share as he chose, so the primary purpose upon the part of both parties to this agreement was as to Pound & Co. to maintain the price of \$1 per share, and as to Lawrence to increase the price which he could have obtained, both expressly inhibited by subdivision No. 2, of the statute quoted. *Star Mill & Elevator Co. v. Fort Worth G., etc., Co.*, 146 S. W. 604.

We are therefore of the opinion that the cause should be reversed and dismissed; and it is so ordered.

WALTHALL, J. (dissenting). I do not concur in the result reached by the majority members of this court in the proper disposition to be made of this case. I fully concur in the majority opinion that shares of stock in the corporation are "commodities," as that term is used in the anti-trust articles of our statute, but I am of the opinion that the trial court was not in error in overruling the appellants' general demurrer, nor in rendering

judgment upon the fact submitted and found by the jury.

In addition to the testimony of appellee, Lawrence, I submit that of George H. Pound, though not materially different from that of Lawrence. Pound testified:

"On the 23d day of January, 1920, the corporation of George H. Pound & Co. was doing business in El Paso, and did so continue to do business here until April 1, 1920; at that time the corporation was dissolved. I was president, and C. A. Williams was secretary and treasurer. During that time George H. Pound, H. B. McDowell, and J. O. Crockett were directors of that corporation. I was manager of the George H. Pound & Co. from the 23d of January, 1920, up to the 1st day of April, 1920.

\* \* \* The American Oil & Refining Company was a joint-stock association. \* \* \* On the 23d day of January, 1920, down to the 1st of April, 1920, George H. Pound Company was the sole agent and underwriters of the American Oil & Refining Company as regards the handling and selling of the stock of the American Oil & Refining Company. \* \* \* I had a conversation with Mr. Lawrence there in his office. \* \* \* After I was introduced to Mr. Lawrence, I said: 'I understand you have some stock of the American Oil & Refining Company to sell, which you are going to sell for less than \$1. He said that he had, and he might sell it for less than \$1. I was selling it at that time on the curb for \$1. \* \* \* I told him I would prefer that he would not sell his stock for less than \$1, and he said if I would guarantee him a price he would not do so. \* \* \* My object in going down there [to Lawrence's place of business] was that I preferred that he not sell his stock for 75 cents. My purpose in going over there was to do something to prevent him from selling it for less than \$1, because I was then selling the same stock on the curb for \$1, provided I could do so in a proper way. \* \* \* I went there for the purpose of getting Lawrence to forbear and refrain from selling his 1,600 shares, provided I could do so properly. He did not sell his stock up to the time he told me he put the matter in the hands of his attorney. I sold the stock of the American Oil & Refining Company during that time for \$1 a share."

The action of the trial court in overruling the general demurrer I think presents the material point of controversy in the case. The sixth subdivision of the petition copied into the majority opinion, and to which the demurrer is directed, states the agreement entered into by Lawrence and Pound. It reads:

"George H. Pound & Co. agreed with plaintiff [Lawrence] that in consideration of said plaintiff forbearing and refraining from selling his 1,600 shares of stock at said price of 75 cents per share and withholding same from sale at said price, that it, the said George H. Pound & Co., guaranteed to the said plaintiff that he, the said plaintiff, within 60 days from said date, would receive, and agreed that it, the said George H. Pound & Co. would within 60 days from said date pay unto the plaintiff the sum

of 90 cents per share for the said 1,600 shares owned by the said plaintiff aforesaid."

The rest of the paragraph states the action taken by Lawrence under the agreement; that is, that he did refrain and forbear from selling the shares of stock.

The petition and the evidence is somewhat confusing by the use of the word "guaranty." I think that, in view of the latter portion of the paragraph, in stating that Pound agreed to pay Lawrence within 60 days the sum of 90 cents per share for the 1,600 shares of stock, the agreement made was not a guaranty, as alleged, but was a collateral warranty, an original and absolute undertaking in present that Lawrence should realize the sum of 90 cents per share for each share of his stock to be paid by appellants within 60 days. It was not a guaranty to answer for the default of another, which must be in writing; the subject-matter of the agreement was things, shares of stock, and not persons, and in that sense, though not in writing, the agreement is enforceable, if not void as contravening the anti-trust laws of this state. The case was tried upon the issue as to whether Pound agreed to pay Lawrence 90 cents per share, within 60 days, in consideration that Lawrence would not sell the shares in the market at 75 cents per share. Lawrence said Pound was to have 60 days in which time he (Lawrence) was to make no effort to sell his stock, and that he made no effort at all to sell. There is practically no difference between the testimony of Pound and Lawrence on the issue presented in the appeal; the difference in portions of their evidence was settled by the jury in the issue presented, and found as stated in the opinion. The petition does not show on its face that subsequent to the agreement Lawrence was to put the shares on the market at any price, nor that Pound was to do so for Lawrence, nor that Pound and Lawrence were to act together in any way in reference to the shares. The only concert of action alleged or shown was that Lawrence was to sell and Pound to buy the shares of stock at the price and time agreed upon.

The jury found under the evidence, and I think on a fair construction of the agreement, that Pound bought the 1,600 shares of stock at the time of the agreement, and agreed to pay for them 90 cents per share within 60 days. That seems to be the construction the parties put upon the agreement, and as construed by the trial court and as found by the jury.

To be a trust under the statute and subject to the demurrer, the petition must show on its face that the parties agreed to a combination of capital, or a combination of skill or acts of the parties with reference to the transaction had, and to accomplish some one or more of the purposes specified under article 7796, V. S.

The term "combination" is not defined by the statute. The term, however, as applied to the anti-trust laws of this state has been defined and construed by our Supreme Court. Judge Denman said in *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079, that—

"'Combination' as here used means union or association. If there be no union or association by two or more of their 'capital, skill or acts,' there can be no 'combination' and hence no 'trust.'"

In that case the court was led to the conclusion that the union or association of capital, skill, or acts, denounced by the statute is where the parties in the particular case designed the united co-operation of such agencies which otherwise might have been independent and competing for the accomplishment of one or more of the purposes specified.

I do not understand the law to be that it prohibits Lawrence from making an absolute sale of his shares of stock to Pound, although the effect of such sale is to remove Lawrence as a competitor of Pound in the market in the sale of the shares of stock, or that such sale of the Lawrence shares would have the effect to enable Pound to sell the shares in the market at a higher price than that at which Lawrence was offering them for sale, and but for the sale to Pound Lawrence would have sold them at a lower price than that at which he sold to Pound. Neither the pleading nor the evidence shows Lawrence to be a stockbroker, or that Lawrence owned or had bought or sold any shares of stock other than that involved in the one transaction with Pound, but it does show him to be a wholesale groceryman, and at the time of the transaction was engaged in that business. The evidence further shows that at the time of the transaction shares of stock in the American Oil & Refining Company were being sold on the curb and in the open market at \$1 per share. The evidence does not show that any shares of stock, in the American Oil & Refining Company, at that time or any other time, was being offered for sale or sold for less than \$1 per share. The evidence further shows that Lawrence sold to Pound at 10 cents less than the open market price to enable Pound to make a commission on the sale, as Pound said it would not be fair to him to buy and make nothing on selling.

The petition at which the demurrer is directed does not allege the intent of Lawrence and Pound in effecting the sale and purchase of the stock, nor its effect upon the market, and I think to consider either the intent of the parties in making the agreement or its effect upon the market of the price of the stock would add to the statute an element not written therein. I am of the opinion that one owning a commodity may sell it to another for cash or on time, regardless of what

his intent may be in making the sale, and regardless of the effect such sale may have upon the market price of such commodity by reason of such sale, and although the purchaser, prior to such sale, was a competitor in the market with the seller of such commodity, and without being in combination with the buyer, in capital, skill or acts, and without being in violation of the anti-trust laws of this state.

The view I take of the petition alleging the agreement, the construction the parties themselves put upon the agreement alleged, the evidence offered, and the fact found by the jury, I am of the opinion that there is not alleged such combination of capital, skill, or acts of the parties, and the purpose for which it is formed, as is denounced by the statute, and think the case should be affirmed.

#### LOUISIANA WESTERN RY. CO. v. JONES et al. (No. 7944.)

(Court of Civil Appeals of Texas. Galveston.  
April 20, 1921. Rehearing Denied  
June 30, 1921.)

#### 1. Railroads $\S$ 348(1)—Evidence held to show negligence.

In an action for damages for death of automobilist at railroad crossing, evidence held sufficient to sustain finding of negligence on part of the defendant.

#### 2. Death $\S$ 99(1)—\$21,000 held not excessive.

A verdict for \$21,000 for the death of driver of motortruck was not so excessive as to authorize appellate court to conclude that it was the result of passion, prejudice, or any other improper motive.

#### 3. Railroads $\S$ 328(11)—Motortruck driver held guilty of contributory negligence.

In an action for death of motortruck driver at railroad crossing in the state of Louisiana, evidence held to show as a matter of law that deceased was guilty of contributory negligence, although deceased stopped, looked, and listened, but because of the rapidity with which the train was running, and the length of time it took to get his car started and get on the crossing, and the difficulty of seeing to the side of the car because of its closed top, he drove onto the track in front of the train without knowing of its approach.

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Suit by Mrs. Walter Jones and others against the Louisiana Western Railway Company and others. Judgment for plaintiffs, and defendant Railway Company appeals. Reversed and rendered.

Baker, Botts, Parker & Garwood and Garrison, Polard, Morris & Berry, all of Houston, for appellant.

S. P. Jones, of Marshall, and Smith & Crawford, of Beaumont, for appellees.

**PLEASANTS, C. J.** This is a suit by the widow, mother and minor son of Walter Jones, deceased, who sues by his mother as next friend, for damages from appellant for the death of Walter Jones which it is alleged was caused by the negligence of the appellant.

Walter Jones was killed by a train on appellant's road while attempting to cross the railroad track in a motor delivery car at a public crossing of said railroad in Arcadia parish, in the state of Louisiana. The negligence of the defendant, which it is alleged was the cause of the death of Walter Jones, is set out in the petition as follows:

"That the said Walter Jones was traveling in, or driving a car or automobile commonly known as a delivery truck, and that he approached and came upon the railway of said defendant at a point where the said public highway crossed the railway track, and that he was struck, injured, and killed by reason of the negligence of the said defendant railway company, in that the said railway company was at the said time causing one of its through passenger trains, commonly known as the 'Sunset Limited,' running from New Orleans, La., to Houston, Tex., to be run at a very high rate of speed, and that at the time the said Walter Jones, after the exercise of proper care, approached, and drove upon the said crossing, and before he could pass over the tracks of the said defendant, that the said train was carelessly and with great speed, and without sounding the whistle or ringing the bell, run upon him, striking the said automobile or delivery truck, turning the same over, and crushing and killing the said Walter Jones. That the road on which and from the direction which Walter Jones was traveling ran parallel with the track of the said railway for some distance and then curved abruptly toward the track, and that the said agents, servants, and employes of the said railway company, in approaching the said public crossing, gave no warning signal of any kind or character whatever, such as ringing the engine bell or blowing the whistle, to warn persons of the approach of said train, notwithstanding that the persons in charge of the train saw, or could have seen, that the said Walter Jones was approaching the said crossing, after he had exercised proper care for his safety, and notwithstanding that they knew, or should have known, the train was approaching said crossing at a high rate of speed, where people were in the habit of constantly using the same as public highway. That if the said persons in charge of the operation of said train had blown the whistle or rung the bell the said Walter Jones would have been thereby apprised of the approach of the said train, and could have avoided being struck and killed by the same.

"That plaintiffs show that it was exceedingly dangerous and negligent for the said train to have been run at such a high rate of speed as the train was being run when said Walter Jones was struck and killed while approaching and crossing a public road at grade crossing, such as the place where the said Walter Jones was struck and killed, and that it was negligent and dangerous for the said train to be caused to approach said crossing at so high a rate of

speed without giving warning of its approach by ringing the bell or sounding the whistle in time to have apprised the said Walter Jones of the approach of the said train a sufficient time before it reached said crossing to have enabled him to avoid a collision with the said train, and that by reason of the said negligence of the said defendant railway company, its agents, servants, and employes in approaching the said crossing at so high a rate of speed, and without giving any warning by sounding the whistle or ringing the bell in approaching the same, that the said Walter Jones was run down, crushed, and killed."

The defendant, after pleading a general denial, specially pleaded as follows:

"And for further answer herein, defendant says that the accident which caused the death of plaintiff's husband and father did not occur in the state of Texas, but in the state of Louisiana; that the plaintiff's husband and the plaintiff were at that time citizens of the state of Louisiana, and that the plaintiffs now are resident citizens of Louisiana, and that this suit is controlled by the laws of Louisiana, and this defendant prays that this suit be tried in accordance with the law of the state of Louisiana, and not by the laws of Texas.

"This defendant would further show that by the law of Louisiana, on approaching a railroad grade crossing for the purpose of crossing the same, one is required to exercise ordinary care, and to stop, look, and listen before attempting to make such crossing, and that, on attempting to cross said railroad, is required to stop, look and listen at a place and under conditions where stopping, looking, and listening for the approach of a train would be effective in discovering the approach of a train in ascertaining whether or not said person could proceed and cross said track with safety to himself, and that this is especially true in reference to those who are driving or operating automobiles, and that said law of Louisiana requires that the driver of an automobile, in attempting to approach and cross a railroad crossing shall continue looking and listening for a train up until the time of the crossing of said track, and until it is ascertained with certainty that he can approach and cross said track with safety to himself, and that a failure to stop, look, and listen to discover the approach of a train in time to prevent injury or collision when the same could be ascertained by stopping, looking, and listening, or either, will constitute such contributory negligence upon the part of the driver of said car as to bar any right of action on the part of the driver of said car or those attempting to recover for his injuries in the event of his death.

"This defendant would further show that the death of the deceased, if caused either directly or indirectly by the negligence of the defendant or its agents, which is not admitted, but denied, was directly or proximately caused by the negligence of the deceased, which negligence on the part of the deceased is pleaded in defense of plaintiffs' cause of action, if any they ever had; that the negligence of the deceased consisted of this:

"That he was the driver of an automobile, and that he drove said automobile onto defendant's track directly in front of an ap-



(233 S.W.)

proaching train, which could have been both seen and heard by him had he stopped, looked, and listened for the approach of a train, or otherwise exercised ordinary care, that the deceased did not stop and look and listen for a train at a place and under conditions where stopping, looking, and listening, or either of such means, would have been effective in discovering the approach of said train of defendant, and did not, by stopping, looking, and listening, or either, at a proper time and place, ascertain whether or not he could approach and cross said railroad with safety to himself, but approached said track and went onto said track with his said automobile without having stopped, looked, and listened for the approach of said train, at a time when by stopping, looking, and listening, or doing either, he could have ascertained in time to have prevented his injury whether or not a train was approaching said crossing: that had he stopped, looked, and listened as required by law he could and would have discovered the train in time to have avoided the train, and that his failure to so stop, look, and listen, or to do either, constituted contributory negligence on his part, which contributory negligence on the part of the deceased continued until the time or the moment of the accident, and that in so approaching said track, under the laws of Louisiana, his conduct amounted to and constituted contributory negligence on his part such as to bar plaintiffs' right of recovery herein, which contributory negligence is pleaded in defense of plaintiffs' cause of action, if any.

"That if there was any negligence on the part of the defendant, or of any of its agents, servants, and employes, which is not admitted, but denied, then defendant says that the negligence of the deceased in failing to stop, and to look, and to listen for a train at a place, under conditions that would have caused him to know of the approach of said train in time to have prevented his injury, was continuous up until the time of the accident, and his said negligence was concurrent with the negligence of the defendant, if any, such as to make inapplicable the law of the last clear chance or the law of discovered peril, as it applied by the law of Louisiana, which Louisiana law is pleaded herein."

A jury in the court below, in response to special issues submitted to them, found:

"(1) That the employes of the defendant, in approaching said crossing, did not blow the whistle of the locomotive for said crossing.

"(2) That the failure of the employes to blow the whistle was the direct and proximate cause of the death of Walter Jones.

"(3) That the employes of the defendant, in approaching said crossing, did not ring the bell of said locomotive for said crossing.

"(4) That the failure of the employes to ring the bell was a direct and proximate cause of the death of Walter Jones.

"(5) That the deceased, Walter Jones, as he approached and was in close proximity to the railroad track, stopped the automobile and looked and listened for the approach of a train.

"(6) That the said Walter Jones did not see or hear the train, nor could he, by the exercise of ordinary care, have seen or heard the train.

"(7) That the deceased, Walter Jones, used ordinary care in attempting to cross the railroad track to discover the approach of a train and to protect himself from injury from the same.

"(8) That the failure of the deceased, Walter Jones, to use ordinary care in attempting to cross the railroad track was not the direct and proximate cause of his death."

Damages were found by the jury in the sum of \$21,000, \$1,000 of which was apportioned to the mother, \$6,000 to the widow, and \$14,000 to the minor child of the deceased. The record discloses the following facts:

Walter Jones, while attempting to cross the railroad of appellant at a public road crossing between the towns of Crowley and Rayne in Arcadia parish, in the state of Louisiana, was killed in a collision between the motortruck in which he was riding and a passenger express train on appellant's railroad known as the "Sunset Limited," which runs from New Orleans, La., to Houston, Tex. At the time of the collision the train was going west, and was running at a speed of 45 or 50 miles an hour. The railroad track at the crossing and for a mile or more on either side runs practically due east and west. The public road from Rayne to Crowley runs on the south side of the railroad east of the crossing, and after crossing the railroad runs westward along the north side of the track. Walter Jones was traveling this road in a motor delivery truck, which had a top with its sides boarded up so that the side view of a person on the driving seat was obstructed, and in order for the driver to see any great distance at a right angle from the course he was traveling, he would have to get from behind the driving wheel and off the seat, or put his head around in front of the side of the top. The public road east of the crossing runs in the same general direction as the railroad, and near thereto. When it gets within about 100 feet of the crossing it turns northward and approaches the crossing at an angle of 64 degrees. After making this turn a traveler using this road and looking forward would see much further down the railroad track to the west than to the east. The road and crossing are in an open level prairie, with nothing to obstruct the view down the railroad track east or west for miles except a row of telegraph poles along the track and the cattle guards near the crossing. The railroad whistling post is 1,382 feet east of the crossing, and 2,900 feet east of the crossing there is a 3-degree curve in the track to the south. Jones, as before stated, was traveling the public road going west from Rayne to Crowley. He was driving slowly, making from 8 to 10 miles an hour. There is testimony that after he passed the point where the road turned to the north to cross

the railroad track, and when at or near the telegraph poles, which are about 50 feet from the track, he stopped his truck. The witness who gave this testimony was 250 yards south of the crossing, and did not know why Jones stopped, nor how long the stop lasted. His testimony on this issue is as follows:

"As to whether I saw the car come to a dead stop or slow down, will say—well, it looked like it slowed down. In fact, it stopped; I am positive it stopped. I didn't turn south until he was stopped; I was going west until he stopped, and at the very moment he stopped I then turned south. I am positive the car came to a dead stop; I was facing it, looking right at the back. I cannot look at the back end of a car and tell whether or not it is running just a mile an hour or stopped; very few men can do that; but you can stand off to the side, with the direction I was in, and tell whether it is moving or not. The back was not exactly to me; it puts me, just like I was over here (indicating) and the car was about in that way; it put me pretty near on the back of it. It did not impress on my mind then that the car stopped; as a matter of fact, I didn't know; I just thought maybe he stopped; for some reason or other I didn't pay any attention to it. I remember that he stopped; that is all. I should judge he might have stopped to look for the train, or might have stopped for gasoline, or his car might have gone dead; I don't know why he stopped. It impressed upon me the thought that the man stopped. I don't know how long he stopped; the moment he stopped I wheeled south. The moment I stopped I didn't hear the train."

Several other witnesses, some of whom were traveling the public road behind Jones, and another in a field some distance to the south of the railroad track, saw him as he drove along the road, and also saw the train approaching from the east, but none of them saw Jones after he made the turn in the road to go over the railroad, and none of them saw him stop his car. The fireman on the engine of the train that struck the car testified:

"Prior to the accident I saw the automobile; I seen him. At the time I saw it, he was just running along the road. Just before the accident happened, I didn't call the attention of the engineer to anything, or notify him to do anything, until we got within 150—100 or 150—feet of the crossing; when he made that turn he came within 15 or 20 feet of the track, and stuck his head out, and it appeared to me that he may not have been going to stop; he was going right along slow, not stopping. I yelled at the engineer; and he went right up on the track, and he applied the brake in emergency right away; and, of course, the crash came then. After he turned and started towards the track he never stopped the automobile at all. I should judge he was probably 15 feet from the track, just guessing at it, when I gave the alarm to the engineer. We were running, I should judge, about 45 or 50 miles an hour; we have 50-mile schedule on that train."

In deference to the verdict of the jury we will for the purpose of this opinion assume that Jones did stop his car for the purpose of looking and listening for the approach of a train after he had turned to go on the crossing, and when he was near the line of telegraph poles along the railroad track. One of plaintiff's witnesses who made a survey of the crossing testified:

"If a person was standing in the road going from Rayne to Crowley, within a distance of 25 to 100 feet from the railroad track, there is nothing to prevent him from seeing a train coming from Rayne, except possibly the pole line."

"It is a fact that a person standing in the road, at any time after it passed the line of the right of way of the railroad company, between 100 feet of the crossing and the crossing, could have looked in the direction of Rayne and have seen the approaching train coming. A person standing in the road would have to be within 40 or 50 feet of the track in order to get an unobstructed view of the track; in other words, to get clear and unobstructed view he would have to be inside the line of poles; however, at any point in the vicinity of the crossing a train could be seen by a person standing in the road for a distance of 3,600 feet or more."

This testimony is not contradicted. The following testimony of another of plaintiff's witnesses shows how far a train could have been seen by a person approaching the track in an automobile like the one Jones was using:

"If a person driving an automobile approaching the track at this crossing had stopped within 30 or 50 feet of the track, he could have seen the train coming from Rayne by putting his head out of the hood or cab or curtain, for a certain distance east; possibly as far as the whistling post. He could not have seen it further on account of the angle at which the car would be to the track. Looking towards Crowley he could have seen the train much further, because the car would be facing more towards Crowley. Nothing would have prevented him seeing the train as just stated except the angle at which the dirt road approached the railroad track, and this would have prevented him in that position from seeing a train approaching from the east more than 200 yards; also the noise of an automobile engine would prevent a man hearing the noise of the train as it approached the crossing, but would not keep him from hearing the whistle if blown, or the bell if rung."

Jones had been making delivery of goods out of Crowley for some time. He had often used this road, and was thoroughly familiar with the crossing and its surroundings. The train that struck him was a regular passenger train on appellant's road, and was running on schedule time. The evidence shows that the weather was dry and the road very dusty. There was a good breeze, and the dust made by Jones' car was being blown towards the railroad track.

[1, 2] The evidence is sufficient to sustain all of the findings of the jury upon the issues of appellant's negligence in the operation of the train, and the amount of damages found by the jury is not so excessive as to authorize this court to conclude that it was the result of passion, prejudice, or any improper motive.

It was shown upon the trial that the law of Louisiana, as interpreted by the Supreme Court of that state, requires a person approaching a railroad grade crossing before going upon the crossing to stop, look, and listen for an approaching train at a convenient and effectual place for that purpose, and a failure so to do is contributory negligence as a matter of law.

The trial court gave the jury the following instructions:

"The law in the state of Louisiana, at the time of the death of Walter Jones, required that the said Walter Jones, in approaching the crossing in question, and in attempting to cross the track at that point, should use ordinary care to discover the approach of a train, and to protect himself from injury, and it was his duty to stop, look, and listen for the approach of a train before attempting to enter upon the track of the defendant, and to exercise ordinary care in doing so, and his failure to do so would be contributory negligence."

That this is the law in the state of Louisiana as interpreted by an unbroken line of decisions of the Supreme Court of that state is conceded by counsel for appellees.

Under appropriate assignments of error the appellant assails the several findings of the jury acquitting the deceased, Walter Jones, of contributory negligence, and complains of the refusal of the court to instruct the jury to return a verdict in favor of the defendant on the ground that the undisputed evidence in the case shows that Walter Jones did not use ordinary care to ascertain the approach of the train before going upon the track, and that his failure to use such care was a proximate cause of his death.

Appellees' contention is that the evidence is sufficient to sustain the conclusion that at the time Jones stopped his car to look and listen the train was not near enough to be seen or heard, and because of the rapidity with which the train was running and the length of time it took Jones to get his car started and get on the crossing, and the difficulty of seeing to the side of the car because of its closed top, he drove on the track in front of the train without knowing of its approach.

If the collision occurred just in this way it cannot be held that Jones used ordinary care to discover the approach of the train. He was thoroughly familiar with the situation, knew how far he had looked down the track, knew that a fast train was likely to be approaching, and knew the difficulty in the way

of looking to the side of his car. With a knowledge of these facts, we do not think ordinary minds can differ in the conclusion that he was not exercising ordinary care in driving on the crossing without making any further effort to discover whether a train was coming. The undisputed fact that the deceased in broad daylight drove upon a railroad track in the open prairie in front of a train of seven passenger cars with nothing along or near the track to obstruct the view of the approaching train *prima facie* forbids the conclusion that in so doing he was using ordinary care. Counsel for appellees admits this when he says in his brief:

"I readily admit that if the deceased had been walking, and had stopped, looked, and listened, and then had walked upon the track and been struck by the train, that he must have been held guilty of contributory negligence. I likewise admit that if he had been traveling in an open buggy or an open car that the same conclusion would be reached; but in this case we are confronted with an entirely different situation, and one that the appellant has consistently and persistently tried to ignore, namely, that the deceased was traveling in a vehicle that had been prepared to protect its occupants against the ravages of the storm and the rays of the sun; that he had a right to travel in that kind of vehicle; that the railroad company owed him the same duty to protect him from injury in that kind of vehicle as if he had been driving in an open car; that is, that it should have sounded the whistle and bell in approaching the crossing."

The circumstances cited by counsel as lessening the quantity of care required of deceased, under well-established principles of law required him to use more care. We copy from the case of *Perrin v. New Orleans Terminal Co.*, 140 La. 818, 74 South. 160, the following portions of the opinion, which cites many of the authorities and clearly states the law of that state upon this question:

"It was the duty of the plaintiff, before crossing the track, to have stopped, looked, and listened; and, where it is shown that the view was unobstructed and the accident occurred in the daytime, it is clear that the train was in plain view of the plaintiff for a sufficient length of time before the accident to have allowed him to realize its presence, and to have avoided the danger.

"In the case of *Tatum v. Rock Island, A. & L. R. Co.*, 124 La. 927, 50 South. 798, we say:

"As the deceased could have avoided the accident by the exercise of the least degree of ordinary care, it is useless to inquire into the particular acts of negligence charged against the defendant, as none of them, if established, would affect the result."

"And in *Eyma Brown v. Railroad Co.*, 42 La. Ann. 355, 7 South. 684, 21 Am. St. Rep. 374, it is said:

"No failure on the part of the railroad company to do its duty will excuse any one from using the senses of sight and hearing, upon

approaching a railway crossing, and whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of negligence, without any reference to the railroad's failure to perform its duty.'

"Even if the weeds had obstructed plaintiff's view, as he claims, his duty to stop, look, and listen was the more incumbent upon him. We say in *Blackwell v. Railroad Co.*, 47 La. Ann. 270, 16 South. 819, 49 Am. St. Rep. 371:

"These obstructions, while they are not to be lost sight of in considering the question of responsibility, \* \* \* should have suggested to travelers about crossing the tracks."

"And in *Barnhill v. Railway Co.*, 109 La. 43, 33 South. 63, we say:

"The greater the difficulty of seeing and hearing the train as he approaches the crossing, the greater caution the law imposes upon the traveler.

"The traveler, however, is rigidly required to do all that care and prudence would dictate to avoid injury, and the greater the danger the greater the care that must be exercised to avoid it, as where, because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary.'

"And Mr. Wilkinson, in his work on *Personal Injuries*, in commenting on the case of *N. Y. C. & H. R. R. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794, says:

"The looking and listening for an approaching train should be made at a time and in a place to make them most effective. It would be useless to look where the sight is obscured, or to listen where other greater noises drown the roar of the coming train. In other words, the precaution of the traveler should be reasonable, and by that is meant such precautions as a reasonable man would exercise in the ordinary affairs of life. Because of the fact that a collision between a train and automobile endangers not only those in the automobile, but also those on board the train, and also because the car is more readily controlled than a horse vehicle, and can be left by the driver, if necessary, the law exacts from him a strict performance of the duty to stop, look, and listen before driving upon a railroad crossing where the view is obstructed, and to do so at a time and place where the stopping and looking and listening will be effective.'"

We cannot agree in the contention that because Jones stopped and made an ineffectual effort to discover the approaching train before he reached the crossing that he could thereafter proceed to go upon the track without using further care to ascertain whether a train was approaching. It seems to us that every dictate of prudence required him to continue to look out for a train while he was approaching the crossing, and if he had done this it is clear under the undisputed evidence in this case that he would not have been killed.

The holding of our Supreme Court in the

case of *Railway Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106, is, we think, applicable to the facts of this case. In that case, the court, speaking through Justice Williams, says:

"The law is well settled that a driver approaching a railroad crossing must exercise ordinary prudence in going upon the track to see that he do so with safety. He cannot excuse the absence of all care by showing that those in charge of a train have also been guilty of negligence."

Further on in the opinion it is said:

"While persons using a railway crossing have the right to expect that the law requiring signals will be obeyed, this is not a substitute for the duty of exercising care for themselves, and they are not excused by the fault of the other party. No case in this court has allowed a recovery upon facts such as these, and the judgment cannot be permitted to stand without abolishing the rule, recognized by all authority, requiring the exercise of ordinary prudence on the part of persons crossing railroad tracks."

[3] The other cases in this state which we think sustain our conclusion that upon the undisputed evidence in this case the deceased must be held guilty of contributory negligence as a matter of law are *Railway Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *Railway Co. v. Dean*, 76 Tex. 73, 13 S. W. 45; *Railway Co. v. Fuller*, 5 Tex. Civ. App. 660, 24 S. W. 1090; *Railway Co. v. Hart*, 178 S. W. 795; *Railway Co. v. Paine*, 188 S. W. 1033; *Baker v. Collins*, 190 S. W. 519.

It may be that the rule which denies any recovery for injuries which were contributed to by the failure of the injured person to use ordinary care should be modified and that the doctrine of comparative negligence is more equitable and just, but the rule is established by an unbroken line of decisions in this state, and it should not be frittered away by the courts by the approval of strained and unreasonable findings of facts by juries.

We shall not discuss any of the other assignments of error presented in appellant's brief. None of them, in our opinion, present any error which would require or authorize a reversal of the judgment.

We think the undisputed evidence shows that the deceased, Walter Jones, failed to use ordinary care in going upon the railroad crossing, and that such failure was the direct cause of this death. It follows from this conclusion that the judgment of the court below should be reversed, and judgment here rendered for the appellant, and it has been so ordered.

Reversed and rendered.

On Motion to Correct Findings of Fact and for Rehearing.

At appellees' request we make the following corrections in the statement of facts con-

tained in our opinion heretofore filed in this case:

The statement that the train which struck and killed Walter Jones "was running on schedule time" is inaccurate and misleading. The train was running on schedule time in the sense that it was running at its usual or scheduled rate of speed at the time of the accident, but it did not reach the crossing at which the accident occurred at its usual or scheduled time of passing this crossing. The evidence shows that it was behind time, and there is testimony to sustain a finding that it was about one hour late. The fact that the evidence shows that the train was late was not called to our attention in appellees' brief, and we do not regard such fact as controlling or material. The contention of appellees in their motion for rehearing that, the train being late, the deceased Walter Jones could reasonably have presumed that it had passed the crossing before he reached it, and was therefore relieved of the duty of using ordinary care to discover the approach of the train before going upon the crossing, cannot be sustained.

The record shows that Jones, on the evening of the accident, had gone from Crowley, a station upon appellant's road several miles west of the crossing, to the town of Rayne, which is situated on the railroad a few miles east of the crossing, and was returning to Crowley when the accident occurred. The road from Crowley to Rayne over which he traveled in making this trip was along the railroad track, and if the train had been on time he could have seen it pass, and he could not have assumed when he went upon the crossing that it had not passed.

We have carefully considered the motion for rehearing, and feel constrained to adhere to the conclusion expressed in our original opinion that reasonable minds cannot differ in the conclusion that the undisputed evidence shows that if Jones had used ordinary care to discover the approach of the train before going upon the track he could not have failed to have seen it, and that his failure to use such care was the direct cause of his death. Such being our view of the evidence, the fact that the jury did not so view it cannot control our judgment. As said by this court in the case of *Railway Co. v. Loeffler*, 59 S. W. 562:

"We fully recognize the importance of a strict observance by the court of the rule that jurors are the exclusive judges of the credibility of witnesses, and of the weight to be given to their testimony, but this rule neither requires nor contemplates that the mind and conscience of the court shall be entirely and unreservedly surrendered to the judgment of a jury upon all questions of fact that may arise in the trial of a case. When the verdict of a jury is so against the weight and preponderance of the

evidence as to be clearly wrong, it is the duty of the court to set such verdict aside; and the grave responsibility thus placed upon the judiciary of determining whether or not the evidence in a particular case is legally sufficient to deprive a citizen of his property cannot be evaded."

We are of opinion that the motion for rehearing should be overruled and it has been so ordered.

Overruled.

## FRESNOS LAND & IRRIGATION CO. et al. v. BOX et al. (No. 6588.)

(Court of Civil Appeals of Texas. San Antonio. June 8, 1921. Rehearing Denied June 29, 1921.)

1. Continuance  $\S$  26(3)—Denied for absence of witness, diligence not being shown.

There is no abuse of discretion in denying continuance for absence of witness; there having been no proper and sufficient diligence to secure his attendance or deposition.

2. Appeal and error  $\S$  1050(1)—Admission of evidence not ground of complaint, harm not being shown.

Complaint of admission of testimony is not available where harm therefrom is not shown.

3. Trial  $\S$  351(2)—Party desiring submission of special issue should offer one.

One desiring submission of a special issue should prepare and offer one.

4. Waters and water courses  $\S$  261—Irrigation contract exemption from liability held inapplicable to laterals to be constructed.

Exemption of water company in contract for furnishing water for irrigation through laterals to be constructed by it in case of breaking down of machinery or laterals, being in the part of the contract referring to existing and completed plant, does not relieve it from liability for damages from insufficient supply merely because the laterals it constructed under the contract were defective.

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Action by E. D. Box against the Fresno Land & Irrigation Company and another, others intervening. From an adverse judgment, defendants appeal. Affirmed.

Graham, Jones & Williams, of Brownsville, for appellants.

Seabury, George & Taylor, of Brownsville, for appellees.

COBBS, J. E. D. Box, appellee, sued appellants for damages growing out of the breach of alleged written contracts. Fresno Land

& Irrigation Company leased to appellee Block No. 184, containing 23.37 acres of land, and 9.29 acres of land off of the east end of block No. 187, aggregating 32.66 acres in Cameron county. The contract began October 1, 1918, and ended October 1, 1919. By the terms of the contract appellee became entitled to three-fourths of the crops grown and to be grown for the year 1919, and it became the duty of Fresno Land & Irrigation Company to furnish to plaintiff water sufficient to properly irrigate the lands so that the crops would grow thereupon. The water to irrigate with was to be furnished by the other appellant, Rio Grande Canal Company, sued herein as a party jointly engaged in the undertaking, the contract being made through Scott, the president of both companies. Appellee Box alleged that he carefully and properly prepared the 32.66 acres in the early part of the year 1919 for the purpose of planting same in cotton, and on or about the 4th of March, 1919, planted said land in cotton of good well-selected seed, and advised Fresno Land & Irrigation Company of the planting, both prior and subsequent thereto, and demanded to be furnished with water through the lateral prepared, and to be prepared, by appellee to irrigate the cotton, which it failed and refused to do within a reasonable time thereafter, and the cotton reached only a partial stand. It was also alleged that the cotton seed sprouted in the ground from natural moisture, and would have, if watered, come up in a good and perfect stand; whereas only about one-eighth of the stand came up above the ground, and for lack of moisture, or failure to supply water to the ground and crop, it did not have a good stand, but if properly watered it would have had and would have grown and would have produced 20 bales of cotton more than it did make; that the bales would have averaged 500 pounds of lint cotton in weight, would have been worth in the market at time of its gathering the sum of 30 cents per pound, and the seed produced would have been 10 tons, worth \$61 per ton; that the cost of harvesting and marketing would not exceed \$20 per bale, cost of growing would not exceed \$8 per bale, leaving a net loss of \$3,050.00, three-fourths of which being plaintiff's made a total loss to him of \$2,287.50, for which suit was brought.

The cause of action against Rio Grande Canal Company (an alleged irrigation corporation and common carrier for hire) is that at the time of the execution of the contract with Fresno Land & Irrigation Company (an alleged landholding company) it likewise became a party to said contract, and agreed to furnish water for the proper irrigation of said land and said cotton in accordance with the contract, but utterly failed to furnish water sufficient to irrigate

the land within time to prevent the loss of said cotton.

The canal company was a corporation organized under the laws of Texas to conduct water from the Rio Grande river, the source of its supply, as a common carrier to serve the public, and especially the lands of appellees, designated by said canal company as under its system, and there was an abundance of water from its source of supply not contracted to other parties, with which appellee's lands could have been irrigated, but appellants breached the agreement and negligently failed and refused to construct to said land any sufficient lateral or canal from its main canal to irrigate said land, and hence made parties to the suit.

The defenses as pleaded by appellants were general demurrer and general denial, and appellant Rio Grande Canal Company denied under oath that it executed the contract sued on, or that it was in any way a party thereto, and pleaded specially it never agreed to furnish water for irrigation except on conditions provided in its general water contract with Fresno Land & Irrigation Company, and at all times stood able and willing to comply with the terms of that contract.

Fresno Land & Irrigation Company brought A. N. Tandy in as a defendant, alleging it sold Tandy some of the lands across which it had to construct canals in order to enable Rio Grande Canal Company to reach appellee Box's lands, as a part of the consideration for sale to Tandy, who agreed to construct the canal across the lands purchased by him, which he failed to do within the time agreed upon, and if appellee Box suffered any injury it was caused by Tandy, and prayed to recover over against Tandy if appellee Box recovered. Tandy filed appropriate defenses. By agreement of all parties Pedro Cortez intervened in the suit, but made no claim, and it was agreed that whatever rights he might have should be recovered by Box; this agreement disposed of the intervener's case. Fresno Land & Irrigation Company filed a motion for a continuance, which was overruled.

The case was tried with a jury upon special issues, which having been duly answered, the court entered a judgment that interveners Cortez and Tandy go hence with their costs and judgment in favor of appellee Box against Fresno Land & Irrigation Company and against the Rio Grande Canal Company jointly the sum of \$778, with 6 per cent. interest per annum thereon from the 1st day of October, 1919.

[1] The first assignment complains that the court erred in not granting a continuance to secure the testimony of John G. Fernandez, a witness for appellants. He was an officer in appellant's company. An inspection of the record discloses that appellant pur-

sued no proper and sufficient diligence to secure the attendance of the witness or to take his deposition, and the court did not abuse its discretion in overruling the application. The assignment is overruled.

Appellant's second assignment of error embraces his first, second, third, fourth, eleventh, and seventeenth assignments, all under one assignment, with as many several different propositions thereunder. The appellee urges us not to consider this assignment, as it is violative of rule 29 of this court.

The first proposition under this multifarious assignment is that plaintiff failed to allege that the defendant Fresno Land & Irrigation Company was guilty of any negligence tending to produce the injury because it was relieved by a clause in the contract from any damages not involving its negligence. The contracts were attached to and made a part of the pleading. The petition and contract together showed that appellants were acting together in this contract, both receiving common benefits, and in which it was agreed that appellee would be furnished water by February 1, 1919. A claim was set up in this suit by the canal company for the price of water furnished to and recovered against appellee for \$128, which was credited on the amount of damages recovered by appellee. The judgment of the court recites the gross value of the cotton and seed that would have been raised was the sum or value of \$1,416. Deducting three-fourths of the gross value, less the cost of gathering, harvesting, ginning, and marketing, found by the jury, the court ascertains to be the sum of \$906, appellees' share. The court further found Rio Grande Canal Company is entitled to recover from appellee Box the sum of \$128, water rent set off against appellants, leaving the amount of judgment \$778, recovered with interest as above shown. The pleading was entirely sufficient to support the recovery, and the assignment is overruled. There is no reason why the two corporations, the land company and the irrigation company, as they did, could not jointly agree with a water-taker, for a sufficient and valuable consideration, the one to furnish the land, the one to cultivate, and the other to furnish the water; it being to and in the mutual interest of all the parties in respect thereto. *Granger v. Kislil*, 139 S. W. 1004. This assignment is overruled.

We overrule the third assignment, which complains that the court should have given the requested instruction for a verdict. There is no merit in this assignment. Under the state of the evidence the trial court would have erred had he so done, as there were sufficient facts introduced to take the case to the jury.

The fourth, the eleventh, and seventeenth

assignments do not clearly state what the errors are, but send us to bills of exception Nos. 5 and 12 to hunt out in the record to find what they are. And the seventeenth is too general to understand at all, as it is complaining of the judgment without telling us the distinct grounds. The proposed propositions and statements do not assist the court. Nevertheless, we have considered each, find no merit disclosed, and overrule them.

Appellants' third assignment of error includes here the fifth, seventh, eighth, ninth, tenth, eleventh, and seventeenth, which they say in part present the same legal question and will be briefed together; then follow all those assignments separately written under the so-called third assignment. If they all together present, as stated, the same legal question, it would have been much better to have presented such in one proposition, or for that matter in several, but not as here in both the so-called second and third assignments restate each one of these grouped, and follow each with so many separate general so-called propositions. Each of these assignments is complaining of the supposed error in each ruling, and refers us in each assignment by saying "is more fully shown by defendant's bill of exception No. —." We find no merit in any of them, and they are overruled.

As already stated, the two companies, the one holding the title to the land and the other the water rights, entered upon mutual binding contracts whereby the one company leased the land to appellee, and the canal company was to furnish the water. At that time some of the laterals were not built, but in addition to the lease contract for the use of the land, appellee and canal company had the further agreement made contemporaneously, that it would furnish the water to appellee, and appellee would pay the regular water charges, and the necessary laterals would be constructed to it for the water. The appellee put the land in shape for cultivation. The cause of the failure to get water in time was because the laterals appellants were to build to connect with the one appellee was to, and did, construct to connect with his, which was to be done by February 1, 1919, were not completed until the cotton had come up and died for the lack of moisture which caused appellees' loss. When the water was first put in the lateral, it broke, and was not completed until April 8th, after appellee had lost his crop.

We do not believe that it was necessary to plead or prove negligence any more specifically than it is pleaded. The parties contracted to, and they were required to perform, their obligation as set out, alleged, and proven. However, the issue of negligence was submitted to the jury in the form requested by appellants, and the jury found against them. The contract objected to in

the assignment as not being admissible was the contract entered into between the parties and sued upon, and, being signed by one of the parties, was clearly admissible against such, and besides this, it was admissible for the jury to pass upon the question as to whether or not the canal company had ratified it. The issue submitted to the jury and complained of is:

"Question No. 1. Did the defendant Rio Grande Canal Company agree to, accept, or ratify the contract between the plaintiff and the defendant Fresno Land & Irrigation Company, and agree to furnish water in accordance with its terms? Answer, Yes."

The question was a proper one and the answer of the jury concluded appellants from denying the execution of the contract. The finding is supported by the evidence. The canal company also pleaded over against appellee—recovered a judgment against him at the rate of \$4 per acre, and in the aggregate the sum of \$128. It is provided in the face of the contract that appellee Box was to pay it its regular charges for furnishing water to irrigate his lands.

[2] The fifth assignment of error is too general to understand or consider. It complains that the court erred in allowing counsel to interrogate witnesses Pedro Cortez, Pedro Zavalette, and A. N. Tandy on cross-examination; they testifying in behalf of the irrigation company in regard to the cause of action against A. N. Tandy on issues and along lines in no manner pertaining to the issues between plaintiff E. D. Box and appellants more fully shown by bill of exception No. 13. There is no statement showing what is contained in that bill. If there was any error, it is not set out in any statement. The introduction of testimony, at any rate, is a matter largely within the discretion of the court, and there is nothing to show any harm done by the examination of the witnesses, or any abuse of discretion upon the part of the court, and this assignment is overruled.

We overrule the sixth assignment of error.

The appellee was the plaintiff in the trial court. The burden was on him to establish his case, and it was his duty to produce his evidence, and was entitled to the conclusion thereof.

[3] The seventh assignment complains that the court erred in not giving the special issue to the jury as to what caused the breaks in the canal constructed by the defendant Tandy, as is more fully shown by bill of exception No. 19. The appellee strenuously objects to its consideration. There is no proposition or statement whatever showing what the special issue was that the court was requested to submit. In fact there is nowhere in the record any special charge whatever requested by appellants to be given the jury for the submission of any issue

for them to pass on, except for a directed verdict. It was the duty of appellant to prepare and submit such issues thought material to his case. This was due to the court and to the parties. It was the proper way to secure the submission of issues desirable. This would give the court the opportunity to present one of his own if such issue was material to aid in the determination of the case if not satisfied with the one offered by counsel.

Appellants' eighth, ninth, and tenth assignments of error, which appellants state do not appear in the record as assignments of error, nor covered by bills of exception, are submitted as fundamental errors. Appellee makes no reply to them. The assignments and propositions themselves do not comply with the rules, and submit no sufficient statements.

Through the first so-called assignment, proposition and alleged statement it is contended that Fresno Company was liable only for negligent breach, and second that there was no allegation of joint liability of appellants, and it was error to credit \$128, the judgment in favor of canal company, on the judgment in favor of appellee against appellants for \$906. The evidence in this case shows that J. B. Scott was the president of both appellant companies, one engaged in operating and leasing irrigated lands and the other engaged in furnishing water to the tenants and water-takers, cultivating such lands. Appellee leased a tract of land which adjoined the Tandy tract, through and over which it was agreed appellants would construct a lateral to transport the water to the leased land of appellee to connect with laterals to be prepared by appellee over his leased lands to receive and distribute the waters. Scott, the president of both companies, contracted with Tandy to construct the lateral for the purpose of conducting the waters to appellee's lands.

[4] We do not think the clause in the contract in which it undertakes to exempt appellant water company by the "act of God or public enemy, the breaking down of machinery or appliances, \* \* \* laterals," etc., applies, because that part of the contract was in reference to the existing and completed water plant, and not to a lateral subsequently imperfectly completed under the contract in this case. After appellee completed the laterals he was to complete on his land, he testified:

"Well, they went ahead about the 8th of April and completed this lateral across here, and the first day they pumped after they got it built, why, I turned water in here, and it came on down through the company's canal all right and into Mr. Tandy's, and got out here about 150 yards in Mr. Tandy's lateral, and there was a high place in there, and he hadn't built up his borders high enough; consequently, when this water come here, the canal back there was full



and ran over and washed it all out, and before I could get back up there and cut off the water, why, it ran out quite a bit of water, in other words, flooded the country. The water did not come down on my land over 150 yards; I immediately called up Mr. Scott and told him what had happened. 'Why,' he says, 'I didn't expect anything better. I saw that lateral and knew it wouldn't hold water; I didn't expect anything better.' So Mr. Scott told me while I was talking to him over the telephone to tell Mr. Tandy about it; I went on down to Olmito, and saw Mr. Tandy's son down there, Mr. Dave Tandy, and I told him about it. He made no reply, whether he would fix it or not. I notified Mr. Scott of this situation."

It is too clear that both appellants in this case undertook to perform a joint obligation. It was their duty to complete a sufficient system of laterals in the first place. They knew it had not been done here. And the jury has found that it was appellants' negligence that caused the damages. We can see no harm done in the joint judgment. The appellants must adjust that matter between themselves.

We have considered all the assignments so far as we can see the questions presented in the manner and form in which the assignments are submitted and discussed. We do not think there is any reversible error assigned or presented, and they are each overruled.

The judgment is affirmed.

#### WHITE v. DENNIS et ux. (No. 9640.)

(Court of Civil Appeals of Texas. Fort Worth.  
May 7, 1921. Rehearing Denied  
July 2, 1921.)

**Mines and minerals**  $\Leftrightarrow$  79(3)—Annual rental under lease held payable in advance.

An oil lease held to require payment in advance of the annual rental, with ten days of grace additional in which to make payment; this having been the construction placed on it by the parties.

Appeal from District Court, Young County; W. F. Weldon, Judge.

Action by W. A. Dennis and wife against E. E. White. From judgment for plaintiffs, defendant appeals. Affirmed.

Marshall & King, of Graham, and Ike A. Wynn and Charles L. Morgan, both of Fort Worth, for appellant.

Kay, Akin & Kenley, of Wichita Falls, and Arnold & Arnold, of Graham, for appellees.

DUNKLIN, J. This is the second appeal of this cause; disposition by this court of the

former appeal being shown in 220 S. W. 161. That opinion contains a full statement of the issues involved, and a repetition of the same in this opinion will be unnecessary. After the reversal of the judgment rendered on the first trial, the case was tried again upon the single issue whether or not E. E. White, the owner of the lease in controversy, did, on February 11, 1919, tender the required rental of \$60, which was, by the terms of the lease, made necessary to continue the same in force. As shown in the former opinion, the Beckham National Bank was made the agent of the lessor to receive the rental. Upon the last trial the jury made answers to special issues submitted to them, which issues and answers are as follows:

"No. 1. Did the defendant, E. E. White, or his wife, Mrs. E. E. White, for him, tender to Beckham National Bank the lease rental of \$60 on February 11, 1919? Answer: No.

"No. 2. Was Mrs. White, acting for the defendant, E. E. White, ready, willing, and able to pay the rentals to the Beckham National Bank for plaintiff on February 11, 1919, within banking hours? Answer: No.

"No. 3. Did Mrs. White, acting for the defendant, E. E. White, offer to pay said rentals to the Beckham National Bank on February 11, 1919, within banking hours? Answer: No.

"No. 4. Was the failure of Mrs. White to make such payment of February 11, 1919, due to the statement made to the cashier by plaintiff Dennis on the same day to the effect that he considered the lease already forfeited for non-payment of such rental and instructed the bank not to accept any rental? Answer: No.

"No. 5. If the defendant, E. E. White, or his wife, had tendered the rental to the Beckham National Bank on February 11, 1919, would the bank have accepted the same? Answer: Yes.

"No. 6. If W. A. Dennis stated to any official of the bank that said lease was forfeited and he would not receive any payment of rental thereon, was such statement communicated to Mrs. White or E. E. White on February 11, 1919? Answer: No.

"No. 7. Did the plaintiff W. A. Dennis, on the 11th day of February, 1919, instruct any official of the Beckham National Bank not to accept the rental of \$60 in question if the same was tendered to said bank? Answer: No."

Upon those findings by the jury the trial court rendered a judgment in favor of the plaintiffs, W. A. Dennis and wife, for the recovery of the land covered by the lease and for a cancellation of that lease. From that judgment the defendant, White, has appealed.

Appellant insists that the proof showed without controversy that on February 11, 1919, Mrs. Lula White, wife of E. E. White, offered to pay the rental due on that date, but that she was told by Mr. Deats, cashier of the bank, that she could not do so, by reason of the fact that plaintiff Dennis, the owner of the land, had already informed him (Deats)

that the lease had been forfeited; that on the same date, and prior to said conversation between Mrs. White and Mr. Deats, plaintiff Dennis instructed Deats that the lease was forfeited, and that he should not receive the rental in the event it was tendered, and that such action on the part of Dennis constituted repudiation of the contract by him, and made the tender of the rental thereafter unnecessary to a continuation of the lease.

We deem it unnecessary to review the testimony in detail offered upon the issue of tender. We have examined it and carefully considered it and have been unable to concur with appellant in the contention just stated. Mrs. White, Mr. Deats, and W. A. Dennis all testified upon the trial; and while certain portions of the testimony tended to support the contention made by appellant, other portions of such testimony were sufficient to support the verdict of the jury, and as it was the province of the jury to pass upon the credibility of the witnesses and the weight of the evidence, we have reached the conclusion that the assignment of error now under discussion must be overruled.

Another contention made by appellant is to the effect that under the terms of the lease the rental in controversy for the year beginning February 1, 1919, and ending February 1, 1920, did not become due until the end of that year, since no specific due date for such rental was fixed by the terms of the lease. In support of his contention, appellant has cited, among others, the following authorities: *Rhodes v. Mound City Gas Co.*, 80 Kan. 762, 104 Pac. 851; *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188, 86 N. E. 219; *Warren Oil & Gas Co. v. Gilliam*, 182 Ky. 807, 207 S. W. 698; *Thornton's Law of Oil and Gas*, p. 403.

This proposition is stated in appellant's brief:

"The lease involved in this suit imposed an absolute unconditional liability upon appellant to either drill a well or pay rentals. He did not drill a well, and therefore he was bound to pay rentals."

In connection with that proposition, appellant quotes the following from Thornton on Law of Oil and Gas, p. 402, which he says is in accord with all the authorities upon that

question, including those noted above and many others cited in his brief:

"But where the lessee must pay the rent—where a legal obligation rests upon him to pay which can be enforced and the amount collected—then payment in advance cannot be compelled, in the absence of a clause in the lease to that effect."

The lease in controversy contains, among other things, the following provisions:

"It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas or either of them is produced therefrom by the party of the second part.

"In consideration of the premises said party of the second part covenants and agrees: \* \* \* The party of the second part agrees to commence operations for drilling a well on said premises within one year from the date hereof, or pay rental at the rate of 50 cents per acre per year, while such commencement of operating for drilling a well is delayed. \* \* \*

"It is further agreed that if suit be instituted affecting said premises or adverse to the interest of the second party hereunder, that thereupon the time for either the commencement or completion of a well, or for the payment of rental hereunder, shall be extended from date of filing of such suit until final termination thereof, and that rentals accruing during said litigation shall not be chargeable against said second party. Failure of second party to pay rental within ten days after same becomes due (subject to exceptions herein stated) shall render this lease void; provided, second party shall pay all rentals, if any, then accrued. Second party shall pay all damages caused by it to growing crops on said land."

We adhere to the conclusion expressed in our opinion on the former appeal that according to the terms of the lease the rentals for each year were payable in advance, and the due date was February 1st of each year, but the lessee was allowed ten days of grace additional in which to make the payment. *Whitherspoon v. Staley*, 156 S. W. 557. That was the construction placed upon the instrument by the parties, as shown by the uncontroverted proof; and that fact, of itself, is entitled to weight. 6 R. C. L. p. 852, § 241.

For the reasons noted, all assignments of error are overruled, and the judgment is affirmed.

CITY NAT. BANK OF CORPUS CHRISTI v.  
CITY OF CORPUS CHRISTI et al.  
(No. 6624.)

(Court of Civil Appeals of Texas. San Antonio. June 22, 1921. Rehearing Denied June 29, 1921.)

**1. Depositaries** ⇨6—City of Corpus Christi could reject all bids offered for depository or treasurer.

The city council of Corpus Christi, under Special Charter, art. 10, § 7, in Sp. Laws 1909, c. 33, in the exercise of reasonable and sound discretion, is clothed with the power and authority to reject any and all bids offered under an advertisement for the use of the public funds of the city, and it has the inherent power to reject all bids if none is offered that gives a fair remuneration for the use of the money, or if the bids are the result of fraudulent combination; but such discretion must not be arbitrarily, corruptly, or unreasonably exercised.

**2. Depositaries** ⇨6 — Council held to have acted within bounds of discretion when it rejected bids for treasurer.

Council of the city of Corpus Christi held to have acted within the bounds of a sound discretion when it rejected bids made by two banks seeking the position of city treasurer.

**3. Contracts** ⇨119—Combinations among bidders render contracts void.

Arrangements and combinations among prospective bidders for municipal contracts to prevent competition among themselves, and to bring about an award at a figure which is not the result of an honest competition, are contrary to public policy and void.

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by the City National Bank of Corpus Christi against the City of Corpus Christi and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. B. Ward and J. C. Scott, both of Corpus Christi, for appellant.

Jas. M. Taylor and Kleberg, Stayton & North, all of Corpus Christi, for appellees.

**FLY, C. J.** This is an appeal from an interlocutory order dissolving a restraining order issued at the instance of appellant against the city of Corpus Christi, its mayor, P. G. Lovinskold, its commissioners, William Shely, W. H. Griffin, H. N. Carter, and D. A. Segrist, its secretary, John T. Bartlett, and Corpus Christi National Bank, which commanded said appellees, the city and its officers, to accept the bid of appellant for the position of city treasurer and appoint appellant to that position for two years and deliver to it the funds of the city, upon its qualification as required by law; that said city

and officers be enjoined from further advertising for and receiving bids for treasurer, and from purchasing breakwater construction bonds with the sinking fund or any other fund. The temporary restraining order was made on May 10, 1921, and continued until May 17, 1921, when it was considered on its merits and dissolved.

It was alleged in the petition that, as required by the charter, the commissioner of receipts, disbursements, and accounts had, in the month of April, 1921, duly advertised for bids for the office of city treasurer, requiring such bids to be made before 5 o'clock p. m. on April 29, 1921, and appellant duly and legally filed its bid, agreeing to pay to the city on its funds interest at the rate of 5½ per cent. per annum on daily balances and tendered a good and sufficient bond in the sum of \$500,000, and was ready, able, and willing to comply with all the conditions of the bid. It was further alleged that there was but one other bid, which was made by the Corpus Christi National Bank, and was for 5 per cent. per annum on the daily balances; that after such bids were received the mayor and commissioners refused to pass upon the bids and select a treasurer, and have advertised for other bids, in which are numerous conditions, among the number being that no rate of interest less than 6 per cent. per annum on daily balances will be considered nor a higher rate of interest than 6 per cent. per annum will be paid on loans made to the city. It was also alleged that \$350,000 of the funds of the city were in the possession of the Corpus Christi National Bank, the former treasurer of the city, and that some of the appellees are about to purchase "seawall and breakwater construction bonds" issued by the city in the sum of \$100,000, and appellant asked that they be restrained from so using the funds. The city answered that the first advertisement for bids was illegal and not in compliance with the city charter; that neither of the bids was filed within the legal time, and that the bids were properly rejected because there was a conspiracy between the two banks; that appellant had by an agreement prevented the Corpus Christi National Bank from bidding as high as it would have done, and thus deprived the city of a higher rate of interest on its daily balances.

This is really a suit for the position of depository or treasurer of the city of Corpus Christi, prosecuted by appellant, a local bank, on the sole ground that the mayor and commissioners of that city having advertised for bids, as provided in its charter, for the position of depository or treasurer, and appellant having bid 5½ per cent. per annum on daily balances and the competing bank having subscribed only 5 per cent., appel-

lant was legally entitled to the award, and that the municipal authorities had no authority to reject the bids and advertise for others, as they proposed to do. In other words, it is contended that under the charter the mayor and commissioners were compelled to award the position of depository to the highest and best bidder, and that they could exercise no discretion in the matter.

In section 7, art. 10, of the special charter of the city of Corpus Christi, found in Special Laws of 1909, chapter 33, and which section was fully construed, as to the powers of the city council in accepting bids, by this court in *City of Corpus Christi v. Mireur*, 214 S. W. 528, it is provided that—

"The office of city treasurer shall be let by contract to the highest and best bidder, in the discretion of the city council, and in determining the highest and best bidder, the highest rate of interest to be paid upon daily balances and the value of bond tendered shall be the criterion that shall decide."

It is also provided that at the next regular meeting of the council after said bids are opened the city council shall proceed to pass upon said bids and elect a treasurer, who shall hold his office for a period of two years and until his successor is elected and qualified. This court, in the *Mireur* Case, held that no office could be created in the manner contemplated in the charter, but that a depository would merely be chosen for the moneys of the city. In that opinion it was also held that the charter gives no discretion to the city council in the selection of a depository except in ascertaining the highest and best bid, and that—

"When the highest rate of interest on daily balances and the value of the bond is ascertained, the end of all discretion is reached, and the law then commands the city council to let the contract to the bidder of the highest rate of interest and who has the most valuable bond."

It was held that the award to the lowest bidder with the least valuable bond was not within the discretion of the city council.

It was not held in the *Mireur* Case, however, that the city council had no discretion in the matter of rejecting any and all bids made for the deposit of the city money, nor has any decision tending to uphold any such doctrine been presented to this court. It cannot be contemplated for a moment that the Legislature intended to confine the discretion of the city council in the selection of a depository to one of the bidders, regardless of the size of the bid, and that it could not consider its inadequacy to properly remunerate the city for the use of its money, nor proof of any fraud exercised by the bidders to obtain the use of public money without paying a just value. It is well known that in small towns or communities

there are only a limited few who are in a position to bid for the use of large sums of public money subject to a daily checking out of the same, and if the highest and best bid, however trivial and insignificant it might be, must be accepted by the city council, the taxpayers would be placed at the absolute mercy of any set of men who might conspire to bid for public money and then divide the spoils and plunder. Even though there should be no combination to defraud the public, it cannot be conceived that the Legislature intended to withhold the exercise of discretion from the city council in regard to determining whether any bid for the use of public money was sufficient to warrant a granting of its use to the bidder. The charter undoubtedly clothes the city council with discretion in determining the highest and best bid and at the same time gives directions as to how that discretion should be exercised, but it is not intimated that the city council cannot exercise a sound discretion in preventing predatory attacks upon the public money through bids which fail to give customary and just compensation for the use of such money. To license such use of public funds would be a flagrant attack upon the rights of taxpayers and utterly destructive of public policy. Under the theory contended for by appellant no bid, however contemptible and insignificant, could be rejected by the city council, but when once bids are received in answer to an advertisement issued by a commissioner of the council the inexorable decree of fate has gone forth and no power can release the public from the injustice that is inflicted upon them, writhe as they may under the injury and wrong. Such a theory staggers reason, and would imply that the lawmaking power had legislated to place the people of Corpus Christi at the mercy of those controlling the money of the community. We will not indulge in any such presumption.

The section of the charter under consideration gives discretion to the council in passing upon the highest and best bid, and furnished the criterion on which the council shall act. That criterion is that the bid shall be awarded to the bidder offering the highest rate, but it is left open to the council to say what is the best value in the bonds offered. There is no provision in the charter commanding that, when one or more bids are made, the highest, however low and insignificant it might be, shall be accepted. Under that construction, if one hundredth of 1 per cent. per annum was the highest bid offered, the public money would be used for that farical sum, when it was worth much more in commercial circles. The provision of the charter was undoubtedly enacted in the interest of the people of the municipality, and not, as contended in argument by appel-

lant, in the interest of banks or individuals who might be bidders for the use of the public funds. If the highest bid, however, contemptible and insignificant it might be, must, under the inexorable demands of the law, be accepted, the bidder would receive that protection so often heretofore given to classes and certain interests in our government; but, as in every instance of such protection to the individual, class, or corporation, the masses would be paying for the protection.

[1] We hold that the city council of Corpus Christi, in the exercise of reason and a sound discretion, were clothed with the power and authority to reject any and all bids offered, under the advertisement for the use of the public funds of the city of Corpus Christi. As in the case of judicial discretion, it could not be arbitrarily or unreasonably exercised, but with the view of conserving the public interests and upholding the principles of public policy. While held to the strict letter of the law in not awarding a bid except to the highest and best bidder, the city council has the inherent power to reject all bids, if none is offered that gives a fair remuneration for the use of the money, or if the bids are the result of fraudulent combinations; but such discretion in the rejection of bids must not be arbitrarily, corruptly, or unreasonably exercised. It would be just as reprehensible and indefensible to reject fair bids which offer a just remuneration for the use of the public funds as to award the contract to the lowest bidder, or to award it to a highest bid that was so low as to be a fraud upon the public.

Discussing the proposition as to the right of the city council to reject any and all bids when, within the exercise of a sound discretion, it deems that public policy and the public interest require such rejection, Judge Dillon thus states the rule in *Municipal Corporations*, § 811:

"In the absence of any statutory restriction upon the power to contract, the selection of a contracting party rests within the discretion of the municipality, and if the charter does not expressly require that contracts shall be let to the lowest bidder, the action of the municipality acting through its officers in accepting a bid, whether it be the lowest or not, rests within the discretion of the designated officials, and their determination will not be interfered with so long as they act in good faith. If, however, the statute requires that the contract shall be awarded to the lowest bidder, no contract can be let to any person other than to the lowest bidder. But, even under such a statutory provision, the municipality is not compelled to make a contract with the lowest bidder; while no contract can be let to any other person, the body or officers awarding the contract, acting in good faith, may refuse to award it to the lowest bidder if they deem it for the best interests of the city to do so, and they may reject all the bids and readvertise."

Changing the words "lowest bidder" to "highest bidder," the language fits this case exactly. The text is fully supported by the Court of Appeals of New York in the case of *Walsh v. Mayor, etc.*, of New York City, 113 N. Y. 142, 20 N. E. 825. The court in that case was considering a contention that, a bid being the lowest, under the statute, the municipality was without discretion to reject it, and it was said:

"It is true that the language of that act is quite peremptory, and provides that all contracts 'shall be awarded to the lowest bidder for the same, with adequate security, and every such contract shall be deemed confirmed in and to such lowest bidder, at the time of the opening of the bids, estimates or proposals therefor, and such contract shall be forthwith duly executed \* \* \* with such lowest bidder.'"

The language of that statute is stronger and more far-reaching than the charter provision we are considering, and yet it was held by the New York court:

"Under such law it is quite clear that no contract could be let to any person other than to the lowest bidder with adequate security. The obvious purpose was to secure to the city the advantages of having its work done by the lowest bidder therefor after proper advertisement. I do not think it meant to compel the making of a contract even with such lowest bidder, if it were plain that the bids were all largely in excess of the real cost of the work. If by combination or other cause all of the bids were greatly in excess of such cost, and it so appeared to the commissioners, and that the true interests of the city demanded that none of such bids should be accepted, we think that such commissioners, acting in good faith, would have the right to reject them all, and advertise over again. The existence of such a power might frequently be necessary to protect the city against fraudulent combinations, evidenced, perhaps, by informal bids for low prices, and if such power did not exist, ending in the award of a contract to the lowest bidder whose bid was formal, but at a price enormously in excess of the real cost of the work. It was never intended, as we think, to render it absolutely necessary in such a case that an award of the contract should be made to such a bidder. It was meant that no contract should be awarded to any but the lowest bidder, and whether to him or not would be a question for the body awarding the contract, acting in good faith, and for what they deemed the true interests of the city.

"If otherwise, if there were but one bid, and that vastly in advance of a fair price and decent profit, nevertheless, the city would be bound to have such a contract saddled upon it. It would require the plainest commands from the Legislature before we should be able to bring ourselves to think for a moment that any such result was intended. We do not think that the act cited contains such language, or that it was ever intended to accomplish any such end."

There can be no doubt as to the logic and force of that decision.

With the principles enunciated in view, we enter into a consideration of the facts. On April 14, 1921, a notice was issued and properly published asking for bids for the office of treasurer of the city of Corpus Christi, and stipulating that the bids must specify the rate of interest that will be paid on daily balances of city funds, and what rate of interest would be charged on daily loans. It was also stated that \$75,000 would be borrowed for current expenses, \$7,000 for street fund and \$10,000 for waterworks fund. In response to that advertisement the Corpus Christi National Bank bid 5 per cent. per annum on daily balances, and agreed to furnish the sums named in the advertisement at 6 per cent. per annum on daily loans, and tendered a bond in the sum of \$1,000,000. The City National Bank, appellant, bid 5½ per cent. interest per annum on daily balances and to "charge the city 6 per cent. per annum on daily loans to pay vouchers issued daily as funds are needed until taxes are collected." At the same time it tendered a bond in the sum of \$500,000 to faithfully perform its duties.

The evidence indicates that the bids were not at once considered by the council, but it was decided that both bids would be referred to the city attorney for an opinion. On May 6 both bids were rejected, after receiving the opinion of the city attorney. At the time the bids were made the city was receiving from its depository 5.6 per cent. interest on daily balances, and will receive that rate of interest on its daily balances until December, 1921, when the contract with its depository expires. The bids were rejected because the council deemed the rate of interest offered by the highest bidder to be too low, and because it was rumored that the two banks had agreed to offer a low rate of interest and then divide the money between them. It was shown that money was worth at the time the bids were offered a great deal more than it was two years ago when it was loaned by the city at 5.6 per cent. per annum. The evidence was sufficient to show that money on call was bringing more than the highest bid made for the city money. It was shown by the testimony of appellant that it had recently offered 6.10 per cent. interest per annum for money belonging to the state. The evidence shows that the officers of the two bidding banks had a tacit understanding that one was to bid 4½ per cent. interest and the other also bid and then divide the funds. Acting under that agreement the Corpus Christi Bank made a bid of 5 per cent., but appellant, contrary to the understanding, did not bid 4½ per cent. but bid 5½ per cent. There was evidence tending to show collusion. The Corpus Christi National Bank would have made a different bid from what it did had the understand-

ing with appellant not existed. The rates that each was to bid was discussed by the parties.

[2] The evidence tends to show that the city council acted within the bounds of a sound discretion when they rejected the bids made by the two banks. There was a tacit agreement between the parties to obtain the use of the public funds for a less sum than would have been bid if such agreement had not been made.

[3] It is the settled rule of the law that arrangements and combinations among prospective bidders for municipal contracts to prevent competition among themselves, and to bring about an award at a figure which is not the result of an honest competition, are contrary to public policy and void. Such contracts being illegal and void, no inquiry is necessary as to the particular effect of the contract. *Dillon, Mun. Corp.* p. 1165, § 781; *People v. Stephens*, 71 N. Y. 527; *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; *James v. Fulcro*, 5 Tex. 512, 55 Am. Dec. 743. As said in the Texas case last cited:

"Any agreement or combination, therefore, the object and effect of which, is to chill the sale and stifle competition, is illegal; and no party to the agreement or combination, can derive benefit from the sale."

It would not matter in this case that, while combining to obtain the money of the city at less than a proper interest, one of the parties may have, to use an expressive colloquialism, "double-crossed" a partner in the matter. The tainted illegal contract had vitiated the proceeding, and the city council was justified in rejecting the bids and advertising for others. The council was authorized and justified, under the circumstances, in fixing the minimum bid that would be entertained. That will probably have a most salutary effect in decreasing the chances of fraud and combination for obtaining gain at the expense of the taxpayers of Corpus Christi.

If appellant had attempted to show any injury inflicted on it by a rejection of its bid, it must have been a possible indefinite future injury, as it could not under any circumstances have become the treasurer or depository until the end of the term of the present depository in December, 1921. Appellant does not claim to be a taxpayer of the city, county, or state, or that any injury would result to it from a rejection of the bid. It has failed to show that any right belonging to it has been invaded by the acts of the city council, which it must be presumed were done along the lines of a duty owed to the people of the city of Corpus Christi. The council may have been actuated by political or other improper motives in reject-

ing the bids for the money of the city, but, if so, the record fails to reveal any such motives, and it must and will be presumed that they acted in good faith and in pursuance of what was considered a duty owed to the people of the municipality by its governing body. The council should not be disturbed in the discharge of duties resting upon them under the terms of the charter.

The judgment is affirmed.

### REILLY v. REILLY. (No. 9668.)

(Court of Civil Appeals of Texas. Fort Worth.  
June 18, 1921.)

1. Appeal and error  $\S$ 499(3)—Objection to testimony must be presented by proper bill of exceptions.

An objection to the introduction of testimony, to be available on appeal, must be presented by a proper bill of exception.

2. Appeal and error  $\S$ 688(1)—Bill of exceptions held not to show witness was in courtroom after rule invoked.

A bill of exceptions, reciting that a witness was permitted to testify, "After said witness had been in the courtroom and heard a number of witnesses testify, the rule had been duly invoked," did not show that the witness was in the courtroom and heard other witnesses testify after the rule had been duly invoked.

3. Divorce  $\S$ 130—Evidence held to support decree for wife.

In a wife's suit for divorce, evidence that the husband slapped the wife, and evidence concerning his associations with women of questionable character and concerning fusses between the husband and wife, held to support a decree in favor of the wife.

4. Divorce  $\S$ 184(6)—Conflicts in evidence in divorce suit were for trial court.

That a husband, sued for divorce, denied slapping his wife or associating with women of questionable character, or other circumstances tending to show a want of harmony between the parties, testified to by the wife's witnesses, merely presented a conflict of testimony which it was the province of the trial court to determine.

Appeal from District Court, Eastland County; Geo. L. Davenport, Judge.

Suit by Pearl Reilly against W. T. Reilly for divorce. Judgment for plaintiff, and defendant appeals. Affirmed.

Burkett, Anderson & Orr, of Eastland, for appellant.

Turner & Seaberry, of Eastland, for appellee.

CONNER, C. J. This suit was instituted by the appellee, Pearl Reilly, against her

husband, W. T. Reilly, for a divorce and the custody of their minor child. The plaintiff alleged that the defendant failed and refused to furnish the necessities of life for herself and child; that defendant disregarded his marital vows by associating himself on different occasions with women of questionable character; that during the month of May, 1920, the defendant assaulted the plaintiff, and inflicted upon her bodily pain and injury, without justification or provocation on her part.

The defendant answered with demurrers, general and special denials of the facts alleged by the plaintiff, and in turn sought a divorce and the custody of said child by cross-action, alleging certain acts, denominated as cruel, such as would render their further living together as husband and wife insupportable, and such as would render plaintiff an improper person to have the custody of their said child.

The trial was before the court without a jury, and after a hearing of the evidence the prayer of the plaintiff for a divorce and for the custody of the minor child was granted. From the judgment so rendered, the defendant has appealed.

Appellant's assignments of error present but two questions. In the inverse order of their presentation they are: First, whether the court erred in admitting the testimony of the witness Sam Bench; and, second, whether the evidence, as a whole, is sufficient to support the judgment.

Sam Bench, among other things, testified:

"I was present one Sunday afternoon when Mr. and Mrs. Reilly were out kodaking and had a little fuss. Mr. Clarence Reilly and Mrs. — and myself and Mr. and Mrs. Reilly were present. They were kodaking, and all got ready to go, and Mrs. Reilly wanted to take another picture, and W. T. didn't want her to; he wanted her to get into the car. He stepped out of the car and told her to get into the car, and slapped her, and they got in the car, and we left. It was a hard lick he struck her. He hit her pretty near hard enough to knock her down. I took it he was angry. After they got home, I heard him say he wished she would leave. He didn't tell her where he wished she would go to."

The following, omitting formal parts, is the bill of exception presented as supporting the objection to Bench's testimony:

"Be it remembered that trial was had upon the above entitled and numbered cause on the 17th day of November, 1920, whereupon a judgment was rendered in favor of the plaintiff, and thereupon in open court the defendant duly excepted to said judgment for the following reasons, to wit: Because the court erred in admitting the testimony of Sam Bench over the objection of the defendant after said witness had been in the courtroom and heard a number of witnesses testify after the rule had been duly invoked, and defendant here and

now tender this his bill of exception No. 11, and asks that the same be allowed and ordered filed as a part of the record in this cause, which is accordingly done, this the 30th day of December, A. D. 1920."

[1] An objection to the introduction of testimony to be available on appeal must be presented by a proper bill of exception. *Morgan v. Oliver*, 80 S. W. 111; *Ellis v. Marshall*, 41 Tex. Civ. App. 501, 95 S. W. 689. By observing the bill quoted, it will be seen that appellant fails to show that objection was made to Sam Bench's testimony at the time it was offered. The objection appears to have been to the "judgment" rather than to the evidence.

[2] Furthermore, the bill recites that the witness had been permitted to testify "after said witness had been in the courtroom and heard a number of witnesses testify after the rule had been duly invoked." If the bill can be considered as sufficiently presenting an objection to the testimony at the time it was offered, the bill nowhere shows that in fact Sam Bench had been in the courtroom, and had heard a number of witnesses testify after the rule had been duly invoked. The court overruled the objection, from which, in the absence of a contrary showing, it must be implied that the facts were not as stated by counsel in his objection, nor do they so appear in the statement of facts. The mere recitation of such facts in the objection made is not proof of their truth. See *Bailey v. State*, 42 Tex. Cr. R. 289, 59 S. W. 900; *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2. It follows, we think, that the first question must be determined adversely to appellant.

[3] In considering the second question, we have carefully weighed the evidence, and think it must be determined against appellant. In addition to the testimony of Sam Bench already quoted, Mr. Ogg testified that upon a certain occasion mentioned by him, at a rooming house in the town of Ranger, he observed appellant "playing with a woman of questionable character, and had heard him talk about other occasions when he had been out with other women several times." Appellee testified to a number of disagreeable occurrences and "fusses," and appellant himself testified, among other things, "I consider that Mrs. Reilly and I can never live together further as husband and wife."

[4] The evidence quoted and indicated, we think, supports the trial court's judgment in decreeing the divorce, and there is abundant testimony to the effect that the appellee, Mrs. Reilly, is the proper person to take care of their minor child, only about 2½ years old. The fact that appellant denied having slapped his wife and denied association with lewd women at any time, and denied other

specified circumstances tending to show a want of harmony between them, merely presents a conflict of testimony which it was the province of the trial court to determine.

We conclude that the judgment must be affirmed; and it is so ordered.

# DANIELS et al. v. FRANKLIN et al. (No. 9646.)

(Court of Civil Appeals of Texas. Fort Worth.  
May 21, 1921. Rehearing Denied July 2,  
1921.)

## 1. Appeal and error $\S$ 768 — Statements in brief not controverted taken as true.

The appellate court is authorized to accept as true statements in briefs not controverted by the opposing parties.

## 2. Trial $\S$ 269—Omission of judge to precede signature to requested charge with word "given" or "refused" held inadvertent.

Omission of trial judge to precede his signature to a requested special charge with either the word "Given" or "Refused" held merely an inadvertent omission, inasmuch as it appeared to have been submitted.

## 3. Trial $\S$ 356(1)—Judgment cannot be entered where jury fails to answer material issues.

In cases submitted to a jury on special issues, it is error to render judgment on their verdict where the jury fails to answer issues that are material in a determination of the controversy.

## 4. Contracts $\S$ 287(2)—Conclusion of architect only avoided where he acted capriciously, arbitrarily, or fraudulently.

Where a builder and contractor by their written agreement make an architect the judge of the proper performance of the contract, neither can avoid his conclusion on the subject without showing that he acted capriciously, arbitrarily, or fraudulently, but to be conclusive an architect's certificate must have been delivered in good faith, and in the absence of gross ignorance, carelessness, or indifference as will amount to a fraud upon the builder.

## 5. Trial $\S$ 365(1)—Answer to one issue held not answer to another.

In an action against builder to recover for plumbing under an agreement whereby certificate of architect was to be conclusive, an answer of the jury to a special issue that the delivery of a certificate by the architect was not pursuant to any conspiracy between him and the plaintiffs was not an answer to another special issue as to whether, in the delivery of the certificate, the architect acted under circumstances of such gross ignorance as amounted to a fraud upon the builder.

## 6. Trial $\S$ 232(2)—Charge on special issues held misleading.

In an action by plumbers against builder to recover for plumbing under a contract,



whereby certificate of architect was to be conclusive as to the completion of the contract, an instruction explanatory of special issue that "a conspiracy as that term is herein used means an agreement entered into between two or more persons to do or not to do some particular thing" was one that may have misled the jury into believing that to answer an issue as to whether or not there was a conspiracy between plaintiffs and the architect in the affirmative there must be evidence to the effect that there was an actual formal agreement, whereas it would be sufficient if the agreement could be implied from the circumstances shown in the proof.

**7. Appeal and error ⇨1070(2)—Failure of jury to answer special issue held not immaterial.**

In an action by plumbers against builder to recover under a contract whereby certificate of architect was to be conclusive upon both parties as to the completion of the work, *held*, under the evidence, that an answer to a special issue that the delivery of the certificate by the architect was not pursuant to any conspiracy between him and the plaintiffs did not render immaterial failure to answer the special issue as to whether in the delivery of the certificate the architect acted under circumstances of such gross negligence as amounted to a fraud upon defendants.

**On Motion for Rehearing.**

**8. Appeal and error ⇨264—Rule respecting exceptions in lower court to answer to special issue only intended to aid court.**

Rules bearing upon the taking of exceptions to the failure of the jury to answer special issues have been promulgated for the purpose of aiding the courts in an orderly disposition of their business, and to conserve time, but nothing therein precludes the appellate court from considering an assignment because of some technical objection in the manner of its presentation.

**9. Appeal and error ⇨835(2)—Objection to assignment not raised on original hearing waived.**

An objection on motion for rehearing that the appellate court was without authority to consider the assignment of error upon which judgment was reversed for the reason that the appellants failed at the trial in excepting at a proper time was waived where, on the original hearing, appellees, without objection to the assignment endeavored to answer it on its merits.

**Appeal from District Court, Eastland County; Geo. L. Davenport, Judge.**

Suit by the Franklin Plumbing Company, a partnership composed of R. E. Franklin and others, against G. W. Daniels and another. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

**Butts & Wright, of Cisco, for appellants. Kirby, King & Keeble, of Abilene, for appellees.**

**CONNER, C. J.** This suit was instituted by the Franklin Plumbing Company, a partnership composed of R. E. Franklin and others, against G. W. Daniels and C. H. Daniels, to recover the contract price for certain plumbing alleged to have been installed by the plaintiffs in the Daniels Hotel at Cisco, Tex. The contract declared upon was in writing, and provided that the plumbing company was to furnish the material and install all plumbing in the building. It was further provided that the material put in and work done should be under the supervision of R. S. Glenn, an architect, and that the decision of the said R. S. Glenn as to the character of the material and work should govern and be final. The plaintiffs alleged that they complied with their part of the contract, and had completed the plumbing to the satisfaction of the architect, who had issued his final certificate as follows:

"Franklin Bros. have finished their contract on the hotel building and you are now due them the balance of their money according to the contract."

The certificate was presented to the defendants and a demand made for final settlement, which was refused, whereupon this suit was instituted.

The defendants, by their first original answer, upon which they went to trial, pleaded a general denial, and specially denied that the plaintiffs had complied with their contract, specifying numerous and apparently material instances in which the work done was not as provided for in the contract, and further alleged that the certificate of the architect declared upon by the plaintiffs had been delivered to them as result of a conspiracy between the plaintiffs and the architect, entered into for the purpose of defrauding the defendants, or, if not the result of a conspiracy, it was issued and delivered to the plaintiffs by the architect through such gross negligence or gross ignorance on the part of the architect as amounted to a fraud upon these defendants, and that at the time of the delivery of the certificate to the plaintiffs they well knew that the workmanship and material of said plumbing system was not in accordance with the terms and conditions of the contract entered into between the parties.

The case was submitted by the court to a jury, upon special issues, which, together with the answers of the jury thereto, in so far as pertinent, are as follows:

"(1) Did the plaintiffs herein, Franklin Plumbing Company, or any member of said firm, enter into a conspiracy with R. S. Glenn to cheat and defraud the defendants C. H. and G. W. Daniels in connection with the plumbing job on the building in controversy? Answer: No.

"(2) Was the plaintiff herein, Franklin Plumbing Company, guilty of any such gross mistakes in installing the plumbing job as to amount to a fraud on the rights of the defendants C. H. and G. W. Daniels? Answer: —."

"(3) Now in the event you have answered questions 1 and 2 'Yes,' and only in that event, you will pass to a consideration of the following questions herewith, but if you have answered said questions 1 and 2 'No,' then you will not consider or answer the next question."

"Was the plumbing in the hotel building in question installed and completed substantially as called for by the contract with Franklin Plumbing Company? Answer: —."

"(8) You are instructed that 'gross negligence' is that entire want of care which would raise a presumption of a conscious indifference to the consequences. Bearing in mind the foregoing definition of 'gross negligence,' you will answer the following question 'Yes' or 'No': Was the architect, R. S. Glenn, guilty of gross negligence in delivering to plaintiffs the certificate showing that plaintiffs had completed their contract to install the plumbing in defendants' building, and that said plumbing had been installed in compliance with the contract? Answer: —."

In this connection, the court charged that:

"A 'conspiracy,' as that term is herein used, means an agreement entered into between two or more persons to do or not to do some particular things."

A number of other special issues were submitted, but not answered, or, if answered, are not material in the disposition of this case, and we therefore omit copying them.

Upon the incoming of the verdict, the court, over the objection of the defendants, entered a judgment in behalf of the plaintiffs for the sum of \$3,511.41, as the balance due the plaintiffs upon their contract, and from this judgment the defendants have appealed.

[1, 2] The principal questions presented by the assignments of error to the judgment are that the court erred in rendering the judgment because of the failure of the jury to answer special issue No. 2, and because of the failure of the jury to answer special issue No. 8, last above quoted. In reply, appellees insist that "gross mistakes," as submitted in special issue No. 2, were not pleaded by the defendants, and that therefore the failure of the jury to answer this issue, if erroneous, is not available. We have not taken the time to read the voluminous pleadings in order to ascertain whether or not "gross mistakes" were pleaded by the defendants, inasmuch as under the rules which govern this court we are authorized to accept as true statements in briefs not controverted by the opposing parties, and appellants have not undertaken to correct the misstatement, if any, of the appellees. It might be observed, however, in this connection, that

the court, in concluding to submit the issue, must have interpreted the pleadings as presenting the issue of gross mistakes. But, however this may be, there remains the objection to the judgment for the want of an answer to special issue No. 8. To the assignment directed to this failure, appellees urge that this issue appears in a special charge requested, and that the record falls to affirmatively show that it was given. The special charge, as requested, is as above quoted, and is merely signed by the district judge, who omitted to precede his signature with either the word "given" or "refused." This omission, however, we think must be accepted as one that was merely inadvertent, inasmuch as upon an inspection of the judgment of the court the issue, as we have quoted it, appears to have been submitted. We will therefore address ourselves to the question of whether or not the court should have entered a judgment for the plaintiffs, in the absence of an answer by the jury to special issue No. 8.

[3, 4] It is well settled that in cases submitted to a jury upon special issues it is error to render judgment upon their verdict where the jury fails to answer issues that are material in a determination of the controversy. *Bargna v. Bargna*, 127 S. W. 1157; *Garlitz v. Runnels County Nat. Bank*, 152 S. W. 1151, and cases therein cited. Indeed, this proposition is not controverted by appellees, but it is insisted that inasmuch as it is undisputed that architect Glenn in fact delivered the certificate hereinbefore quoted, and inasmuch as the jury in answer to special issue No. 1 found that the certificate had not been delivered pursuant to any conspiracy between the Franklin Plumbing Company and R. S. Glenn, that the failure to answer issues Nos. 2 and 8 was immaterial. But upon a consideration of the record, we feel unable to concur in the contention. It is true, as has been frequently decided, that where a builder and contractor by their written agreement make an architect the judge of the proper performance of the contract, neither can avoid his conclusion on the subject without showing that he acted capriciously, arbitrarily, or fraudulently. See *Carnegie Public Library Ass'n v. Harris*, 43 Tex. Civ. App. 165, 97 S. W. 520; *Kettler Brass Mfg. Co. v. O'Neil*, 57 Tex. Civ. App. 568, 122 S. W. 900; *Buchanan & Gilder v. Gibbs*, 156 S. W. 914; *Southern Real Estate v. Bankers' Security Co. (Mo.)*, 184 S. W. 1030; *Garrett v. Dodson*, 199 S. W. 675; *Kihlberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106; *Martinsburg & Potomac Ry. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255.

All of these cases which have been cited in behalf of the appellees, as well as the following ones cited in behalf of the appellants, recognize the very important distinction that the architect's certificate, to be conclusive, must have been delivered in good faith and

in the absence of such gross ignorance, carelessness or indifference as will amount to a fraud upon the builder. See *Taub v. Woodruff*, 63 Tex. Civ. App. 437, 134 S. W. 750; *Buchanan & Gilder v. Gibbs*, 156 S. W. 914; *Kettler Brass Mfg Co. v. O'Neill*, 57 Tex. Civ. App. 568, 122 S. W. 900; *Brin v. McGregor*, 45 S. W. 923; *Boettler v. Tendick*, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270; *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Perkins v. Locke*, 27 S. W. 783; *M. & P. Ry. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; 9 *Corpus Juris*, pp. 776, 828; 6 *R. C. L.* p. 964; *Chandler v. Wheeler* (Tenn. Ch. App.) 49 S. W. 279.

[5, 6] The answer of the jury to special issue No. 1, that the delivery of the certificate under consideration by the architect Glenn was not pursuant to any conspiracy between him and the appellees, is by no means, as we think, a plain answer to the question of whether, in the delivery of the certificate, Glenn acted under circumstances of such gross negligence as amounted to a fraud upon appellants. To repeat, the issue was:

"Did the plaintiffs herein, Franklin Plumbing Company, or any member of said firm, enter into a conspiracy with R. S. Glenn to cheat and defraud the defendants C. H. and G. W. Daniels in connection with the plumbing job on the building in controversy?"

As explanatory of this issue, and as pertinent thereto, the court gave the following instruction as to the meaning of the vital word in the issue, viz.:

"A 'conspiracy' as that term is herein used means an agreement entered into between two or more persons to do or not to do some particular thing."

In the light of this charge, it is not at all improbable that the jury may have understood that to answer the issue in the affirmative there must be evidence to the effect that there was an actual formal agreement entered into between Glenn and the contractors, whereas it would be sufficient if the agreement could be implied from the circumstances shown in the proof, and there is evidence in the case tending to show that before the delivery of the certificate both the contractors, Franklin Plumbing Company, and Glenn, the architect, were engaged in controversies with appellants over the payment of their several demands. We are unwilling, therefore, as indicated, to accept the answer of the jury to issue No. 1 as a sufficient answer to issue No. 8, for there is evidence, as it seems to us, which at least tends to show numerous material failures of the contractors to comply with the provisions of the contract in the installation of the plumbing, and we think the jury should have determined whether these failures were of such a character as showed such a degree of indif-

ference, carelessness, or negligence on the part of Glenn as to operate as a fraud upon appellants. For instance, one of appellants, G. W. Daniels, testified to the effect that none of the pipes in the lower part of the building were inclosed in "chases," as provided by the contract, that they were all suspended from the ceiling or standing on the inside of the building next to the wall; that the pipes had not been tested as specified in the contract, and many of them leaked; that he had never been able to stop all of the leaks; that water runs out of the joints of the pipes in the lobby; that there were closets that had not been installed; that under the lavatories several connections had been made with putty; that the fixtures had been insecurely fastened to the walls; that the walls and foundation of the building are cracked and settling all the time; that the building was cracked from top to bottom, and was cracked before Mr. Glenn turned it over to him; that he did not think Mr. Glenn was there upon the building over 50 per cent. of the time while the building was going on.

Mr. Glenn himself testified that:

"All pipes are not concealed in that building as required by the contract. \* \* \* I should say a half dozen required to be concealed are left exposed. \* \* \* The contract did provide for circulating hot water system on both floors. \* \* \* The special connection from the water main to the fire line, provided for in the contract, was not installed. It was not installed like it was specified to be done. \* \* \* Those pipes or stacks on the roof were not finished off with hubs. Those pipes or stacks did not extend six inches above the fire walls on that building. The contract requires them to extend six inches above the roof; that is what the contract says. They didn't extend above the fire walls. It is not necessary for them to. It is a fact that the plumbing contract required that when the contract was completed the system be tested out in my presence with either ether or peppermint. \* \* \* The test was not made with either ether or peppermint because we had had a better test (water with which the test was made). \* \* \* The catch basin was not installed in just the size called for by the specifications. It was a smaller box, I don't know just the size. It was a small matter; didn't amount to much. The plumbing specifications provided that slop sinks, wash racks, or floor drains and catch basins should be reverted the same as water closets and urinals. I don't know whether that was done. \* \* \* All pipes or stacks passing through the roof of the building were not flashed with sheet lead of 2½ pounds per square foot or 10 ounce copper," etc.

[7] The witness Glenn gave explanations for the departures from the contract in his testimony, but the reasonableness of such explanations was for the jury, and we have undertaken to set out just enough of the testimony to illustrate our conclusion that the

answer of the jury to special issue No. 1 should not be accepted as rendering immaterial the failure of the jury to answer special issue No. 8. Particularly, in view of the further fact that the jury also failed to answer special issue No. 3, which called for a conclusion of whether the plumbing in the building had been installed and completed substantially as called for by the contract. It would seem to be quite plain by the failure of the jury to answer special issue No. 3 that they were not satisfied by the evidence that the building had been so completed, and that by their failure to answer special issue No. 8 they were not satisfied to give a negative answer to the inquiry whether Glenn had been guilty of such gross ignorance or carelessness as would amount to or operate as a fraud upon appellants.

We conclude that for the reasons indicated the judgment must be reversed, and the cause remanded.

#### On Motion for Rehearing.

[8, 9] Appellees present an insistent motion for rehearing, in which they contend that we were without authority to consider the assignment of error upon which the judgment below was reversed, for the reason that appellants failed at the time of the incoming of the verdict to except thereto because of

the jury's failure to answer the issue. The record fails to show that appellants were present at the time the verdict was returned, but does show that in their motion for a new trial complaint of the failure of the jury to answer the issue was made. But if it be admitted that ordinarily an exception to the consideration of an assignment on the ground stated would be good, we think it too late to now entertain it with favor. On the original hearing no objection of any kind was made to our consideration of the assignment; but appellees endeavored to answer it upon its merits, with the result that we, in fact, did consider and determine the question presented as shown in our original opinion. The rules bearing upon the subject have been promulgated for the purpose of aiding the courts in the orderly disposition of their business and to conserve time, but nothing therein absolutely precludes our consideration of an assignment because of some technical objection in the manner of its presentation, and, this court having already considered the assignment without objection on appellees' part, will not now reverse our action on the grounds stated.

Appellees in their motion do not attack the conclusion we reached upon the consideration of the assignment, and having, as we think, waived the objection now presented, the motion for rehearing will be overruled.

**GALLOWAY v. KANSAS CITY RYS. CO.**  
(No. 22125.)(Supreme Court of Missouri, Division No. 1.  
July 23, 1921.)**1. Carriers ⇐244—Person boarding moving street car held not "passenger."**

One who was thrown to the pavement by the giving away of a handhold when boarding a street car after it left its usual stopping place, without invitation or knowledge on the part of the street car employees, and in the absence of a custom of so boarding, was not a passenger.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

**2. Carriers ⇐292(2)—Street railway held not negligent in maintaining defective handhold.**

A street railway could not be held negligent for maintaining a handhold on a street car which contained a defect not discoverable except by breaking the brass casting holding the rail, where the handhold was inspected from time to time by stepping on the step and jerking on it, as far as injuries to one not a passenger was concerned.

**3. Courts ⇐231(4)—Decisions of appellate courts held not so conflicting as to necessitate overruling of one.**

Decisions of appellate courts concerning the status of one boarding a moving street car held not so conflicting as to require the overruling of one of them on certification to the Supreme Court.

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.

Action by Ralph B. Galloway against the Kansas City Railways Company. Judgment for plaintiff, and defendant appealed to the Kansas City Court of Appeals, which reversed the judgment, and it is certified on the ground that the opinion of the appellate court conflicts with an opinion of the St. Louis Court of Appeals. Judgment of Kansas City Court of Appeals approved, and judgment of trial court reversed.

Richard J. Higgins, of Kansas City, Kan., Ben T. Hardin, of St. Louis, and Ed. C. Hyde, of Kansas City, Mo., for appellant.

Brewster, Kelly, Brewster & Buchholz and William B. Bostian, all of Kansas City, Mo., for respondent.

ELDER, J. This case has been certified to this court by the Kansas City Court of Appeals by reason of an alleged conflict between the opinion rendered herein by the said Kansas City Court of Appeals and an opinion rendered by the St. Louis Court of Appeals in the case of McCarty v. St. Louis & Suburban Railway Co., 105 Mo. App. 596, 80 S. W. 7.

The facts involved and the basis of the alleged conflict appear from the opinion of

the Kansas City Court of Appeals, which is as follows:

"Plaintiff recovered a verdict and judgment in the sum of \$750.00 for personal injuries suffered on account of the alleged negligence of the defendant. The evidence shows that plaintiff was injured by reason of the breaking of a brass shoulder, being a portion of a long handhold made mostly of wood, attached to one of defendant's street cars where passengers board and alight from the same. The allegation of negligence in the petition was that defendant was engaged in the operation of a street railway system in Kansas City, Missouri, and—

"\* \* \* that on the 19th day of December, 1915, one of defendant's cars stopped at the intersection of Tenth and Locust streets in Kansas City, Missouri, a regular stopping place for defendant's said cars; for the purpose of taking on and discharging passengers; that a number of passengers boarded said car; that just before plaintiff attempted to board the same, said car started forward; that just as said car started, and while said car was moving very slowly, not to exceed approximately one or two miles per hour, plaintiff attempted to board the same; that in boarding said car, plaintiff put his foot upon the step thereof and took hold of one of the handholds, or rods provided on said car by the defendants for the use of passengers in boarding and alighting from said car; that on account of the dangerous and defective and insecure condition of said rod, or handhold, and the manner in which same was attached to said car, said handhold broke and became loosened from said car, thus and thereby, then and there causing this plaintiff to fall from said car to the pavement of the street, and thus and thereby then and there giving to plaintiff the following painful, permanent and dangerous injuries, to wit: \* \* \*

"Plaintiff says that he has been damaged by the negligent acts of the defendants, aforesaid, in the sum of ten thousand dollars (\$10,000) for which sum, together with costs of suit in his behalf expended he asks judgment."

"The facts show that plaintiff was injured on the 18th day of December, 1915, at 12:30 p. m. while boarding an east-bound street car on Tenth street in Kansas City, Missouri. The southwest corner of Tenth and Locust streets was the regular stopping place for taking on and discharging passengers for east-bound cars. Defendant's car had stopped at the usual place for the purpose of taking on and discharging passengers. After several passengers had boarded the car at the rear end thereof the car started up at the rate of 1½ to 2 miles per hour. About that time plaintiff who had come north on the west side of Locust street, on the south side of Tenth street, proceeding in a fast walk or slow trot, reached the car when it had gone about its length. He boarded the first step of the car with safety, holding with his right hand to the middle handhold and with his left hand to the west handhold, or the nearest one to the back of the car. When the car had partially crossed Locust street plaintiff attempted to step up into the vestibule when the right handhold broke and came loose, precipitating plaintiff to the pavement.

"We believe that the petition fails to state

a cause of action and from the evidence plaintiff is not entitled to recover, and that defendant's demurrer to the evidence should have been sustained. A person becomes a passenger on a street car by a contract express or implied and may become one in attempting to get on a car at the time and place provided for that purpose, but one does not become a passenger by making an attempt to board a moving car when the car men are ignorant of his presence. There is no allegation in the petition or contention in this case that the car men knew that plaintiff was attempting to board the car. The car had started up and defendant's servants were not expected to anticipate that persons would board it. There was no pleading or proof that defendant by custom had permitted persons to board cars after they had started up. Plaintiff was not an invitee nor was he a passenger. *Schepers v. Union Depot Ry. Co.*, 126 Mo. 665, 675, 29 S. W. 712; *Schaefer v. St. Louis & Suburban Railway Co.*, 128 Mo. 64, 71, 30 S. W. 331; *Meriwether v. Railway Co.*, 45 Mo. App. 528, 534; *Mathews v. Railway*, 156 Mo. App. 715, 723, 137 S. W. 1003; *Danielson v. Railway*, 175 Mo. App. 314, 316, 162 S. W. 307; *Speaks v. Railway*, 179 Mo. App. 311, 323, 324, 166 S. W. 864. Defendant owed him no duty other than to use ordinary care to avoid injuring him after its servants discovered or should have known that voluntarily and uninvited he had placed himself on the car and was liable to be hurt. *Mathews v. Railway*, supra; *Speaks v. Railway Co.*, supra.

"In the case of *McCarty v. Railroad*, 105 Mo. App. 596, 80 S. W. 7, plaintiff boarded a car not at the usual stopping place and where he was not known or expected by defendant's servants in charge of the car. The car started and plaintiff grabbed for the handhold and it came loose, injuring him. The court permitted him to recover on the theory that defendant owed him under the circumstances the duty of using ordinary care to furnish a reasonably safe handhold. The court's theory is expressed on pages 603, 604 of the opinion (80 S. W. 9), wherein the court said:

"The present plaintiff was not a servant nor, yet, a passenger; but as regards the use of the handrail at an unusual place, his status was intermediate between that of a bare licensee and a passenger; a status that has no distinctive legal appellation so far as we know. He was not exactly an invited licensee, but, perhaps, might be called appropriately a probable licensee; for he, like every one else, was expected to use the handrail as an aid to mounting to the platform and maintaining a position on it. The duty owed by the defendant to the plaintiff is like that owed by railway companies to persons who walk on depot platforms or get on cars, not with the intention of becoming passengers nor as mere idlers or intruders, but to assist friends who are taking passage, or on some other privileged mission. A carrier is under an obligation to that class of people to use ordinary care in keeping its platform fit for their use and in regulating the movements of its trains so as not to hurt them."

"If the court was correct in that case then we think that this plaintiff has a case. However, we are unable to agree with the theory upon which the court permitted recovery in

that case. We think the court clearly in error in comparing plaintiff's position in that case to that of persons who walk on depot platforms or who assist passengers on and off of trains. Carriers are under obligation to use ordinary care towards such persons for the reason that the latter are invited to use such places. We know of no such status as intermediate between that of a bare licensee and a passenger, or a probable licensee. The learned judge who wrote the opinion in the *McCarty* Case cites no authority to support his statement that there is such a status. The plaintiff, both in the *McCarty* Case and in this case, was not invited to board the car under the circumstances shown in evidence. "From what we have said the judgment must be reversed and it is so ordered. All concur. But deeming the opinion herein to be in conflict with the case of *McCarty v. Railroad*, supra, decided by the St. Louis Court of Appeals, the cause is certified to the Supreme Court."

[1] In *Schaefer v. St. Louis & Suburban Railway Co.*, 128 Mo. 64, loc. cit. 71, 30 S. W. 331, 332, the doctrine was enunciated that—

"Without a contract for carriage on one part shown, and an acceptance on part of the other, either expressed or implied, the relation of passenger and carrier can never exist."

In *Schepers v. Union Depot Ry. Co.*, 126 Mo. 665, 29 S. W. 712, the rule was laid down that one does not become a passenger on a street car by a mere attempt to board the car while it is in motion, but that there must be some act on the part of the carrier indicating acceptance.

In *McCarty v. St. Louis & Suburban Railway Co.*, supra, Judge Goode, speaking for the court, said:

"A person becomes a passenger on a street car by a contract, express or implied. He may become one in attempting to get on a car at a place provided for that purpose, and where people are expected to take passage, though his attempt fails [citing authorities]. But a man does not become a passenger by making such an attempt at a place where he is not expected and when the car men are ignorant of his presence. As was said in *Washington, etc., Railroad v. Grant*, 11 App. Cas. (D. C.) 107, 'If a person voluntarily alights from a street car in motion or when at a place or in a position where passengers are not intended or expected to get off the car, the passengers so getting off or on the car takes the risk of injury by the sudden starting up of the car, and the employees who so start the car are not negligent if they are ignorant that the passenger is so alighting from or getting on the car.'"

In *Speaks v. Metropolitan Street Ry. Co.*, 179 Mo. App. loc. cit. 323, 166 S. W. 868, it was said:

"The mere fact that deceased ran or went towards and jumped or stepped on the moving car did not create the relation of carrier and passenger."

In the instant case the petition does not allege that plaintiff was a passenger or intending to become a passenger, nor does it or the evidence disclose that the motorman or conductor of the car knew of plaintiff's presence. The motorman testified:

"Q. As you went across Locust street, I will ask you to state to the jury about at what rate of speed your car was going when you passed the sidewalk line at the east line of Locust street? A. I was going about ten miles an hour I should judge.

"Q. You had then run clear across Locust street? A. Yes, sir.

"Q. What was the first notice you received that anything unusual had happened? A. When I got a bell from the conductor.

"Q. What kind of a bell? A. Emergency bell to stop.

"Q. You had then passed the sidewalk line of Locust street? A. Yes, sir.

"Q. Do you know of your own knowledge about passengers getting on the rear end back there, anything of your own knowledge about that? A. No I don't.

"Q. You were at the front end and looking ahead? A. Yes, sir."

The conductor testified:

"Q. After starting your car did you see the man who afterward fell from the car coming toward the car? A. I saw him as he ran toward the car.

"Q. From where did he run? A. He came from the west side of Locust street.

"Q. Which direction did he come? A. (Indicating) Like this would be Locust street.

"Q. The west line of Locust street? A. Yes, sir; he angled across and caught the car just past the middle of the street.

"Q. He caught the car? A. Yes, sir.

"Q. Now then at that time when he ran and caught the car, how fast was your car running? A. I should judge about ten miles an hour."

H. J. G. Mos, a passenger on the car, testified:

"Q. Where was that man when you first saw him? A. Right in the center of the street on Locust.

"Q. After the car started from the west side, after it had stopped on the west side of Locust and started, how far had it gone before you saw him at all? A. The rear end of the car was right even with the west curb.

"Q. When you say him? A. Yes, sir.

"Q. What was he doing when you saw him? A. Running right toward the street car from the southeast corner; that is, right back of the southeast corner of Locust.

"Q. He was coming diagonally going north-east? A. Yes, sir."

"Q. Now, I will ask you to tell the jury about how fast the car was running when he got hold of that handle and jumped up on the step? A. The car was going about between eight and ten miles an hour."

Plaintiff testified that when he attempted to board the car the rear end thereof was about five feet west of the property line on

Locust street and that the car was moving. "I should say a mile or mile and a half an hour." Clearly, under the authorities quoted above, he was in no sense a passenger on the car.

[2] II. Bearing upon the question of negligence of defendant, John H. Eastham, formerly employed by defendant as a car repairer, testified that when so employed he had charge of "taking care of and putting on" handholds on the cars of the company; that during six years of service none were ever broken by a passenger; that an outside inspection of the casting which was broken would not have revealed the defect but that the same could only have been detected by breaking it in two.

"Q. Was it your business to keep these things in repair? A. Yes, sir.

"Q. And to see that the handholds on the cars were strong enough to do the work? A. Take hold of them on inspection day, take these things and stand on the step and jerk on them.

"Q. The inspection you put on them you get on the step and jerk on them like this? A. Yes, sir.

"Q. You were an inspector, were you? A. Yes, I inspected that part of the work, just that part of the body work.

"Q. When did you inspect car No. 221? A. Well, on Monday before this was broken.

"Q. What day did it break? A. It broke on the 19th, I think.

"Q. It broke on Sunday? A. Yes, the next following Monday would have been inspection day.

"Q. You inspected it about a week before? A. Yes, sir.

"Q. Now, you did not think that this condition was one which had grown there? A. That piece, you couldn't detect it.

"Q. I did not ask you that, you saw it, you concluded it had been that way ever since it was cast? A. Yes, sir."

Walter H. Prior, in the brass foundry business, testified that for about 16 years his concern had manufactured for defendant all brass castings used for holding handrails on cars; that all such castings were not made out of anything but brass; that after they were moulded, they were inspected twice, once in the foundry and again in the shipping department; that "it is absolutely impossible to make all perfect castings, nobody does it, and nobody can do it, and it is for this reason that we use this rigid inspection which we do"; that a flaw called a "cold-shot," where the metal "is poured a little cold," and another flaw called a "blow-hole," in the form of a pocket, and coming from an air vent, frequently occurs.

"Q. Then I will ask you if there is any amount of ordinary inspection which would detect that blow-hole or pocket? A. There is just the usual amount of inspection we give—the castings go through.

"Q. Could you detect it by inspection other than to break into it? A. Not if it was a flaw on the inside. We have no way of seeing

it. You may look down into those castings very readily and see it was hard to detect, anything like a little bit of a crease you couldn't see under a magnifying glass.

"Q. Is there any way of preventing a flaw from happening in your work of this brass mold? A. We wish we could find some way.

"Q. Have you been able to? A. No, and nobody else.

"Q. You have been in this business how many years? A. Since I have been 16 years old, about 16 years—about 18 years."

In the light of this evidence, coupled with the manifest fact that plaintiff was not a passenger, we do not think that defendant could be adjudged guilty of negligence. By the system of inspection described, defendant seems to have exercised ordinary care for the safety of passengers and it should not be held responsible for latent defects in equipment purchased from competent and reputable manufacturers who use proper material and a skillful method of manufacture. Any other rule would make it an insurer and liable for what is not negligence. *Grand Rapids & Indiana R. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *City Passenger Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779; *Toledo, Wabash & Western Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Roanoke Ry. & Elec. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 19 L. R. A. (N. S.) 316, 128 Am. St. Rep. 971. The record before us shows that the manufacturer of the particular castings used had been in the brass foundry business for 18 years, that the material always used was brass, that a rigid double inspection was made of all castings moulded, and that there was no evidence tending to impeach his business reputation or questioning his competency or skill as a manufacturer. Defendant made a weekly inspection of all handholds by a test which to all intents and purposes seemed thorough and practical, thereby fulfilling the obligation resting upon it.

[3] III. The case of *McCarty v. St. Louis & Suburban Railway Co.* referred to by the Kansas City Court of Appeals, while somewhat analogous upon the facts, is nevertheless dissimilar in some respects to the case under review. As far as the opinion there discloses, no previous inspection of the handrail was proven in that case, nor was any testimony offered as to whether or not the railway company purchased from another or itself manufactured the handrail which gave way. True, the rule was there laid down that the defendant "was under an obligation to the plaintiff, as to the public generally, to have the handrail sound and secure, if that could be done by ordinary care. In providing the handrail the company tacitly agreed with any one who had occasion to use it, in a lawful attempt to take passage on the car, to be careful that it was safe." However, that doctrine but comports with

what the defendant did in this case by using ordinary care, through its system of inspection, to see that the handhold was safe. While we do not fully approve of what was said in the *McCarty* Case as to the status of plaintiff being "intermediate between that of a bare licensee and a passenger" and that he "was not exactly an invited licensee, but, perhaps, might be called appropriately a probable licensee," nevertheless, that language does not affect the merits of the decision.

Our conclusion in the case at bar is, that that judgment of the Kansas City Court of Appeals, reversing the judgment of the circuit court, was correct, and we hereby reverse the judgment of the circuit court. However, under the evidence herein adduced, we do not think there is sufficient conflict between the said opinion of the Kansas City Court of Appeals and the opinion of the St. Louis Court of Appeals in *McCarty v. St. Louis & Suburban Railway Co.*, supra, to necessitate our overruling the latter case. Upon the facts there before the court, as indicated by the opinion, the judgment seems to have been correct.

All concur.

**STATE ex rel. JOPLIN & PITTSBURG RY.  
CO. v. PUBLIC SERVICE COMMISSION.  
(No. 22592.)**

(Supreme Court of Missouri, in Banc. July 8, 1921. Motion for Rehearing Denied July 22, 1921.)

**Constitutional law §129—Denial of railroad company's right to issue bonds held impairment of contract right.**

Under a railroad company's mortgage on its property, existing and after acquired, giving it the right to issue bonds on subsequent additions and extensions upon showing net earnings double its interest charges, the railroad proposed to issue bonds on additions to its property, for part of which the expenditures were made more than five years prior to application to the Public Service Commission for authority to issue such bonds, the delay in making such application being due to the fact that the company could not show the requisite net earnings prior to its application. By Public Service Act, § 57, the Commission is prohibited from authorizing the issuance of bonds for additions made more than five years prior to the application. *Held*, the application should be granted, for section 57, if construed to deny such right, would be unconstitutional, as impairing the company's contract right to issue such bonds, contrary to Const. U. S. art. 1, § 10.

**Mandamus** by the State, on the relation of the Joplin & Pittsburg Railway Company, against the Public Service Commission of the state of Missouri. Alternate writ made permanent.



This is a proceeding by mandamus instituted in this court by the relator against the respondent to compel them to authorize the former to issue its bonds in the sum of \$278,000, as authorized by its first mortgage, dated March 1, 1910, to be more fully mentioned later. The facts of the case are undisputed, and appear from the petition for the writ and the return thereto, which is a demurrer, to be substantially as follows:

The company has the contract right, by the terms of the mortgage mentioned, to issue these bonds on account of additions and extensions to and of its property made since the date of the mortgage, and to sell the same and receive the proceeds thereof. That mortgage was upon all of the property of the company then existing or thereafter acquired. By its terms, the company could not create another first lien upon property thereafter acquired, and borrow money by reason thereof, having disabled itself from so doing by reason of the after-acquired property clause, by the terms of which the mortgage covered not only all property in existence at its date, but also all thereafter acquired. Hence, it was provided that the company should have the right to borrow money by way of additional first mortgage bonds on a parity with those already issued to the extent of 80 per cent. of the value of the property acquired by the company subsequent to the date of the mortgage. It was further provided in this mortgage that after the expenditures were made the company should not issue bonds on account thereof unless and until the company could show that its net earnings, for 12 months preceding the issuance, were equal to twice its interest charges. The company was unable to make such showing as to interest, and hence unable to exercise the right to issue these bonds until shortly before the date of its application to the Commission. In other words, the company made its application as soon as it was entitled under the terms of its mortgage to issue the bonds. The provisions of the company's first mortgage enabling it to issue these additional bonds constituted a property right springing from the contract.

Application was duly made to the Commission for the requisite authority to issue these bonds. A hearing was regularly held and the authority denied. The Commission found and declared that: (a) The company was given the right by the mortgage to issue the bonds; (b) it had actually made the additions to property claimed; (c) had complied in all respects with the terms of the mortgage contract to be performed by it as a condition to such issuance; (d) was entitled under the law and facts to be authorized by the Commission to make such issue, and the Commission should and would authorize the same, save and except only for the fact that a part of the expenditures occurred more than

five years prior to the application to the Commission for such authority, and that the Commission was prohibited by the provisions of section 57 of the act (Laws 1913, p. 556) from authorizing the issuance of bonds for additions made more than five years previous to the application.

The company was not remiss in failing to apply for authority to issue these bonds within five years after the expenditures. As stated, it could, under the mortgage, issue additional bonds only when it could show net earnings double the interest charges. This showing it could not make previous to the date of the application. This fact is pleaded and is, of course, admitted by the demurrer. The Commission held that it was prohibited by a provision of section 57 of the Public Service Commission Act from granting such authority where such expenditures have occurred more than "five years next prior to the filing of an application with the Commission for the required authorization."

Under these circumstances it is contended that, in the event that such quoted provision is not applicable or for any reason is void, then the Commission, having found that but therefor it should and would grant the authorization, the company is entitled to have the Commission compelled to grant the authority as a mere ministerial act.

The first contention of counsel for relator is stated in the following language:

"The five-year limitation provision, if applied to the mortgage contract in question, is unconstitutional, null, and void and constitutes no defense for the failure of the Commission to grant the authority in reliance thereon because (a) such provision so applied impairs the obligations of the mortgage contract, and (b) deprives the company of its property, i. e., its vested right to issue these bonds and receive the proceeds thereof, without due process of law."

There can be no question but what the mutual rights of the parties as stated in the mortgage are protected by section 10 of article 1 of the Constitution of the United States, which provides, among other things, that—

"No state shall \* \* \* pass any \* \* \* law impairing the obligations of contracts."

The rulings of the Supreme Court of the United States are all one way upon that subject. 6 Ency. of U. S. Sup. Ct. Reports, 782; *Fletcher v. Peck*, 6 Cranch, 87, loc. cit. 137, 3 L. Ed. 162, loc. cit. 178; *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547, loc. cit. 570; 6 Ency. of U. S. Sup. Ct. Rep. 765; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, loc. cit. 657, opinion of Justice Washington, loc. cit. 663, 664; *Ogden v. Saunders*, 12 Wheat. 213, loc. cit. 316, 6 L. Ed. 606; 6 Ency. of U. S. Sup. Ct. Rep. 874.

Clyde Taylor, of Kansas City, for relator. R. Perry Spencer, General Counsel, and James D. Lindsay, Asst. Counsel, both of Jefferson City, for respondent.

WOODSON, J. (after stating the facts as above). There cannot be any doubt but what the five-year limitation of the Public Service Commission's right to authorize the issue of the bonds in question is an impairment of the company's contract right to issue the bonds in question, and for that reason is unconstitutional and void, without such limitation can be sustained upon the ground that it is a reasonable police regulation.

That the state under its police power, within reasonable limitations, has the authority to regulate or prohibit the issuance of bonds secured by mortgage upon the properties of public service corporations goes without saying, but that does not mean that the state has the absolute arbitrary right or power to so do, for five years, or for any other period of time without it appears that the exercise of such authority is in the interest, protection, or promotion of the public good, defined by the state and federal courts, but not otherwise. *State v. Smith*, 233 Mo. 242, loc. cit. 265, 135 S. W. 465, 33 L. R. A. (N. S.) 179; *State v. Fisher*, 52 Mo. 174, loc. cit. 177; *United States v. D. & H. Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; *Harriman v. Interstate Commerce Commission*, 211 U. S. 411, 29 Sup. Ct. 115, 53 L. Ed. 253.

From the facts in this case it does not appear that the public good will in any way be served by withholding from the company the authority to issue the bonds mentioned, but it is inferable, at least, that the public good will be promoted and served by their issuance, because it is always beneficial to the public interest that the railroads of the country should be maintained and improvements made in the way of betterments, which the facts in this case show was the design, to pay for improvements made by the company.

For the reasons stated we are of the opinion that the alternate writ heretofore issued should be made permanent. It is so ordered.

All concur; DAVID E. BLAIR, J., in separate opinion.

JAMES T. BLAIR, C. J., not sitting.

DAVID E. BLAIR, J. (concurring).<sup>1</sup> I agree that section 57 of the Public Service Commission Act is unconstitutional in so far as it affects the rights of relator to issue bonds under its mortgage issued before the passage of such act, and that no considerations based upon the police power of the state make such act valid as to such mortgage.

I fear the language used in the majority opinion may be regarded as holding that said section 57 is unconstitutional and void in fixing a five-year limitation for the approval

of bonds authorized by mortgages on the property of public utilities, even though such mortgages are executed subsequent to the passage of the Public Service Commission Act. That question is not involved in this case.

For the reason stated, I concur in the result.

#### STATE ex rel. WOLFE v. MISSOURI DENTAL BOARD. (No. 22623.)

(Supreme Court of Missouri, in Banc. July 8, 1921. Motion for Rehearing Denied July 22, 1921.)

1. Physicians and surgeons § 5(2), 11(1)—Dental Board has limited discretion in issuing initial certificate of registration, but no discretion in the mere issuance of a renewal license.

In the issuance of a certificate of registration, and in the revoking of such certificate or a license issued thereunder, after a trial, there is more or less discretion, although not an unregulated discretion, lodged in the Missouri Dental Board; but in the mere issuance of a renewal license there is no discretion, under Rev. St. 1919, §§ 12627-12682.

2. Mandamus § 172—On mandamus to compel issuance of renewal of dental license refused, Supreme Court will not determine facts where there has been no hearing by the board.

In mandamus proceeding in the Supreme Court to compel the Dental Board to issue a renewal dental license refused by it, the Supreme Court will not, in the first instance, determine the facts of a violation of law authorizing such refusal by the board, but the board must first hear and determine the matter, and the Supreme Court will pass upon their record.

3. Mandamus § 172—On mandamus to compel issuance of dental renewal license the board's justification for refusing license confined to grounds given by it to the applicant.

Where revocation by the Dental Board of a dentist's certificate of registration had been adjudged void by the Supreme Court, since which time the only action taken by the Dental Board was evidenced by two letters from the secretary to the dentist in which the board's refusal of the dentist's renewal license was based upon the ground that the records of the board (the judgment vacated by the court) showed that the applicant's license had been revoked upon charges covering certain matters, the Supreme Court would not consider, on return to alternative writ of mandamus in proceedings by the dentist to compel issuance of the renewal license, other grounds of refusal than those upon which the board based its refusal.

4. Physicians and surgeons § 5(2)—Dental Board's power to revoke or refuse registration does not extend to application for renewal license.

Rev. St. 1919, § 12636, authorizing the Dental Board to revoke a certificate of regis-

<sup>1</sup> For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

<sup>2</sup> Concurring opinion withdrawn and dissenting opinion filed on motion for rehearing, 233 S. W. 833.

tration or a license issued thereon upon certain causes, and also providing that the certificate of registration or license may be refused for the same reasons, refers only to the original certificates of registration and the initial license issued thereunder, and does not refer to a mere renewal license.

James T. Blair, O. J., and David E. Blair, J., dissenting.

Original action in mandamus by the State, on the relation of Morris Russell Wolfe, against the Missouri Dental Board. Alternative writ made absolute.

Frank M. Lowe, of Kansas City, for relator.

Arthur N. Adams, of Kansas City, for respondent.

GRAVES, J. Original action in mandamus. Relator avers that in November, 1916, he, after an examination by respondent herein, received a certificate of registration as a dentist, and thereafter, on November 23, 1916, he received from said Missouri Dental Board a certificate in the form of a license, being numbered 4530; that in November, 1918, he received from respondents his renewal license, likewise numbered 4530. The petition then avers:

"Relator informs the court that ever since November 30, 1918, he has been entitled as a matter of right, under the law, to an annual renewal license, as provided by law, and that he has made application therefor, requesting the respondent to issue to him such annual license, and upon each occasion has sent the fee of \$1, as provided for under the law; but without any lawful reason or excuse, and in violation of the mandatory provisions of the law, the respondent has refused, and still refuses, to issue to this relator the annual license to which under the law, as a matter of right, he is entitled to."

The petition then sets out in some detail the history of a former case between these parties, and the result thereof. State ex rel. Wolfe v. Missouri Dental Board, 221 S. W. 70. He then avers that after the judgment in that case he tendered the fees for a renewal license, and that he has been at all times refused a renewal license on his certificate of registration. He sets out the letters from respondent's secretary returning his fee each time, and showing the refusal to issue to him a renewal license. There is much other matter alleged as occurring between relator and a member of the Dental Board, which can be noted if found material. In one letter from a secretary of the respondent it was stated that relator's renewal license had been revoked. We state this to explain fully the following prayer of relator's petition. This prayer reads:

"Wherefore, the premises considered, relator prays the court to issue its writ of mandamus to the end that respondent may be compelled—

"(1) To set aside any order made revoking

the renewal license granted to the relator for the year 1918.

"(2) That respondent be compelled to set aside any order made at any time finding this relator guilty of any charges, for the reason that the court decided that the relator had never been lawfully put upon trial.

"(3) That the respondent be compelled to issue to this relator a renewal license for the year 1921, in accordance with the application made by this relator November 1, 1920."

Return was duly made to our alternative writ, which involves some matters which are perhaps beyond the real questions in the case. Motion was made to strike out these, which motion was taken with the case, and the case is before us upon a request for judgment upon the pleadings. The return contains a number of admissions, and also pleads fully respondent's theory of the case here previously. Notwithstanding the lengthy pleadings upon both sides, there are under paragraph 2 of the return such admissions as will shorten very much the opinion in the case. In the previous case (State ex rel. Wolfe v. Missouri Dental Board) it appears that the respondent therein had attempted to try Wolfe upon charges, and had found him guilty, and revoked both his certificate of registration, issued in 1916, and his renewal license, issued in November, 1918. Respondent admits that this court held that Wolfe had not been tried according to law, and that their order revoking such instruments were void. Admits, further, that relator has tendered his fee of \$1 for renewal licenses to November, 1920, and November, 1921, and that they have been refused. There is no pretense that relator had been tried on any charges by said board since the disposition of the case in 221 S. W., supra. Other details will go with the opinion.

I. Many details in the instant case will be found in State ex rel. Wolfe v. Missouri Dental Board, 221 S. W. 70 et seq. Charges had been preferred against Wolfe, and a futile trial followed. Up to this time Wolfe was not only a registered dentist, but held the usual annual license. Both his certificate of registration and his annual license were revoked by respondent on June 11, 1918. After going over the whole case, this court thus ruled:

"The result of the whole matter is that we hold respondent's order revoking relator's certificate of registration and license to be void for the reasons stated in paragraphs 1 and 2."

Pending the case, supra, in this court, Wolfe was arrested for practicing dentistry without license, and convicted in the lower court. This case was appealed to Division 2 of this court, and that court ruled, on the strength of State ex rel. Wolfe v. Missouri Dental Board, supra, that the judgment of the said Dental Board was void. State v.

Wolfe, 222 S. W. loc. cit. 442. The judgment so declared void reads:

"The Missouri Dental Board, therefore, on the facts above found and stated, and on motion duly made and seconded and carried, hereby revokes the original certificate of registration issued to the said Morris Russell Wolfe, and the license issued to him by the Missouri Dental Board, under which he is now practicing dentistry, and from henceforth said original certificate of registration and said license to practice dentistry issued to him by this board are hereby revoked and for naught held."

So that it appears that by the judgments in these two cases the judgment of the Missouri Dental Board was wiped from their record, and both the certificate of registration and the license remained in full force for all purposes of the law. It is true that the license, which is a document issued annually, had expired, for the full period of its term was at an end. Shortly after the decision in *State ex rel. v. Missouri Dental Board*, 221 S. W. 70, *supra*, the relator, Wolfe, having established the legality of both his certificate of registration and his last license, applied for a renewal license. It was useless for him to apply sooner. Our opinion came down April 1, 1920, and it is admitted that on May 17, 1920, the relator tendered the fee of \$1 and applied for a renewal license. Such license, had it been issued, would have run to November, 1920. It is also admitted in the return that on November 1, 1920, the relator did make application for a renewal license from November, 1920, to November, 1921, and tendered the fee of \$1. To the first application, *supra*, the Missouri Dental Board, through its secretary, replied:

"Your letter requesting license and in which was inclosed \$1.00 received.

"I am herewith returning to you the \$1.00 for the reason that the Missouri Dental Board refuses to grant you a license to practice dentistry in the state of Missouri, because you have violated the Missouri Dental law concerning dentistry; because you have published fraudulent statements as to your skill as a dentist; because you have circulated fraudulent statements as to your skill as a dentist; because you have published and circulated misleading statements as to your skill and method of practicing dentistry; because you have published and circulated by letter circulation, newspaper, card, or otherwise holding yourself out to the public as a practitioner without causing pain; because you have acted in this manner with a view of deceiving and defrauding the public; because you have violated the provisions of the act of the Legislature of 1917 concerning dentistry, beginning at page 252 and ending at page 268; because you have advertised that you could do dental work by mail; because, after due notice given you and trial heard, you have been found guilty of the above charges by the Missouri Dental Board."

This court had previously ruled that relator had not been given a legal hearing,

and yet the Missouri Dental Board, in the face of our ruling, was asserting their judgment by reiterating the old charges against relator, and closing with the language—

"Because after due notice given you and trial heard (the very thing this court said had not been done) you have been found guilty of the above charges by the Missouri Dental Board."

This letter does not prefer new charges against the relator, but reiterates the charges previously made, and the previous judgment of the board thereon, which judgment this court had declared void. To the second application he received this reply of date November 11, 1920:

"Your letter containing \$1.00 received. I am very sorry to say that according to the records of the Dental Board your license is revoked. Therefore I am returning your draft for \$1.00."

Here again the Missouri Dental Board was asserting its judgment when it had been declared void in the court in banc, and on June 4, 1920, by Division 2 in the criminal case. With persistency this board has clung to its judgment, in open defiance of the rulings of this court holding that it was void. No further charges have been lodged against Wolfe, and no trial given him upon further charges, or the previous charges, since we held the judgment of the board void. Respondent now clings to the theory that the issuance of the renewal license is a matter of discretion. When all the rubbish is eliminated from both petition and return, this is the simple issue in the case.

It stands undenied that relator has a certificate of registration, for we declared void the judgment revoking it. It stands undenied that relator had his initial license, and had a license to practice in 1918, because we annulled the judgment revoking such license. So, cleared of feeling (and there appears much of such on both sides), the real issue involved is a very simple one. We have thus eliminated the chaff from the wheat without action on the motion to strike out parts of the return. We are not bound by irrelevant matters in the pleadings, whether it appears in petition or return. For the disposition of the case we shall overrule the motion to strike out, but reserving to ourselves the right to eliminate from consideration all irrelevant matter in both pleadings. This we have done in the statement, *supra*, as to the material facts, and the simple issue left for decision. Relator has asked that, if we overrule the motion to strike out, we then consider the case as on motion for judgment on the pleadings. This we shall do, and the material facts we have garnered, *supra*, from such record.

[1] II. If the granting of a license to a registered dentist is not discretionary, then this board should be compelled to issue the license requested by relator. Relator is a registered dentist, because this court de-

clared void the judgment and order of the Missouri Dental Board, which revoked it. Respondent hangs all hopes on the last paragraph of the opinion of our recent Brother, Williamson, in *State ex rel. Wolfe v. Missouri Dental Board*, 221 S. W. loc. cit. 73. It is there stated that this board had a discretion in the mere matter of issuing a license. This paragraph of the opinion was not really necessary to the case in hand, but I fear we misconstrued the act of 1917 (Laws of 1917, p. 252) in stating that there was any discretion as to the mere issuance of a license. This calls for a review of the act. Judge Williamson in the previous case with becoming modesty said: "The statute can hardly be regarded as a model of lucidity." May I, with less modesty, be permitted to add that the act of 1917 is a model of verbosity, tautology, redundancy, and prolixity? All essentials of this lengthy act could be stated with clarity in a few concise sections, and the law made intelligible. One of the chief objects of the law is to get the cash with which to run the Missouri Dental Board. To this end we have two fees to be paid before a qualified citizen can (as he must under the act) place his name plate, in letters not less than two inches high, on the front door of his dentist's office. First he must apply for and obtain an examination by the Missouri Dental Board, which application must be accompanied with a fee of \$25. This fact is emphasized by the \$25 prerequisite appearing five times in the act. If the applicant fails, and wants another examination, a \$10 bill must be dropped into the till of the Missouri Dental Board. Then, for fear the Missouri Dental Board would run out of funds, the law requires the applicant, after he has been examined and given a certificate of registration, which certificate vouches for his educational and moral qualifications to practice dentistry, and before he can practice under his certificate of qualification (or "registry," as the law calls it), to get a license from the Missouri Dental Board and pay \$1 therefor. Section 5489, Laws of 1917, p. 256. This license must be renewed on or before November 30th of each year, and casually the applicant must drop into the till of the Missouri Dental Board, \$1 each time. Section 5491, Laws of 1917, p. 257. No examination is required for this license. It is a fee proposition, pure and simple. It serves no substantial purpose other than the contribution annually of the dollar to the secretary of the Missouri Dental Board. True, it must be posted in the office; but the posting of the certificate of registration would serve the same end, because it bespeaks the qualification of the party. The whole trouble in this case is occasioned by the requirement of these two instruments from the dental practitioner. The distinction between the two was overlooked in the remarks made in the last paragraph of our

previous opinion. The certificate of registration is the instrument issued after a satisfactory examination. It is in the granting or refusing of instruments of this kind that the courts have ruled that there was a discretion in the examining board. But even this is not an unregulated discretion. It is one which may be reached by the courts. Arbitrary action can always be reached through the courts. *State ex rel. v. Adcock et al.*, 206 Mo. 550, 105 S. W. 270, 121 Am. St. Rep. 681. The relator in this case passed his examination, and received not only his certificate of registration (which he now holds, untarnished, by virtue of our previous ruling), but also his license to practice. It is a renewal license that he seeks in the instant case. Is he entitled to it? We think so. By section 5487 of the Act of 1917, p. 254, it is provided:

"From and after the passage of this act it shall be unlawful for any person to practice dentistry in the state of Missouri, or to attempt, or to hold himself or herself out as a dentist until said person or persons shall first comply with the following requirements: Be examined and registered by said board, and after receiving a certificate of registration the person receiving the same shall file such certificate of registration with the clerk of the county court of the county or counties in which he or she resides or desires to practice dentistry, and shall have the same recorded and a certificate showing the filing and recording of the same, with the book and page where recorded endorsed thereon under the hand of the clerk and the seal of said court; *and thereafter any such person shall apply to and receive a license from said board*, which license shall attest the qualifications of the person named therein and shall give the person named therein the right to practice dentistry for the term mentioned in said license, which term in all cases shall end on the 30th day of November of each year, and shall be dated on the date such license is issued."

Note the language, "and thereafter any such person shall apply to and receive a license from said board." The word "shall" should be supplied before the word "receive," supra. At the end of this same section it is said, "he must procure from the board \* \* \* a license."

Section 5489 of the Act of 1917, p. 256, says:

"After a person shall have been registered and shall have received a certificate of registration showing that the applicant is qualified to practice dentistry in this state, then upon request of such person and the payment to said board of the sum of one dollar (\$1.00) the applicant shall be entitled to a license, authorizing the applicant to practice dentistry and dental surgery in the state of Missouri under this act."

Again note the language, "shall be entitled to a license," and he is thus entitled "upon request \* \* \* and the payment to said

board of the sum of one dollar." This is the first or original license issued after the party has been examined, found qualified, received his certificate of registration, and had such certificate recorded in the county of residence. There is no discretion to be found in the language used as to this first license. Why should there be a discretion, since the Missouri Dental Board had just examined the party, and found him qualified for the practice, and morally fit for the profession? Bear in mind that the certificate of registration must be recorded within six months after its issuance, or it becomes invalid. Section 5492, Laws of 1917, p. 258. So that there was no reason to grant discretion to the board in issuing a mere license, when it must so shortly follow the complete examination of the party. We now come to the law as to renewals of this original license. It is found in Acts of 1917, Laws of 1917, p. 257, § 5491, which reads:

"All persons who have been regularly registered and licensed as dentists under the provisions of this act shall be entitled to have their license renewed upon application to said dental board on or before the 30th day of November in each calendar year next succeeding the expiration of the license then held by such applicant. All applications for renewal of license, as herein provided, shall be accompanied with a fee of \$1.00, and each new license so issued shall be kept and displayed, as herein provided for original licenses."

Is there discretion lodged in the board in the performance of this act? We say not. The law says applicants for a renewal license "*shall be entitled to have their license renewed*" upon the payment of a fee of one dollar. Of course, the applicant must be regularly registered and previously licensed before he is entitled to a renewal license. If the applicant is duly registered and has been previously licensed, then the law says such "applicant shall be entitled to a license." There is no discretion found in this language. If the prerequisites exist, the renewal license must follow the application as the night follows the day.

The only thing in the entire act indicating discretion in the issuance of mere license is found in closing portion of section 5495d of Laws of 1917, p. 262, thus:

"After the applicant has been granted a certificate of registration showing the applicant to be entitled to a license, then the applicant, upon application to the board, may be licensed and authorized to practice dentistry as provided by this act."

The foregoing refers to the initial license just after the examination, and the issuance of the certificate of registration. It does not affect relator's case, even if it be conceded that the initial license was within the discretion of the board, a matter we do not concede. This section 5495d is largely a re-

hash of section 5487, the mandatory language of which we have set out in the first place. Relator is duly registered and received his initial or first license. What he wants is a renewal license, and this, under section 5489, supra, is not a matter of discretion.

Why should there be discretion in the mere issuance of yearly licenses? As said, the whole tenor of the act indicated that the real purpose of renewal license is to get \$1 each from the dentists of the state in order to keep the Missouri Dental Board and its work going. In this feature it differs from the law governing doctors and lawyers. With dentists the certificate of registration is the instrument that bespeaks qualification educationally and morally. As long as that document is in the hands of the dentist, his moral and educational qualifications are vouched for by the solemn judgment of the Missouri Dental Board. The law simply requires that the applicant for a renewal license shall be a person duly registered and previously licensed by the Missouri Dental Board, and that he accompany his application with \$1. Section 5491, supra. Upon what is discretion to be exercised? The records of the board show the registration and initial license, and it requires but a glance at the records to determine whether these facts exist. If they exist, the board cannot say they do not exist. State ex rel. v. Adcock, 206 Mo. 550, 105 S. W. 270, 121 Am. St. Rep. 681. There is no place for discretion there. If the application for renewal is accompanied with the dollar, that fact is before the board, and there is no room for discretion there. If this law required of the applicant for a renewal license the making of some showing as to his work under his certificate of registration and previous license, or some showing as to his then moral and educational standing, or some showing as to his conduct under the ethical standards of the profession, then there might be a discretion lodged in the board. But the law makes no such requirements. He is only to make application for such license and accompany the same with \$1. There is no place for discretion.

In the issuance of a certificate of registration, and in the revoking of such certificate, or a license issued thereunder, after a trial, there is no doubt more or less discretion lodged in the Missouri Dental Board, but this is not an unregulated discretion. State ex rel. v. Adcock, supra. In the mere issuance of a renewal license there is no discretion, under the act of 1917, now chapter 112 of R. S. 1919. The closing paragraph of the opinion in State ex rel. Wolfe v. Missouri Dental Board, 221 S. W. loc. cit. 73, in so far as it indicates that there was a discretion, is wrong. An examination of the whole act does not sustain it.

III. It is urged that the rule as to discre-

tion, announced in the previous case, is stare decisis, or res adjudicata. Counsel use the words "res adjudicata." This is not a second appeal, but a new case. But even upon second appeal, and where the case has been retried nisi on the basis of a ruling by this court, we have reserved our right to correct our ruling on a second appeal. *Mangold v. Bacon*, 237 Mo. loc. cit. 513, 141 S. W. 651 et seq. We feel that what was said in the former opinion was an inadvertence, which should be corrected upon a thorough review of the whole act. The remarks were applicable to the certificate of registration, or to a trial for the revocation of it, or a license issued thereunder, but not to a mere renewal application, and the license to be issued on same. Had the law required the applicant for a renewal license to make a showing with his application, the question might be different. If it requires no showing, as indicated in a previous paragraph, then there is no place for the exercise of discretion.

[2-4] IV. It will be noted that in the foregoing we have not considered that portion of the return by which respondents undertake to justify their act by pleading that relator has violated the dental statutes as to advertising and other things. We did this for several reasons, viz.: (1) This portion of the return was wholly irrelevant in this action. In mandamus in this court we are not called upon to first determine the facts of a violation of law authorizing action upon the part of the board. The board must first hear and determine the matter (if authorized to exercise a discretion), and we pass upon their record. There is no claim in this return that relator had been heard on any charges since the trial which we held void. The action of refusing would be arbitrary, unless relator had been given a hearing by the board. Such board cannot arbitrarily refuse the license, and then undertake to have this court determine the facts in the first instance, as is sought to be done in the instant case. For this reason we dismissed these portions of the return as wholly irrelevant to the issues involved here. (2) There is another more forceful reason for excluding this portion of the return. Since the last trial in this court the only action taken is evidenced by the two letters from the secretary of the board, in which the action of the board is placed upon the ground that their records (the judgment which this court vacated) showed that relator's license had been revoked upon charges covering all the things mentioned in the return. Respondents cannot blow hot and cold. Their record shows that their refusal was based upon their old judgment, and not otherwise. (3) Section 12636 urged, if it were in this case at all, does not go to the extent claimed by respondent's counsel. This section says: "Said

dental board shall have power to revoke a certificate of registration or a license issued thereon upon any one of the following causes:" There follow eight specific grounds or causes upon which a revocation of certificate of registry or of license may be ordered. But note that the power conferred is to revoke something already done, and to revoke for cause, and upon a hearing as provided for by the next section. The power granted is to revoke something already done, and not to refuse to act, for the reasons stated. It is true that there is added to the eighth subdivision of causes for which the certificate of registration or license may be revoked a statement that they may be refused for the same reasons. This can only refer to the original certificates of registration and the initial license issued thereunder. It cannot refer to a mere renewal license, without nullifying all the remainder of the law.

It follows that our alternative writ of mandamus should be made absolute, and it is so ordered. All concur, except JAMES T. BLAIR, C. J., who dissents in separate opinion, and DAVID E. BLAIR, J., who concurs in the opinion of the Chief Justice.

JAMES T. BLAIR, C. J. (dissenting). The return in this case expressly states that the reasons respondent refused to renew relator's license were that after November 30, 1918, he—

"continued to practice dentistry in Kansas City, Missouri, without a license and without any authority so to do, in open defiance of the law, and continued to publish false and fraudulent statements, and is still doing so. Respondent says relator, during the time he has been practicing dentistry, has published false statements as to his skill as a dentist, and has circulated fraudulent statements, and has published and circulated misleading statements, as to his skill and method of practicing dentistry, and has held himself out to the public as a practitioner without pain, and has advertised that he could practice dentistry by mail. Respondent in the exercise of its discretion refused relator his license because he has continued to practice dentistry without a license, and continued to advertise false and fraudulent statements."

The return clearly shows that these charges against relator do not pertain to his practice without a license during the life of the license which the board unsuccessfully attempted to revoke, and shows that the board does not allege or contend that the license in question in the previously decided case was not valid until the time fixed for its expiration under the statute. The illegal practice alleged is that done by relator since the expiration of the license dealt with in the decision in the former case.

The allegations of the return are not denied by relator. They must be considered

as admitted by the pleadings. Section 12636, R. S. 1919, expressly provides that the dental board may revoke a license, or "refuse to grant a license," if the applicant has been guilty of "the publication or circulation of any fraudulent or misleading statements as to the skill or method of any licensee or operator," or when a dentist advertises himself "as a practitioner without causing pain, or advertising in any other manner with a view of deceiving or defrauding the public, or in any way that will tend to deceive or defraud the public."

It therefore appears that it is charged in the return and admitted by relator that relator did the things because of which the statute authorizes the board to refuse a renewal license to relator. That this section is not confined to the original license quite clearly appears. It is specifically made applicable to "licensed" dentists and to a "licensed or registered dentist." This language shows the section cannot well be construed to apply only to the original license. It authorizes the board to refuse a license for reasons which could hardly arise until after the dentist has once been licensed and has been engaged in the practice. For instance, the licensee may be refused "if such licensee or registered dentist shall employ or permit any person not regularly registered and licensed to practice dentistry to practice the same in the office or under the control or direction of such licensed or registered dentist"; or "in case any dentist should fail, neglect or refuse to keep his office and dental equipment in a thoroughly clean and sanitary condition." These clearly indicate that it was the renewal license which was authorized to be refused. In the majority opinion it is now said that the admitted facts which, under the statute as I now construe it and as this court unanimously construed it in *State ex rel. v. Dental Board*, 221 S. W. 70, show relator's guilt of the things which authorize the board to refuse to license him are wholly irrelevant. First, it is stated that this court is not called upon "first to determine the facts of a violation of law authorizing action upon the part of the board. The board must first hear and determine the matter (if authorized to exercise a discretion), and we pass upon their record." This argument is intended as an answer, even though it be assumed that the board has a discretion under the statute, and that the pleadings show the averment in the return and the admission by the motion which would warrant a refusal of the desired license. It has no bearing if the statute is to be construed as previously done in the majority opinion, since that construction would end the matter. The parenthetical clause recognizes this as the hypothesis upon which the argument is made. So far as this argument is concerned,

therefore, it is to be examined in the light of relator's admission that he has been guilty, subsequent to November 30, 1918, of acts which warrant the board in refusing him a renewal license. It is said the board must accord him a hearing, and that the fact that he has not had one precludes consideration of his admission of guilt. The difficulty with this is that relator has sought no hearing. He not only has asked for none, but, as the return charges and relator admits, he has refused to cease his admitted violation of the law, and has refused so much as to discuss such a cessation, and announced, through his attorney, that the reason for his refusal was that he was "so well loaded that" he wanted to "show his hand." The result of the position taken by the majority in this connection is, therefore, that though it be conceded relator is guilty of acts which justify the board in denying him a renewal license, and that the statute gives them a discretion in such a case, yet relator can escape the penalty the law requires to be imposed, and compel the board to renew his license, guilty though he be, by the simple expedient of refraining from asking for a hearing and refusing to have the matter of his guilt considered by the board at all. That relator could have required the board to grant him a hearing may be conceded. That he can refuse to have the matter determined by the board, and thereby put himself in a position to compel the board to give him a license despite his admitted infractions of the law, and thus deprive the board of the power which the statute vests in it to deny a license because of the things he admits he has done, does not seem to me to be a tenable position. Yet that is what the majority opinion means in the argument set out above.

It is also argued that the letters written but the secretary of the board show the refusal to renew relator's license was grounded upon the finding of the board which was held void in our previous decision. The license dealt with in that case expired November 30, 1918. The return in this case avers, and relator admits, that the violations of the law upon which respondents now stand were committed "after November 30, 1918." Paragraph III of the return makes it entirely clear that the misdoing relied upon by the board to justify its refusal to renew relator's license occurred after the date mentioned. It says so in so many words. It is true that the letter of May 22, 1920, mentions the alleged trial and finding held void in our previous decision, but it includes also many general charges of violations of the dental law. The other letter merely states that the records of the board show relator's license has been revoked, and that his dollar is therefore returned. These letters do not justify the holding that is made that they conclusively



show that the sole reason for refusing the renewal license was the previously made void effort to hold a hearing. But suppose they did. Relator now admits that he had frequently, if not continuously, violated the law since the hearing to which the opinion refers. Since this is true, what difference does it make even if the board did, in May, 1920, assign an unsound reason for refusing then to renew the license? The subsequent course of relator was a continuance of the violation for which the futile attempt to try him had been made. A mistake in a letter in May would not deprive the board of the power to act upon subsequent offenses in November, if otherwise it had power to act. It will hardly be contended that the letter of the secretary early in November is of great consequence. Again, though the effort to try relator in 1918 was futile, and the revocations based upon the attempted finding then made were void, this did not render the violations which the board then attempted to examine any less efficacious to sustain a subsequent refusal to renew relator's license. The fact the violations had occurred, if they did, would just as well support such refusal after the futile hearing had been had as it would have done before. The implication in the majority opinion that because the effort to try relator proved to be fruitless, therefore his misdeeds were wiped out entirely, and could not be thereafter considered by the board at all, introduces a new conception of the effect of proceedings had without jurisdiction.

So far as concerns the argument under (3) in paragraph IV of the majority opinion, the statute furnishes the answer, and this has already been considered.

With the facts admitted as charged, and the powers of the board such as shown by the statute quoted, I am unable to agree to the majority opinion. Relator has not shown any arbitrary or oppressive action by the board. He admits facts which show it did its duty when it refused to license him. He admits he refused to take up the matter of his misconduct and even discuss it with the board.

The majority opinion seems to place too much stress upon general language used in sections of the statutes other than section 12636. This statute expressly gives discretion to the board. Its particular provisions cannot be held destroyed by general language used elsewhere, unless well-known canons of construction are to be abandoned.

It may be added that the decision which the majority opinion overrules is well supported by section 12636, and, in my opinion, is sound law. Very respectfully I dissent.

DAVID E. BLAIR, J., concurs in these views.

# EVANS v. ILLINOIS CENT. R. CO. (No. 21125.)

(Supreme Court of Missouri, in Banc.  
July 22, 1921.)

## 1. Railroads $\S$ 327(2) — Automobilst crossing without looking held guilty of contributory negligence

The acts of an automobilist in attempting to cross railroad tracks, in daylight, at a point where he had reason to expect trains at any moment and where he had an unobstructed view, without looking for a train, constituted contributory negligence barring recovery for negligence.

## 2. Railroads $\S$ 327(11) — Automobilst must approach crossing at such speed that he can stop.

It is the duty of an automobile driver to approach a crossing at such speed that he can stop, after reaching a point where he can see an approaching train and before coming within the danger zone.

## 3. Railroads $\S$ 335(1) — Operation at excessive speed without warnings negligence; "willful;" "wanton;" "reckless."

The acts of servants of a railroad company in approaching a public highway crossing at excessive speed and without blowing the whistle or ringing the bell, even when such crossing is in a congested district in the city, constitute negligence only, to which contributory negligence is a defense; "willfulness" implying intentional wrongdoing, a "wanton" act being a wrongful act done on purpose, and "recklessness" being an indifference to the rights of others.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reckless—Recklessly—Recklessness; Wanton; Willfulness.]

## 4. Negligence $\S$ 100—Contributory negligence no defense when injury is intentional.

Negligence of the injured person is no defense when such injury is intentionally inflicted.

## 5. Railroads $\S$ 350(34) — Evidence of willful injury held insufficient for jury.

In an action for an automobile driver's death, alleged to have been caused by willful, wanton, reckless, and conscious disregard of life, where it is shown that defendant's train was moving at a speed of 45 miles per hour without warning, toward and over a busy public street, such facts alone, though evidence of negligence, are insufficient to warrant submission of the question of willful or intentional injury, excluding the defense of contributory negligence.

## 6. Appeal and error $\S$ 1177(7)—Retrial denied on failure to prove allegations of petition, where plaintiff negligent as a matter of law.

Though a petition for negligence was sufficient or could be so amended as to support a recovery, a retrial will not be granted on reversal for failure to establish the allegations of

the petition, where the evidence showed contributory negligence as a matter of law.

Woodson, J., dissenting.

Appeal from St. Louis Circuit Court; Thomas O. Hennings, Judge.

Action by Elizabeth Evans against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Watts, Gentry & Lee, of St. Louis (John G. Drennan, of Chicago, Ill., of counsel), for appellant.

Glendy B. Arnold, of St. Louis, for respondent.

DAVID E. BLAIR, J. Appeal from the circuit court of the city of St. Louis. The verdict and judgment there were for respondent in the sum of \$10,000.

On April 19, 1916, respondent's husband, Harry Evans, was fatally injured, and almost immediately died as the result of a collision between a Ford automobile, moving westward and driven by him, and a train of appellant, consisting of a locomotive and passenger cars, moving northward at the crossing of the terminal railroad tracks over Brooklyn street in the city of St. Louis. Said Brooklyn street at this point is a much-used public street. The accident occurred in the forenoon. Foster Robbins was riding in the automobile with said Evans as it approached the railroad tracks. The uncontradicted evidence shows that the train was moving at a rate of 40 or 45 miles per hour, and that no bell was rung or whistle blown to give warning of its approach. A train could be seen for a distance of several hundred feet south of Brooklyn street from a point 15 feet east of the railroad tracks. As soon as Robbins saw the train, which was at that instant almost upon the crossing, he jumped out of the automobile and escaped injury. The automobile was carried on the pilot of the engine about 500 feet north of the crossing, at which point the train was brought to a standstill. Evans was thrown off a little over 300 feet north of the crossing.

St. Louis Terminal Railway Company and St. Louis Merchants Bridge Terminal Railway Company were joined as parties defendant. Said defendants filed demurrers to the evidence at the close of plaintiff's case, which were given by the court. Defendant Illinois Central Railroad Company also offered a demurrer to the evidence at the close of plaintiff's case. This was refused, and said defendant stood on its demurrer.

The amended petition on which the case was tried was in the form usually drawn in such cases, except that it did not charge that the acts of defendant were negligent. Said petition contained the following allegation:

"Plaintiff further states that the death of her husband, Harry Evans, as aforesaid, was caused by defendants' willful, wanton, reckless, and conscious disregard of the life and bodily safety of the deceased in this, to wit, that with knowledge that the crossing of said tracks with said Brooklyn street was much used for travel and was dangerous to travelers using the same the defendants ran said train to and over said Brooklyn street and onto and against the deceased, at a speed of from 40 to 45 miles per hour, without giving the deceased any warning of the approach of said train."

Appellant filed an answer containing a general denial and an allegation as follows:

"Further answering, this defendant says that the death of Harry Evans, referred to in plaintiff's second amended petition, was caused by his own negligence directly contributing thereto, in this, to wit: That on the occasion referred to in plaintiff's second amended petition the said Evans negligently and carelessly drove an automobile upon the railroad track directly in front of the train operated by the defendant Illinois Central Railroad Company, and so near to said train that it was impossible, by the exercise of ordinary care on the part of said defendant, to stop said train after the appearance of said Evans upon and near said track, and, in so driving upon said track, the said Evans negligently and carelessly failed to look and listen for the approach of trains, and negligently and carelessly failed to avoid being struck by trains."

The portion of said answer above quoted was stricken out on plaintiff's motion on the ground that the same constituted no defense to the cause of action set forth in plaintiff's petition.

At the request of respondent the court gave instruction No. 1, detailing the facts necessary for the jury to find to authorize a verdict for respondent. It is unnecessary to quote it in full. It concludes as follows:

"That under all the facts and circumstances, as shown by the evidence, the running of said train over said Brooklyn street at said speed, if you so find, was a willful, wanton, reckless, and conscious disregard by the servants of said defendant in charge of said train of the life and bodily safety of the deceased, and directly caused, or directly contributed to the cause of, the death of the deceased, then your verdict will be for the plaintiff and against said defendant Illinois Central Railroad Company."

Instruction No. 2, given at the request of the respondent, is as follows:

"The court instructs the jury that the plaintiff is not entitled to recover in this case on the ground of mere negligence on the part of the defendant's servants in charge of said train, but before you can find for the plaintiff you must believe and find from all the evidence that the conduct of the defendant's servants in the running and operation of said railroad train at the time and place mentioned in the evidence was characterized by a willful, wanton, reckless, and conscious disregard of the life and bodily

safety of the deceased, and, unless you so find, your verdict must be for the defendant."

Thus it is clear that the theory on which the case was tried below was that the mere act of the servants of defendant, in moving its train at a speed of from 40 to 45 miles per hour, over tracks laid in a public street and across another much-used public street, and in a densely settled portion of the city, where people are likely to use said crossing at any time, without ringing the bell or blowing the whistle, is sufficient to authorize submission to the jury of the question whether such act was willful, wanton, reckless, and in conscious disregard of the life and bodily safety of respondent's husband, without showing that the engineer or fireman intentionally ran said train upon respondent's husband, or saw him approaching the track or in a position of danger, or likely to be in such position of danger, or within what distance such train could have been stopped if deceased had been seen in a position of peril and oblivious to such peril. No evidence was offered tending to show that the engineer or fireman saw deceased or intentionally ran said train upon him, or what they were doing as the locomotive approached the scene of the accident or what could have been done by them to prevent collision.

[1] The acts of respondent's husband, as shown by the evidence before us, in attempting to cross the railroad tracks in broad daylight at a point where he had reason to expect trains at any moment, and where he had an unobstructed view of any trains that might be approaching the crossing, without looking for a train, or where, if he had looked, he could have seen the train approaching for a distance of 300 to 600 feet, constituted negligence on his part that would bar a recovery by his widow in an action based on an allegation of negligence. *Hayden v. Railroad*, 124 Mo. 568, 28 S. W. 74; *Kelsay v. Railroad*, 129 Mo. 362, 30 S. W. 339; *Hugart v. Railroad*, 134 Mo. 673, 36 S. W. 220; *Stotler v. Railroad*, 204 Mo. 619, 103 S. W. 1.

[2] It appears from the evidence that a great many trains moved over these tracks. One witness estimated the number at 100 daily. At and from a point about 15 feet from the track deceased could have seen the train coming if he had looked. There was no obstruction to the view. No reason why the approaching train could not have been seen is given. Robbins testified that deceased was looking directly ahead when he first looked to the north. This was at a point where the train could be seen. When he looked to the south and instantly saw the approaching train, deceased was then looking south also. The top of the automobile was up, but the side curtains were not on, and there was nothing in the car itself to obstruct the deceased's view. The automo-

bile was moving up grade in low gear at a speed of 5 to 6 miles per hour. Deceased could have stopped it almost immediately. It was his duty to approach the crossing at such speed that he could stop after reaching a point where he could see the approaching train and before coming within the danger zone.

[3] This court has never passed on the question involved here. Respondent cites cases from other jurisdictions tending to support her contention that wanton and willful conduct can be inferred from such facts as are here proven, and under such circumstances as existed here, without showing the actual conduct of the engineer and fireman, further than the speed of the train and failure to give warning. We have repeatedly held that the acts of servants of a railroad company in approaching a public highway crossing at excessive speed, and without blowing the whistle or ringing the bell, even when such crossing was in a congested district in a city, constitute negligence, and that negligence of the injured party contributing to the injury is a defense. This has been held in many cases, such as *Stotler v. Railroad*, 204 Mo. 619, 103 S. W. 1; *Hafner v. Transit Co.*, 197 Mo. 196, 94 S. W. 291; *Green v. Missouri Pacific Railway Co.*, 192 Mo. 181, 90 S. W. 805. The act cannot be both negligent and intentional at the same time. Such allegations are inconsistent. *Raming v. St. Ry. Co.*, 157 Mo. 477, loc. cit. 508, 57 S. W. 268; *O'Brien v. Transit Co.*, 212 Mo. 59, 110 S. W. 705, 15 Ann. Cas. 86. In *Hinzeman v. Railroad*, 182 Mo. loc. cit. 623, 81 S. W. loc. cit. 1137, in discussing the words "willful, wanton, and reckless" Judge Valliant said:

"Among the instructions given for the defendant was the following: '(4) Unless the jury believe from the greater weight of the evidence that the defendant's engineer in charge of the locomotive which struck the deceased, willfully, wantonly, or recklessly ran deceased down and killed him, your verdict must be for the defendant.'"

"The trial court assigned the giving of this instruction as its reason for sustaining the plaintiff's motion for a new trial. The learned trial judge was right in condemning that instruction.

"If the engineer saw the man in a position of danger, apparently inattentive to the approaching train, and if, with the means at hand, by the exercise of ordinary care, he could have given him timely warning, yet neglected to do so, then the case falls within the exception to the rule that a plaintiff cannot recover if his own negligence has contributed to his injury. In discussing that exception to the general rule the courts have characterized the conduct of an engineer under such circumstances as reckless, wanton, or willful; but those are words of characterization expressing a conclusion, a judgment; the fact upon which that conclusion is based is the neglect of the engineer

under the given circumstances to exercise ordinary care with the means at hand to avert injury."

Willfulness implies intentional wrongdoing. A wanton act is a wrongful act done on purpose, or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference whether wrong or injury is done or not. As we understand the words "conscious disregard of the life and bodily safety," they add nothing to the words "willful, wanton, and reckless," and are included within the meaning of those words. As applied to an act, they necessarily mean that such act was intentionally done without regard to the rights of others, and in full realization of the probable results thereof.

[4] Negligence of the injured person is no defense when such injury is intentionally inflicted. *Raming v. St. Ry. Co.*, 157 Mo. loc. cit. 507, 57 S. W. 268, citing and quoting approvingly from 1 *Shear. & Redf. on Neg.* (5 Ed.) sec. 64.

[5] All that is shown here is that the train was moving at a high rate of speed, and without warning, toward and over a busy public street. It is not shown that people were on the crossing in a position of peril as the train approached, or that the engineer or fireman saw deceased at all. There is ample evidence of negligence, but the engineer had the right to assume that, even though he was negligent, deceased would not be injured thereby because deceased himself would not be expected to come on the track in front of the train without himself exercising proper care. The railroad track was in itself a warning of danger to the public, and the engineer had the right to assume that persons approaching such track would use due care. In other words, although negligent, such engineer is not shown to have been acting in such conscious disregard of the rights of deceased as to amount to willful or intentional wrongdoing.

This is not like a case where one drives an automobile at high speed through a densely crowded street, when he knows that people are upon and crossing the street and exposed to danger and likely to be struck by his automobile moving at such high speed. Such an act under such circumstances could well be held to be criminal negligence. The law would read into his act an intention to injure. The same act in the dead hour of the night, when the same street was presumably clear, would be nothing more than negligence for which a civil action only would lie.

Respondent has failed to show that appellant willfully, wantonly, and recklessly caused the death of her husband. The only inference the jury was entitled to draw from the evidence was negligence on the part of appellant. An act cannot be held to be willful, wanton, and reckless by only showing a

failure to exercise the degree of care due under the particular circumstances. Nothing more is shown here.

We have carefully considered the cases from other jurisdictions relied on by respondent. We are not prepared to follow those cases and to depart from the rule, well established in this state, that the character of acts here discussed, merely constitute negligence. Before a case can be submitted to a jury on the theory that the act complained of was willful, wanton, and reckless, something more than acts heretofore regarded as constituting mere negligence must be shown. To rule that intentional injury may be inferred from such facts as are before us in this case would overwhelm our courts with a flood of perjured testimony as the procuring of a witness to swear that any train was moving at high speed, without warning, when the accident occurred at a railway crossing in a densely settled city, would present no practical difficulty to unscrupulous litigants or counsel of like character. If willful, wanton, and reckless conduct may be inferred from the proof of such facts, a further difficulty presents itself. What speed would justify the trial court in submitting such question to the jury? A speed that would appear to one trial judge to be willful, wanton, and reckless, signifying intentional wrongdoing, might appear to another judge as being evidence of nothing more than mere negligence. No two judges would agree when and under what circumstances failure to give warning would authorize the submission of such question. Such a rule would undoubtedly result in chaos in the law governing crossing cases, and in such cases effectually destroy the salutary rule that one whose own negligence contributes to his injury cannot recover for the negligence of another, also contributing to such injury. The rule we have here announced will not prevent the showing in any case of acts which themselves indicate an intentional or wanton infliction of injury, or affect the rule that contributory negligence constitutes no defense to intentional infliction of injury.

[6] Assuming that the petition here either is now sufficient or can be so amended as to support a recovery on the ground of negligence, should the case be remanded for a new trial? The evidence now before us shows contributory negligence on the part of deceased as a matter of law, which is a complete defense as against a charge of mere negligence. As we understand the case, all the persons who saw the accident testified at the trial, and it is not shown that other or further testimony on the question of deceased's conduct at the time of the accident is available. Neither does it appear that any acts of the servants of defendant, other than already appearing in the record, can be shown. A retrial would therefore be useless.

For the reasons set forth, the judgment of the trial court is reversed.

GRAVES, HIGBEE, ELDER, and WALKER, JJ., concur.

JAMES T. BLAIR, C. J., concurs in the result.

WOODSON, J., dissents.

### ULRICH v. PIERCE. (No. 22179.)

(Supreme Court of Missouri, Division No. 1.  
July 23, 1921.)

#### 1. Fraudulent conveyances $\S$ 54(1)—Owner of land not indebted could convey as he chose.

The owner of land who owed no debts other than to his sister, his grantee, and never intended to become otherwise indebted, could convey his land to his sister, on such terms as he should choose, and, having parted with it by deed he could not take it back.

#### 2. Fraudulent conveyances $\S$ 271(3)—Fraud must be proved.

Fraud as to creditors in a conveyance cannot be shown by mere inference, but must be proved, and if the facts shown are equally consistent with an honest purpose, fraud will not be inferred.

#### 3. Fraudulent conveyances $\S$ 162(1)—Plaintiff must show purpose and that transferee participated.

To impeach a sale for fraud as to creditors, plaintiff must show that the purpose of the sale was to defraud and cheat creditors, and that defendant transferee participated in the fraud.

#### 4. Fraudulent conveyances $\S$ 154(1)—Failure to record deed not evidence of fraud.

Under Rev. St. 1919,  $\S$  2199, providing every instrument in writing certified and recorded as prescribed shall, from the time of filing for record, impart notice, etc., where a brother who owed his sister conveyed his land to her in satisfaction of the debt, the sister's mere failure to record the deed for two years, and until four days before sale of the premises on execution against the brother, was no evidence of fraud.

#### 5. Fraudulent conveyances $\S$ 51(1)—Disposition of exempt property not fraudulent.

The disposition by a debtor of property exempt from execution cannot be fraudulent as to existing creditors.

#### 6. Fraudulent conveyances $\S$ 269(1)—Existence of homestead as matter of defense not necessary to be pleaded.

In ejectment to recover land, combined with a statutory action to try title, plaintiff claiming a fraudulent conveyance, on the issue of fraud in such conveyance it was unnecessary to plead the existence of a homestead as a matter of defense; the fact being clearly admissible on the general issue joined on the allegation of fraud.

Appeal from Circuit Court, Franklin County; R. A. Breuer, Judge.

Action by A. D. Ulrich against Elmer Pierce. From judgment for defendant, plaintiff appeals. Judgment reversed, and cause remanded for proceedings in accordance with the opinion.

William T. Keil, of St. Louis, and Jesse M. Owen, of Union, for appellant.

William L. Cole and John W. Booth, both of Union, and James Booth, of Pacific, for respondent.

BROWN, O. Petition filed in said court June 23, 1919, returnable to the August term. It contains two counts: (1) Ejectment to recover the southwest quarter of the southwest quarter of section 10, township 41 north, of range 1 west, containing 40 acres; (2) a statutory action to try title to the same land. The amended answer on which the cause was tried, after a general denial, pleads, in substance, that on the 21st day of September, 1916, in an action for cutting corn before maturity, one William J. Vaughn recovered judgment before F. A. Murphy, a justice of the peace for Central township, in said Franklin county, against Ivan C. Robinson for \$50, with costs, and that afterward, on the 30th day of January, 1918, a duly certified copy of the record of said judgment was filed in the office of the circuit court within and for said county of Franklin, and afterward the sheriff of Franklin county, by virtue of a writ of execution issued out of said court on said judgment February 7, 1918, levied upon said premises as the land of said Robinson, and during the March term of said court and on the 11th day of March, 1919, sold the same to satisfy said judgment, and on the same day executed and delivered to defendant his deed therefor; that said Robinson acquired said land on January 18, 1909, by deed duly recorded, and on the 7th day of March, 1918, there was filed for record in the recorder's office of said county a deed purporting to be a deed of conveyance in fee by said Robinson and wife to plaintiff; that plaintiff claims title to said lands under said deed, which plaintiff avers was made by said Robinson with intent to cover up and conceal his title to said premises and thereby secure to himself credit of a financial character in his future dealing and thereby defraud his creditors both present and future, and the same was and is fraudulent and void as against said Vaughn as creditor and defendant as purchaser; that defendant accepted said conveyance with complete knowledge and notice of the matter so pleaded.

He further says that this deed and record thereof constitutes a cloud on defendant's title, and asks the court by its judgment to

remove the same and to decree title in himself or in defendant. He also pleads that from said 12th day of July, 1916, until the 7th day of March, 1918, plaintiff withheld said deed from record, and suffered said Robinson to possess said premises and deal with same as his own, and that the cause of action upon which the Vaughn judgment was founded grew out of dealing between said Robinson and said Vaughn in respect of said premises and were without notice on the part of Vaughn of the deed to plaintiff or of right or interest of the plaintiff in or to the premises, and that said Vaughn never had or possessed or was chargeable with any other notice of said conveyance to plaintiff than the technical constructive notice which the law implies to him from the time of the filing of said deed for record. Wherefore it says plaintiff is estopped, by reason of matters and things aforesaid, as against this defendant's title to the premises, or any part thereof, and in equity plaintiff is entitled to a decree by reason of said matters establishing said title.

At the trial it appeared that at the time of the execution of the deed which defendant is attacking as fraudulent Ivan C. Robinson had owned the land in question nine years, having acquired it and moved upon it with his family in 1907, obtaining his deed therefor in 1909, and conveying to plaintiff, his sister, on July 12, 1916. Since 1912 he had resided on it with his family, consisting of his wife and one child, with some intervals, and at the time of said conveyance his parents were living there with him. Mrs. Ulrich, the plaintiff, lived with her husband in St. Louis, and had property received from the estate of a former husband. She testified, in substance, that their parents lived with him; that they both together supported them; and that at the time of the execution of this conveyance he owed her \$800 upon notes which she surrendered to him in the office of Mr. Schuler, the justice of the peace in St. Louis who prepared the deed, at the time it was made, and also gave him \$600, which was inserted as the consideration. We find no evidence that she concealed the ownership of this property in any other way than by carelessness with respect to the recording of her deed. In that connection Mr. Reed, one of defendant's witnesses, who cultivated the land or a portion of it in 1917, testified that he paid rental to Mrs. Ulrich and that she then told him she owned the farm. Judge Schuler testified that he saw the money, \$600, paid by Mrs. Ulrich to her brother Ivan at the time the deed was executed in his office, and saw notes given to him by her.

There is no evidence which we can find in this record that Ivan owed a dollar to any one but his sister at the time the deed was made. At the time of the recovery of this judgment Vaughn was a tenant of Ivan on

this same land, which he had planted in corn which was, in September after the execution of the deed, in different stages of development. Vaughn cultivated it for crop rent, that is to say, one-third of the crop. Ivan desired to save the feed, or his share of it, in good condition for his stock, that is to say, he wanted it green enough for that purpose, and as the different patches matured he hurried Vaughn to cut it, writing him letters stating his position. The last patch that ripened Vaughn refused to cut as requested by Robinson, who cut it himself, in September, at least two months after the conveyance to Mrs. Ulrich. This appeared to make bad blood, with the result that Vaughn sued and recovered a judgment for \$50. This judgment, recovered upon a transaction which originated two months after the execution of the deed, constitutes the only foundation for the charge of fraud laid in defendant's answer. The charge implies that, being about to get in this petty quarrel, he conveyed his land. It was stipulated at the trial that the only issues contested were the issue of estoppel and the issue of fraud.

The evidence will be referred to in the opinion as necessary.

[1] 1. It is proper to say at the outset that there is no evidence in this case that Ivan C. Robinson, the party charged with executing the deed in question for the purpose and with the intent to defraud his creditors, ever owed any other person than plaintiff, his sister, and Vaughn, under whose judgment for \$50 the land was sold to the defendant. Nor is there any evidence that he ever intended to become otherwise indebted. It is, moreover, conclusively shown by the defendant that the matter out of which the Vaughn judgment grew, namely, a difference as to the time at which the corn raised by Vaughn as crop renter on this same land should be cut, did not arise until two months after the execution of this deed. Under these circumstances he had the perfect right to convey the land to plaintiff when he did, on such terms as he should choose. It was his to give as well as to sell. Having parted with it by deed, he could not take it back.

[2, 3] It is upon these circumstances that fraud must be brought home to the plaintiff to defeat her recovery. This cannot be done by mere inference, but must be proved; and if the facts shown are equally consistent with an honest purpose, fraud will not be inferred. *Dallam v. Renshaw*, 26 Mo. 533, 544; *Henderson v. Henderson*, 55 Mo. 534; *Garesche v. MacDonald*, 103 Mo. 1, 15 S. W. 379; *Ryan v. Young*, 79 Mo. 30; *Ames v. Gilmore*, 59 Mo. 537. Perhaps this principle has not been better nor more conservatively expressed than in the following language of Judge Brace in *Garesche v. MacDonald*, *supra*:

"While fraud may be inferred when it is a legitimate deduction from all the facts and

circumstances in evidence in a given case it is never to be presumed, and when a transaction under consideration may as well consist with honest and fair dealing as with a fraudulent purpose, it is to be referred to the better motive."

This has been frequently repeated by this and other courts. It is equally reasonable and well settled by authority that to impeach a sale for fraud plaintiff must show that the purpose of the sale was to defraud and cheat creditors, and that defendant participated in the fraud.

In this case there was no creditor in existence except the grantee in the deed, who surrendered her securities for her debt in the office and presence of the officer who took her acknowledgment. There is no circumstance in the world which even remotely connects or can connect this conveyance with the Vaughn judgment under which the land was sold. Had Robinson, a couple of months after the execution of the deed, met Vaughn in the street and beaten him, it might possibly have been that he had conveyed his land to enable him to enjoy this luxury with pecuniary immunity; but this corn was yet too young and tender to suggest a quarrel as to when it should be cut. The law cannot take notice of possibilities so remote that they are entirely out of the range of human provision.

2. Fraud, in this case, is not only unproven but disproven. We think the evidence suggests that it is more natural that a son should take his aged parents into his own home for care and protection than that the daughter, equally affectionate and solicitous, should take them into the house of her husband. In this case the daughter was married and resided with her husband in a home in St. Louis. She had an inheritance from a former husband. The son Ivan was poor, and, with his wife and child and parents, lived on the land. His sister, the plaintiff, had advanced him money to the amount of \$800, for which she had taken his notes. It was arranged between them that the parents should live with him, and that the use of the farm, which she would purchase, should apply on her contribution for their support. There is nothing unnatural or unusual about this agreement, and it seems to have been carried out until the sale of this land by the sheriff on March 11, 1918.

There was no secret about this conveyance. When the Vaughn suit was pending in September, 1916, she heard of it, and on the 30th of that month wrote the justice of the peace, Mr. Murphy, the particulars of her title, with the date of her deed. Mr. Reed, a tenant under contract with her brother, raised wheat on the land after the conveyance and delivered the portion of the crop set aside as rent to her. He also gave her a check in 1917 growing out of his tenancy. It

is impossible that he did not know of her claim to the property at that time. It is equally improbable that, with her letter on file with the justice, Vaughn did not know of her deed before the rendition of his judgment. There is nothing in the facts which indicates any thought of concealment on the part of plaintiff, unless it be inferred from her bare failure to record the deed until four days before the sale.

On the other hand, the careful reading of the testimony of defendant creates a strong impression that at the time of the sale he knew or purposely avoided knowing of her title and of the record of her deed. He states that he went to the abstract office of Mr. White 15 minutes before the sale and found that no deed appeared on his books. Mr. White, the abstractor, testified that his books had not been brought up to date, and that he never gave an opinion about a title until the entire chain in the recorder's office was before him. Defendant ascertained that same day that plaintiff had, or claimed to have, a deed, but said that he did not ascertain it until after the sale but before he received his deed or paid his bid. Although he was there to get a bargain, he seems to have avoided the recorder's office as if it had been a pit into which he might fall with his speculation.

Mr. Cole, a lawyer, says that on the same day he assisted Mr. Pierce about the examination of the title. They went to Mr. White's abstract office, the books were gotten down, and, so far as they showed, the last transfer had been to I. C. Robinson. He did not know anything about their being behind in posting.

Although the plaintiff came and took one-third of the wheat crop Mr. Reed the tenant had set aside for rental, he did not have any conversation with her and knew nothing about her claiming to own the place. When the sale took place he attorned to this defendant. When examined about the check for \$10 to Mrs. Ulrich in 1917, he stated that it was after the sale of March 11, 1918. With reference to what occurred at the time he gave that check his testimony is instructive.

"Q. The check was made to Mrs. Ulrich, but you handed it to Mrs. Robinson? A. Yes, sir.

"Q. What year was that? A. That was in 1917.

"Q. Well, wasn't she making a claim that was her farm at that time to you? A. That was when she came out there.

"Q. And that time she told you she owned the farm too? A. That was after it was sold, after March 11th.

"Q. Is that the time you turned the check over to her. A. I owed for this stuff in 1916.

"Q. Was it in 1917 you gave this check? A. Yes, sir; the same year.

"Q. Don't you know that was before this place sold; the execution sale was on March 11, 1918; you gave the check to Mrs. Ulrich in 1917? A. I think so.

"Q. And she claimed to own the farm at that

time when you gave her that check? A. That was when she came out there.

"Q. And she claimed to own the farm at that time, didn't she? A. Yes, sir."

[4] 3. The mere failure to record this deed earlier is no evidence of fraud. The matter is entirely covered by statute (section 2199, R. S. 1919). It provides:

"Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice."

While the failure to record may, like every other lawful act, be made a part of a scheme of deception and fraud, when standing alone the statute which creates the duty prescribes its effect. In this case, as we have already seen, it constituted a part of no fraudulent scheme or device, and, in the absence of affirmative proof of some fraudulent practice, the statutory notice by record is conclusive. *Miller v. Whitson*, 40 Mo. 97; *Bank v. Rohrer*, 138 Mo. loc. cit. 383, 39 S. W. 1047.

[5] 4. The evidence shows conclusively that I. C. Robinson, plaintiff's grantor, was residing on the land with his family, consisting of his wife and child and aged parents, at the time he made this conveyance. There is no evidence that he had any other land or home. The statute (R. S. 1919, § 5853) defines the homestead as "consisting of a dwelling house and appurtenances, and the land used in connection therewith which is or shall be used by such housekeeper or head of a family as such homestead," and directs that it "shall, together with the rents, issues and products thereof, be exempt from attachment and execution." This court has uniformly held that the disposition by a debtor of property exempt from execution cannot be fraudulent as to existing creditors. In *Burns v. Bangert*, 92 Mo. loc. cit. 177, 4 S. W. 680, in discussing a similar case, we said:

"If his creditors cannot reach it for his debt, its sale or conveyance is no concern of the creditors, since they have no right or claim thereon. They can only complain of sales and conveyances of property that is subject to their debts. To this extent the creditors have no standing in court."

It is said, however, that there is nothing in this record which indicates that this particular question was made by appellant in the lower court as a defense against the charge of fraud. Nevertheless, the facts were all before the court. No instructions having been asked or given by the court of its own motion, and no finding of facts having been made, the question is still presented whether the evidence in its entirety supports the verdict. A vital question is whether the acts alleged as fraud refer to property subject to be taken for Vaughn's debt.

[6] Upon the issue of fraud it was unnecessary to plead the existence of the homestead as a matter of defense. It was clearly admissible upon the general issue joined upon the allegation of fraud, in that it characterizes all the evidence presented to sustain it.

5. The evidence utterly fails to show that either Vaughn, the judgment creditor, or this defendant acted upon or was deceived by any statement, act, representation, or conduct on the part of plaintiff which was calculated or tended to deceive them, or either of them, in their course of dealing in this transaction. We have seen that under the circumstances of this case she was perfectly within her legal right in failing, either through inadvertence or economy, to secure the record of her deed, and that the creditor had her claim before him as it was before the justice of the peace in the act of obtaining the judgment, and that if the purchaser was deceived as to the condition of the title it was the result of his own gross negligence. He was out, as he says, for a bargain. He obtained what he was seeking through his bid of \$100, which he testifies he would have increased to \$700 had it been necessary. It was unnecessary for the evident reason that others there on the same errand evaded the risk. He closed his eyes and took the chance, and also incurred its consequences.

The judgment of the trial court is accordingly reversed, and the cause remanded, to be proceeded with in accordance with these views.

SMALL and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

All concur.



STATE ex Inf. CHINN, Pres. Atty., ex rel.  
BOTTS, v. HOLLOWELL. (No. 21989.)

(Supreme Court of Missouri, in Banc. July 8,  
1921.)

Schools and school districts ~~§~~ 48(2)—Teacher's certificate held "state certificate" within statute prescribing qualifications of county superintendent.

Under Rev. St. 1909, § 11073, a certificate of the board of regents of state normal school, also signed by state superintendent of public schools, authorizing person to whom issued to teach the branches therein named in the public schools of the state for specified period, held a "state certificate" authorizing such person to teach, within section 10929, as amended by Laws 1911, p. 404, making holder of such "state certificate" qualified to hold the office of county superintendent of schools.

James T. Blair, C. J., and Walker and Woodson, JJ., dissenting.

Appeal from Circuit Court, Schuyler County; N. M. Pettingill, Judge.

Proceedings by the State of Missouri, on the information of James H. Chinn, prosecuting attorney, at the relation of J. F. Botts, against Lillie L. Hollowell. Judgment for relator, and defendant appeals. Reversed and remanded, with directions.

Higbee & Mills, of Lancaster, for appellant.

Shelton & Shelton, of Macon, for respondent.

CAMPBELL, Special Judge. This action was instituted on the 16th day of May, 1920, on the information of James H. Chinn, prosecuting attorney of Schuyler county, at the relation of J. F. Botts, against appellant, to oust her from the office of county superintendent of public schools for said county.

At the annual district school meetings in Schuyler county in April, 1915, respondent was elected to the office of county superintendent of public schools for that county. He thereupon qualified and was holding the office at the time of the annual district school meetings in April, 1919. At the annual school district meetings last referred to, respondent and appellant were the only candidates for election to said office. At said meetings appellant received the greatest number of votes. On April 5, 1919, commission was issued to her for said office by the county clerk of said Schuyler county, she took the required oath, gave the required bond, and was holding the office at the date of the institution of this action.

On the date of appellant's election she held a certificate of the board of regents of the state normal school of Kirksville, Mo., which was also signed by the state superintendent of public schools of Missouri, authorizing

her to teach the branches therein named in the public schools of this state for a period of two years from its date.

The cause was submitted to the trial court upon an agreed statement of fact, from which it appears that respondent's only insistence is that appellant did not possess the statutory qualifications to hold the office because the certificate held by her did not comply with either of the three alternative qualifications prescribed in Acts of 1911, p. 404, as follows:

"And shall at the time of his election hold a diploma from one of the state normal schools or teacher's college of the state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate, authorizing him to teach in the county of which he is superintendent."

It is contended by respondent that said certificate, so issued to appellant by the board of regents of the state normal school, authenticated by the state superintendent of schools, is not a "state certificate authorizing him to teach in the public schools of Missouri." This contention presents the only question for decision.

Section 10929, R. S. 1909, among other provisions unnecessary to quote, provided the qualifications of a county superintendent of public schools as follows:

"A life state certificate authorizing him to teach in the public schools of Missouri, granted by the state superintendent of public schools as the result of an examination, which shall include the subjects of school supervision and teaching in the rural schools."

In 1911 the statute, section 10929, was amended (Laws 1911, p. 404) by striking out the word "life" and all that part of the section relative to the certificate being issued by the state superintendent of public schools as the result of an examination, thus leaving the only requirement a "state certificate authorizing the holder to teach in the public schools of Missouri." That the certificate held by appellant is not a life certificate issued by the state superintendent of public schools as the result of an examination is conceded. The law in force at the time of the election in question did not require a life certificate nor a certificate issued by the state superintendent of public schools as the result of an examination. The laws then in force required the qualifying certificate to be a "state certificate."

Section 10929 as amended does not contemplate that the state superintendent may issue a certificate. If, in the amendment of that section, the term "state certificate" had been employed without any other or further qualifying or defining words, the legislative intent might be doubtful. But those words are immediately followed by "authorizing

him to teach in the public schools of Missouri," which is in effect a legislative definition of the term "state certificate." Having amended the statute of 1909 in so far as the same required a person elected to the office to hold a life state certificate issued by the state superintendent as the result of an examination, and enacted in lieu thereof a provision requiring such person to hold a state certificate authorizing him to teach in the public schools of the state, the Legislature necessarily intended a certificate, issued by the authority of the state and by its proper and designated officers, which authorized the person named therein to teach in the public schools of Missouri, to be a "state certificate," and it would be an unnatural and harsh construction of the statute to hold that such a certificate was not a "state certificate."

The certificate held by appellant emanated from the state by statutory authority (R. S. 11073), and authorized her to teach in the public schools of Missouri, and said certificate is therefore a state certificate, within the meaning of the qualifying statute. It follows that appellant at the time of her election was qualified to hold the office, and that the judgment of ouster rendered by the circuit court of Schuyler county should be and is reversed, and the cause remanded, with directions to enter its judgment quashing the information.

GRAVES, DAVID E. BLAIR, and ELDER, JJ., concur.

JAMES T. BLAIR, C. J., and WALKER and WOODSON, JJ., dissent. See 283 S. W. 703, for dissenting opinion of WALKER, J. HIGBEE, J., not sitting.

MIDWEST NAT. BANK & TRUST CO. v. DAVIS, Director General of Railroads.  
(No. 21753.)

(Supreme Court of Missouri, in Banc. July 8, 1921.)

1. Master and servant  $\Leftrightarrow$ 351—Remedy under federal Employers' Compensation Act not exclusive.

The remedy provided by the federal Employers' Compensation Act (U. S. Comp. St. §§ 8932a-8932uu) is not exclusive so as to preclude an action on the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) against the Director General under Act March 21, 1918, § 10 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1918, § 8115½j), for a railroad employé's injuries occurring during federal control.

2. Pleading  $\Leftrightarrow$ 8(1)—Allegation of ultimate fact sufficient.

The pleader is required to state the ultimate facts, and it is not necessary nor proper to

plead the facts or circumstances by which the ultimate facts are to be proven.

3. Master and servant  $\Leftrightarrow$ 256(1)—Petition held to allege employment in interstate commerce.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for the death of a railroad employé, a petition alleging that defendant was operating a railroad carrying on interstate commerce, and that deceased was engaged in assisting defendant in carrying on said interstate commerce, sufficiently alleged that deceased was engaged in interstate commerce, without invoking the aid of the statute of Jeofails (Rev. St. 1919, §§ 1513 and 1550, par. 8).

4. Master and servant  $\Leftrightarrow$ 258(17)—Allegation of negligence in furnishing engine held to charge knowledge.

In an action for the death of a switchman thrown off a freight car by a sudden jerk, due to a defective engine, an averment that by reason of defendant's negligence the engine had been allowed to become out of repair held tantamount to an allegation that defendant negligently furnished a defective engine so as to charge that defendant knew or by the exercise of ordinary care might have known of such defect, especially after verdict.

5. Master and servant  $\Leftrightarrow$ 293(17)—Instruction on negligence in using engine with known defect held correct.

In an action for the death of a switchman thrown from a freight car by a sudden jerk of the engine due to its defective condition, known to the foreman, an instruction allowing recovery if the jury found the dangerous condition of the engine was known to defendant, who negligently continued to use the same, was not erroneous as eliminating the qualification that defendant should have known of the defect in time to have repaired it or procured another engine before the injury.

6. Trial  $\Leftrightarrow$ 192—Instructions assuming defective condition of engine and master's knowledge thereof not erroneous where evidence undisputed.

In an action for death of a switchman thrown from a freight car by a sudden jerk, due to the defective condition of the engine, where the facts of such defective condition and defendant's knowledge thereof were undisputed, instructions assuming the engine was out of repair so that the brakes could not be properly controlled, and that defendant knew or could have known of such condition, were not erroneous.

7. Commerce  $\Leftrightarrow$ 27(7)—Switchman cutting car from interstate train engaged in "interstate commerce."

A railroad switchman who was killed while attempting to cut a crippled car from a train destined for an interstate trip, though such car was not destined for a point outside the state, was engaged in interstate commerce at the time of his death, within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), which covers the liability of a railroad company to employes injured while breaking up trains containing interstate traffic in railroad

yards; transportation and interstate commerce including switching movements as well as main line traffic.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

8. Death ~~of~~ 99(4)—\$32,000 for death of married railroad employé held excessive and reduced to \$15,000.

While a judgment for \$32,000 is excessive for the death of plaintiff's husband, a railroad switchman, within the federal Employers' Liability Act (U. S. Comp. St. §§ 8637-8665), whose life expectancy, was 36.73 years, though his death occurred during the war, when wages were abnormally high, and his occupation was extremely hazardous, it will not be reversed where not the result of passion or prejudice, but should be reduced to \$15,000 as a condition precedent to its affirmance; the Damage Act (Rev. St. 1919, § 4217), fixing the maximum penalty at \$10,000, being purely penal, and not compensatory.

Graves and Walker, JJ., dissenting in part.

Appeal from Circuit Court, Jackson County; Willard P. Hall, Judge.

Action by the Midwest National Bank & Trust Company, administrator of the estate of Ralph Appleby, deceased, against James O. Davis, Director General of Railroads, etc. Judgment for plaintiff, and defendant appeals. Affirmed on condition plaintiff enter voluntary remittitur; otherwise reversed and remanded.

Edward J. White, of St. Louis, and Thos. Hackney and Leslie A. Welch, both of Kansas City, for appellant.

Brewster, Kelly, Brewster & Buchholz and Kimbrell & O'Donnell, all of Kansas City, for respondent.

HIGBEE, P. J. This is an action brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) on account of the death of Ralph Appleby, a switchman. Suit was instituted by the widow, Beulah Appleby, as administratrix of the estate, for the benefit of herself and her three infant children, against William G. McAdoo, Director General of Railroads. On his resignation Walker D. Hines, his successor in office, was substituted as defendant. After the appeal was taken in this cause, John Barton Payne, successor in office to Walker D. Hines, was substituted as defendant in his stead. Prior to the hearing, James C. Davis, his successor in office, was substituted as defendant in his stead.

At the time of his death deceased was 28 years of age. He was sober, industrious, and in good health. He was earning \$150 per month and turned his checks over to his wife. He left as his surviving dependents his widow, 24 years old, and three children, aged 5, 3, and 1½ years, respectively.

The defendant's answer pleaded the federal Compensation Act of September 7, 1916, as a bar to the action, denied all the allegations of the petition, and averred that the deceased came to his death by his own negligence. Since judgment was rendered in the circuit court, Beulah Appleby has resigned as administratrix, and the Midwest National Bank & Trust Company has been duly appointed in her place and substituted as plaintiff in her stead.

The deceased met his death at about 3:05 o'clock on the morning of October 31, 1918. He was working as a switchman in the employ of the Director General in the yards of the Missouri Pacific Railway Company in Kansas City, Mo. He had reported for duty at midnight, and so had been working about three hours at the time of his death. The crew had been performing various switching operations in which the cars were "kicked" onto various tracks. They were making up a train to be delivered to the Kansas City Southern Railway, whose engine was to come over and get it. At about 1:30 a. m. the engine used by the switching crew began and continued to act very badly. Whenever the brakes were applied the engine would stop so suddenly and violently that it threw men out of bed in the cabooses that were being switched.

Mr. Dary, foreman of the switching crew, testified:

"Q. Just describe to this jury what happened—the action of the engine. A. Well, any time I would stop there would be a severe jerk or the engine would jerk the cars so hard when we were moving that it would jerk the men out of bed in the cabooses. It jerked them out of bed and they complained.

"Q. Just tell the jury what was the difference between the ordinary jerk and the jerking on that night. A. Well, in stopping, when the engineer would apply the air, it would give sudden jerks to the cars, and then it would slack them and then it would jerk them back again. It would cause damage to the cars. It pulled out a drawbar in stopping. We had on between 20 and 30 cars.

"Q. Where was the car on which Mr. Appleby was riding at the time you gave the stop or kick signal? A. Just opposite me.

"Q. When you gave the signal, you may say what, if anything, happened. A. When I gave the signal they just stopped right now. I mean the whole drag stopped with a violent jerk and then lunged ahead again. It stopped with an awful severe and sudden jerk.

"Q. What happened to Appleby? A. It jerked him underneath with his left leg across the rail, passing over him, right across his hip. I never worked around an engine that stopped a drag as that did, as this engine had been jerking the cars around.

"Q. Did you ever see anything like this engine? A. No, sir; I did not.

"Q. State whether in your opinion it would have been possible for a man to have stayed

on the car jerked as this was jerked at this time. A. Well, he would have to have been expecting a jerk like that and would have had to be ready for it.

"Q. It was so violent and sudden? A. Yes, sir.

"Q. In following the engine, what car would he ordinarily be riding? A. On the car he was cutting off.

"Q. When that car was cut off, if the engine made a sudden jerk, would that car receive a sudden jerk? A. No, sir.

"Q. He had been doing that all that evening before this drag, kicking it into track No. 10? A. Yes, sir."

Mr. Boone, one of the crew, testified he heard Mr. Dary tell the engineer he was handling the engine "awfully rough." The engineer said he could not help it; the air was bad. They ordered another engine about an hour and a half before Appleby was killed. It would require about two hours to get steam up in the other engine, and they continued to use the defective engine in the switching operations. It was necessary to get the car from which the drawbar had been pulled out of the drag to make it ready for delivery to the Kansas City Southern Railway, and it was while this was being attempted that Appleby was killed. In this transfer there were several cars of merchandise billed to points in other states. The car on which Appleby was riding at the time he met his death was a tank car of oil destined to Oil City, La. Deceased was doing his work in the usual and customary manner, and was in the act of pulling the lever to cut off the "bad order" car when he was thrown from the tank car and met his death.

Defendant stood on his demurrer to the plaintiff's evidence. The jury rendered a verdict for the plaintiff in the sum of \$32,000, and judgment was entered accordingly, from which the defendant appealed.

[1] 1. Appellant contends that the federal Compensation Act of September 7, 1916 (U. S. Comp. St. §§ 8932a-8932uu), governs the compensation payable by the federal government to the widow and children of the deceased employé. Section 1 of the act reads:

"The United States will pay compensation as hereinafter specified for the disability or death of an employé resulting from a personal injury sustained while in the performance of his duty," etc. Section 8932a, U. S. Comp. St.

Section 10 of the Government Control Act of March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½j), provides:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any act applicable to such federal control or with the order of the President. Actions at law and suits in equity may be

brought by and against such carriers and judgments rendered as now provided by law; and in any such action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government."

From the foregoing act, as well as from Order No. 50 of the Director General, it is clear that actions of this character and the measure of damages are governed by the laws in force prior to the time the federal government assumed control of the railroads. The Supreme Court of the United States has affirmed many judgments against the Director General of Railroads in actions of this character. This identical question was decided against appellant's contention in *Dahn v. McAdoo*, Director General (D. C.) 256 Fed. 549. Syllabi 1 and 2 read:

"1. Under Act Aug. 29, 1916, authorizing President to take over transportation systems, President's proclamation of December 28, 1917, delegating control to Director General of Railroads, Federal Control Act, § 10 (Comp. St. 1918, § 3115½j), and General Order No. 50 of Director General, a personal injury action commenced subsequent to General Order No. 50 on a cause of action occurring during federal operation may be maintained against Director General of Railroads.

"2. The federal Employés' Compensation Act (Comp. St. §§ 8932a-8932uu) does not provide an exclusive remedy, so as to preclude a railway mail clerk from maintaining a personal injury negligence action against the Director General of Railroads."

[2, 3] 2. Appellant's second contention is that the petition does not allege that deceased was engaged in interstate commerce. We quote the pertinent averments:

"The defendant, William G. McAdoo, Director General of Railroads, was as such, at all times herein mentioned, engaged in the business of operating the properties of the Missouri Pacific Railway, and said Director General was operating all of said properties in carrying on commerce by railroad between the state of Missouri and the various other states of the United States, and so was engaged in interstate commerce.

"Plaintiff further says that Ralph Appleby, at the time of his injuries, was in the employ of the defendant, and as such employé was engaged in the business of switching cars for the defendant and engaged in the business of assisting defendant in carrying on said interstate commerce."

As said in Thornton's Federal Employers' Liability Act (3d Ed.) § 201:

"To recover under the statute it must be shown by the pleading that the employé-plaintiff was at the time of his injury engaged in interstate commerce, and also that the defendant was a common carrier by railroad, at the same time, in the transaction wherein the employé was injured, likewise engaged in interstate commerce. This may be done by direct

avermment, or by pleading of facts which show such is the fact."

In *Grand Trunk Railway Co. v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168, Mr. Justice White said:

"The right of the plaintiff, who is defendant in error here, to recover for an alleged personal injury, was stated in two counts. In both the wrong was alleged to have been occasioned by the negligence of the railway company while it was engaged in carrying on interstate commerce and while the plaintiff was employed by it in such commerce."

The court held in that case that the allegation was sufficient.

The pleader is required to state the ultimate facts. It is not necessary, nor is it proper, to plead the facts or circumstances by which the ultimate facts are to be proven. See *v. Cox*, 16 Mo. 166. The evidence should not be pleaded. *Planet Property Co. v. Railway Co.*, 115 Mo. 613, loc. cit. 619, 22 S. W. 616. We think the averments are sufficient, and that it is not necessary to invoke the aid of sections 1513 and 1550, par. 8, R. S. 1919, commonly called the statute of Jeofails.

[4] 3. It is claimed that the petition is bad because it is not averred that the defendant knew or by the exercise of ordinary care might have known of the defective condition of the engine in time to have repaired it or to have procured another engine. The petition reads:

"Plaintiff further says that, by reason of the carelessness and negligence of the defendant and his servants and agents, such switch engine had been allowed to become and be out of repair, and, by reason of said engine being out of repair, the brakes on said engine could not be controlled properly, and by reason thereof said engine would cause the cars which it was switching to be operated in a rough, negligent, and dangerous manner. This plaintiff does not allege herein wherein said switch engine was out of repair for the reason that she is unable to do so, and the facts lie more particularly within the knowledge of the defendant than within the knowledge of this plaintiff.

"Plaintiff further avers that, by reason of said switch engine being so out of repair, said switch engine caused the car on which said Ralph Appleby was riding, engaged in his work as aforesaid, to be jolted, jarred, and shot loose in a violent and unusual manner, and by reason thereof said Ralph Appleby was caused to be thrown from and off of said car and down under the wheels of said car and the other cars which were being operated by defendant, and the wheels of said car passed over the body and limb of the said Ralph Appleby, whereby he was caused to suffer injuries from which he died almost instantly.

"Plaintiff further says that the servants and agents of the defendant who were in charge of the operation of the engine aforesaid carelessly and negligently handled said engine in a rough and unusual manner, whereby said engine caused said car on which said Ralph Appleby was riding as aforesaid to jolt and jar in a vio-

lent and unusual manner, whereby the said Ralph Appleby was caused to be thrown off of said car and under the wheels of said car and other cars and run over and injured and killed as aforesaid."

The averment is tantamount to an allegation that the defendant negligently furnished a defective engine and is good after verdict. In *Johnson v. Railway Co.*, 96 Mo. 340, loc. cit. 345, 9 S. W. 790 (9 Am. St. Rep. 351), Norton, C. J., said:

"The specific objection urged to the above petition is that it does not allege that defendant either knew, or might by the exercise of ordinary care have known, that said hammer was not reasonably safe for the purposes for which it was to be used. In the case of *Crane v. Railroad*, 87 Mo. 538, it is held that in an action by a servant against his master for negligence in furnishing improper or unsafe appliances for the servant's use in his work the petition must allege that the master either knew, or might by the exercise of ordinary care have known, of the dangerous and defective construction of the appliance, or it must contain an equivalent averment, and that an allegation that the master negligently furnished an appliance which was defective and unsafe is an equivalent averment and sufficient. Under this ruling the objection to the sufficiency of the petition, based on the ground stated, is not well taken, as it is therein averred that the unsafe hammer was negligently furnished plaintiff by defendant."

In *Fassbinder v. Railway Co.*, 126 Mo. App. 563, loc. cit. 570, 104 S. W. 1154, 1155, it was said:

"Further, it is contended that 'the petition is fatally defective in that it fails to charge that defendant knew or by the exercise of ordinary care might have known of the defective condition of the brake complained of.' The petition does not contain such specific allegation, but the facts pleaded bring the case within the rule followed in *Tateman v. Railway*, 96 Mo. App. 448, which is thus expressed in *Young v. The Shickle, H. & H. Iron Co.*, 103 Mo. loc. cit. 328: 'An allegation that the defendant negligently furnished an appliance which was defective and unsafe was equivalent to a statement that the master knew, or might have known by the use of ordinary care, of the dangerous and defective character of the appliance.'"

Under these rulings there is no substance in appellant's objection to the petition.

[5] 4. Appellant complains of plaintiff's instruction No. 1 in that "the court told the jury that defendant was liable if the engine was out of repair and this condition was known to the defendant, or through the exercise of ordinary care could have been known to him prior to the accident," and that it eliminates the qualification that the master should have known of the defect or danger in time to have repaired it or to have procured another engine prior to the injury.

This instruction is very lengthy. Relative to the matter complained of, it told the jury

that, if they found that the dangerous condition of the engine was known to the defendant and he negligently continued to use the same, and Ralph Appleby, while engaged in assisting the defendant in interstate commerce as previously explained, was thrown from the car and killed, the verdict should be for the plaintiff.

The evidence of Mr. Dary, foreman of the switching crew and defendant's vice principal, is that he complained to the engineer that he was handling them (the cars) "awfully rough," and that the engineer said that he could not help it; that the air was bad. Mr. Dary related to the jury that he ordered another engine and continued to use the defective one in the switching operations; that he was close to Appleby when he gave the signal to stop the engine and saw the deceased thrown under the wheels of the car.

The facts in this case differentiate it from the cases relied on by appellant. In *Staggs v. Gotham Mining Co.* (App.) 199 S. W. 717, loc. cit. 719, it was held that the fact that defendant was starting a new mill furnished no excuse for using a known defective engine to operate and make dangerous machinery about which innocent workmen were employed.

In another case it is said:

"If a master knows or should know of dangerous defects in an instrumentality which he installs, he assumes liability for continuing its use, \* \* \* unless excused by such circumstances as show assumption of risk or contributory negligence. Such cases cannot be likened to instances where public thoroughfares in municipalities are out of repair. The good of the public require their continued use, and in ordinary instances no liability attaches for injuries until a reasonable time for repair has elapsed since knowledge of the defect. There are, of course, many other instances. But this case is not in that class. If the proprietor of a passenger elevator in a public building knows of a dangerous defect in it which is liable to kill or injure the unsuspecting operator or passengers, he cannot escape liability by the plea that he had not known it long enough to repair it." *Popejoy v. Hydraulic Press Brick Co.*, 193 Mo. App. 612, loc. cit. 616, 186 S. W. 1133, 1134.

In *Greene v. Railway Co.*, 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785, an engineer called the attention of the foreman of the roundhouse to certain defects in an engine and requested that it be repaired. The foreman told him he did not have time to repair it and had no other engine, and told him to go ahead and use it. The court said:

"There is nothing in the suggestion that defendant was not guilty of negligence, because, in fact, it did not have a reasonable time to repair this engine that day, and had no other engine in condition to send out. That was no excuse for sending out an engine unfit for use, and it can hardly help the defendant to plead that it did not have good engines enough to do the business of the road."

In *Redmond v. Railroad*, 225 Mo. 721, loc. cit. 739, 126 S. W. 159, 165, Judge Valliant said:

"The length of time the cars remained there did not render them more dangerous or more liable to produce this particular accident. The significance of the fact that a dangerous condition is suffered to remain a long time is that it indicates that the master had notice of it, but when there is no question about the master's knowledge the duration of the condition is immaterial."

In *Morgan v. Zinc Co.*, 199 Mo. App. 26, 32, 199 S. W. 590, loc. cit. 592, the court said:

"The negligence consisted, when he did know of it, in ordering the plaintiff to proceed with a negligently constructed appliance, the knowledge having been brought home to the foreman; and the right of the defendant to insist on a reasonable time within which to discover a defect and repair it cannot arise in a case wherein it is shown that the defect is known to the master before the order is given to use it in the known defective condition."

See *Shimmin v. Mining Co.* (App.) 187 S. W. 76, 77; *Oborn v. Nelson*, 141 Mo. App. 428, 126 S. W. 178.

It was contrary to the Golden Rule, the rule of humanity, to continue to use an engine known to be defective and recklessly expose the deceased to deadly peril.

[8] 5. It is also said that plaintiff's instruction No. 1 assumes that the evidence justified a finding that the engine "was out of repair so that and in such a way that the brakes on said engine could not be properly controlled."

Mr. Dary, the foreman, testified that when the engineer would apply the air it would give sudden jerks to the cars, then it would slack them, and then it would jerk them back again. It would cause damage to the car. It pulled out a drawbar in stopping. Mr. McGuire, the engineer, testified that he laid the engine trouble to dirty triple valves, a mechanism used in the engine in connection with the air for the purpose of stopping the engine. When they are dirty they are too loggy to act, but when they do act they act suddenly and make the brakes take hold quickly and stop the engine quick; had trouble with the dirty triple valves ever since he went on the engine that night until Appleby was killed. On cross-examination Mr. Hackney, counsel for appellant, asked the witness:

"Q. You used the engine with the dirty triple valves? A. Yes, sir.

"Q. About 1:30 you found it out for the first time? A. Yes, sir.

"Q. You say dirty triple valves was the report? A. Yes, sir."

Here Mr. Hackney showed witness the report he had made of the engine to the mechanical department of the Missouri Pacific,

which witness identified. Witness said he made the report under the rules of the road between 1:30 and 2 o'clock the morning of the accident. The complaint is without merit.

This instruction reads in part:

"\* \* \* And if you further believe and find from the evidence that after defendant knew, or by the exercise of ordinary care could have known, of said condition of said engine, if any, he negligently continued to use the same," etc.

It is said that this assumes that the defendant knew or could have known of the condition of the engine, and that this language was calculated to impress the jury that the court had decided this important issue in favor of the plaintiff.

It has been seen that there was, in fact, no issue raised on this proposition by the evidence. Appellant's counsel, in cross-examining the defendant's engineer, asked him:

"Q. You used the engine with the dirty triple valves? A. Yes, sir.

"Q. And you got another engine when? A. Four o'clock."

Counsel also proved by the witness that he made a report before the accident of the dirty triple valves to the mechanical department. There was no dispute on this point.

"This court has many times held that the trial court may in its instructions to the jury assume the truth of a proposition which is established by the undisputed evidence in the case." *Sotabier v. Railway*, 203 Mo. 702, 102 S. W. 651.

"That the trial courts, under certain circumstances, may assume the existence of certain material facts is well settled by a long line of decisions in this court. We have reached that stage under our system of jurisprudence, and it affords us pleasure to make note of this advanced step in the administration of the law in controversies in court, to apply to such litigated controversies practical and business rules." *Davidson v. Co.*, 211 Mo. loc. cit. 356, 109 S. W. 583.

See, also, *Fullerton v. Fordyce*, 121 Mo. loc. cit. 13, 25 S. W. 587, 42 Am. St. Rep. 5716, and *Dunavant v. Land Co.*, 188 Mo. App. 93, 173 S. W. 747.

We find no error in the giving of this instruction.

[7] 6. Appellant contends that the court erred in giving plaintiff's instruction No. 5, defining what acts constitute interstate commerce. We quote the complaint:

"The mere fact that a number of cars had been assembled in the Missouri Pacific yards, some of which cars contained interstate freight, and the further fact that it became necessary to cut out the empty stock car not destined for a point out of the state, would not and did not make the movement of cutting out the stock car interstate commerce."

Appellant also complains:

"(a) The court erred in refusing defendant's instruction D-1 to the effect that the evidence

was not sufficient to show that the deceased was engaged in interstate commerce at the time of his death.

"(b) The court also erred in refusing defendant's instruction D-2 to the effect that, if the jury found from the evidence that at the time of the fatal injury to Appleby he and the crew with which he was working were engaged in taking off of track 9 and placing on track 10 an empty stock car not being used in interstate commerce and not being moved in interstate commerce, the plaintiff could not recover.

"(c) The court also erred in refusing defendant's instruction D-3, which told the jury that the switching of the empty stock car with broken or pulled out coupler from track 9 to track 10 was not interstate commerce."

In *Roberts, Federal Liabilities of Carriers*, § 500, the applicable rule is thus stated:

"The federal act governs the liability of railroad companies to employees injured while 'breaking up' or 'making up' trains containing interstate traffic in railroad yards; for the transportation in interstate commerce includes switching movements as well as main line traffic. For example, a fireman on a switch engine at the time he was injured was engaged in shifting cars in a railroad yard. The cars which were attached to the engine at the moment of the accident were used solely in intrastate commerce, but the shifting and the movement of these cars were necessary for the purpose of making up a train to which cars were to be attached which came from points beyond the state and were destined to points in another state. The fireman's remedy was under the federal act. A car inspector injured while coupling the air hose on a string of cars which were to become a part of a train then being made up in a yard was employed in interstate commerce. An engineer engaged in switching cars from a train at a terminal point preparatory to placing the cars in the yard was within the federal act while so employed. A member of a switching crew engaged in switching cars between two points in the city of Indianapolis for the purpose of being made up into an interstate train was employed in interstate commerce. A switchman assisting in distributing cars from an interstate train and clearing the track for another interstate train has no remedy under a state law."

*New York C. & H. River Ry. Co. v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, is in point. The headnote reads:

"A brakeman on an intrastate car in a train consisting of both intrastate and interstate cars who is engaged in cutting out the intrastate car so that the train may proceed on its interstate business is while so doing engaged and employed in interstate commerce, and may maintain an action under the Employers' Liability Act."

We quote from the opinion by Justice Lamar (238 U. S. loc. cit. 262, 35 Sup. Ct. 780, 59 L. Ed. 1298):

"The railroad company insists that when the two cars were cut out of the train and backed into a siding, they lost their interstate char-

acter, so that Carr while working thereon was engaged in intrastate commerce and not entitled to recover under the federal Employers' Liability Act. The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But, owing to the fact that, during the same day railroad employes often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from the interstate business. The present case is an instance of that kind; and many arguments have been advanced by the railroad company to support its contention that, as these two cars had been cut out of the interstate train and put on a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employe at the moment of the injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. \* \* \* The plaintiff was a brakeman on an interstate train. As such, it was part of his duty to assist in the switching, backing, and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employes, on its interstate journey. \* \* \* Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury, and the judgment in his favor must be affirmed."

In *L. & N. Ry. Co. v. Parker*, 242 U. S. 13, loc. cit. 14, 37 Sup. Ct. 4, 5 (61 L. Ed. 119), Justice Holmes said:

"The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the Court of Appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate."

It was necessary to set out the crippled car in order to make ready the train for delivery to the connecting carrier. The train included several cars loaded with interstate freight. The tank car upon which Appleby was riding was filled with oil destined for Oil City, La. It was while he was about to uncouple this car from the "bad order" car that he was thrown under the wheels of the train.

In *Penn. Co. v. Donat*, 239 U. S. 50, 36

Sup. Ct. 4, 60 L. Ed. 139, where a similar question was raised, the court said:

"The question presented on this writ of error is 'so frivolous as not to need further argument,' and the motion to affirm the judgment below must be granted."

The deceased was engaged in interstate commerce when he met his death.

[8] 7. The judgment for \$32,000 is excessive, but there is no reason to conclude that it was the result of passion or prejudice. The deceased was 28 years of age at his death. His expectancy was 36.73 years. *R. S. 1879, § 5973*. The widow was younger than he; hence his expectancy, and not hers, is to be considered. His death occurred during the World War, when wages were abnormally high. It must also be considered that the work of a switchman is extremely hazardous. It is unfair to predicate the monetary value of his life either upon a continuation of the wages earned by the deceased at the time of his death or upon the normal expectancy of one of his age in a non-hazardous employment. Nor should we adopt the maximum penalty of \$10,000 allowed by the Damage Act (*R. S. 1919, § 4217*). That statute is purely penal, and is in no sense or degree compensatory, as was held in *Grier v. Railway Co.*, 228 S. W. 545. If the plaintiff will, within 10 days, enter a voluntary remittitur of \$17,000, the judgment will be affirmed for \$15,000 as of the date of its rendition; otherwise it will be reversed and remanded.

All concur, except GRAVES and WALKER, JJ., who dissent in separate opinion.

GRAVES, J. (dissenting in part). I do not concur in the holding that our statute (section 4217, *R. S. 1919*) is purely penal. I know that we have recently so ruled, which ruling, in my judgment, is without rhyme or reason. This statute, in allowing a recovery, says that the defendant shall forfeit and pay as a penalty \* \* \* the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury." In law a penalty is a sum fixed for the doing of a wrongful act. In this instance the wrongful act is negligence. In Missouri we have consistently ruled that there are no degrees of negligence, and that we will not approve the doctrine of comparative negligence. If negligence is without degrees, as we have consistently ruled, then upon what is the jury to exercise its discretion in fixing the penalty?

The jury can say that the negligence of defendant caused the death, but the penalty follows without considering the degree of the negligence. Without saying there are degrees of negligence recognized in this state (a question long since adversely ruled, and continuously ruled thereafter) there is absolutely nothing upon which the jury can



exercise a discretion. In the matter of a penalty for the taking of life, the earning power, the age or expectancy of deceased, and all other things allowable as compensation are not to be considered. Penalty is one thing, and compensation is another. If the statute is purely penal, as my learned Brother says, then the mere matter of death by negligent act is all there is properly before the jury. Compensatory matters have no place in the fixing of a penalty. Expectancy, earning power, and other things of like character have no place in the case. The time is near at hand when we will be forced to discover that our recent ruling upon this statute is without foundation. That time will come when we are called upon to pass upon the propriety of evidence in these cases as to earning capacity, expectancy, and other matters going to compensation solely.

II. Another novel question is raised as to the limit of recovery in cases under the federal act in this state. We have been allowing a recovery in death cases in excess of the Missouri statutory limit. The federal act fixes no limit, but it provides for trials by state courts. If this had not been interstate work, the limit of recovery in Missouri would have been \$10,000. Had the character of the work not been interstate, the negligence charged in this case could not have resulted in a verdict of more than \$10,000. Our state courts are thus placed in the position of saying to one class of our citizens, You can only recover \$10,000, and to the other class (those working in interstate commerce), You can recover more than \$10,000, for the identical negligence. I have long thought this wrong, and take this opportunity to so express myself. I therefore dissent to the idea of allowing a recovery in excess of \$10,000, the amount fixed by the statute of the forum.

WALKER, J. (dissenting in part). I concur in this opinion, except in the conclusion which directs a remittitur as a condition precedent to an affirmance of the judgment. If the verdict is excessive to the extent of shocking a sense of justice, the conclusion is authorized that it was the result of passion and prejudice, and the judgment should be reversed, and the cause remanded. If, however, as the opinion expressly holds, the finding was not the result of passion and prejudice, it is no part of the province of this court, despite rulings to the contrary, to affirm on the condition of a remittitur. Such a conclusion assumes that the appellate court with nothing before it, except the cold record, is better qualified to determine the amount of the verdict than 12 men, sworn triers of the facts, who saw the witnesses and heard their testimony, and whose finding the trial judge refused to disturb.

**C. M. SMITH BROS. LAND & INVESTMENT CO. v. PHILLIPS et al. (No. 21516.)**

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921. Motion for Rehearing  
Denied July 23, 1921.)

**1. Dower §57(1)—Right is assignable after death of husband.**

The right of the widow to dower is assignable by deed after the death of the husband.

**2. Dower §59—Executors and administrators §187—Rights of quarantine and dower not affected by intervening homestead rights.**

Where the entire estate left by a deceased husband and father was less than the homestead under the Homestead Act of 1895 (Rev. St. 1890, § 3820), the possession of the land by the widow and children as the homestead does not affect the right of the widow to quarantine and dower after the homestead is terminated by her remarriage.

**3. Homestead §147—Children's rights cease on remarriage of widow.**

Under the Homestead Act of 1895, amending Rev. St. 1889, § 5439, so as to define the rights of the children in the homestead as the joint right of the occupation with the widow until they reached their majority, and providing that upon the widow's death or remarriage the homestead shall pass to the heirs of the husband, the rights of the minor children cease upon the termination of the widow's homestead rights by her remarriage.

**4. Dower §75—Limitation against recovery not suspended by disabilities in general statute.**

The limitation of actions to recover dower to 10 years after the death of the husband by Rev. St. 1909, § 391, is not subject to the disabilities enumerated in the general statute of limitations, so that, since the saving provisions of the Act of 1887 were repealed by Rev. St. 1889, § 4558, the disability of coverture is not an excuse for failure to commence action for dower.

**5. Dower §75—Right accrues on remarriage of widow who had been in possession as homestead.**

Where a widow had been in possession of all the real estate left by her deceased husband as a homestead, which terminated upon her remarriage, her right of action to recover her dower accrues upon the termination of the homestead, so that the widow and her grantee cannot recover dower by action commenced more than 10 years after her remarriage.

**6. Dower §82—Homestead §150(1)—Commission to assign homestead and dower unnecessary where property is less than \$1,500.**

Where all the property left by a deceased householder was valued at less than \$1,500, it was unnecessary for the probate court to appoint commissioners to set out the homestead and the dower as provided by Rev. St. 1889, § 5439.

7. Executors and administrators ⇐175—Right to quarantine ceases when right to dower ceases.

The widow's right of quarantine under Rev. St. 1889, § 4538, authorizing her to remain in possession until dower be assigned, is an incident to the right to have dower assigned, and disappears when that right ceases.

Appeal from Circuit Court, Mississippi County; Frank Kelly, Judge.

Ejectment by the C. M. Smith Bros. Land & Investment Company against Martha C. Phillips and others. From a judgment denying plaintiff the relief sought, plaintiff appeals. Affirmed.

See, also, 233 S. W. 418.

R. L. Ward, of Caruthersville, and Russell & Joslyn, of Charleston, for appellant.

Haw & Brown, of Charleston, for respondents.

BROWN, C. Ejectment to recover 80 acres of land in said county, described as the east half of the northwest quarter of section 9, township 25, of range 15. The defendants are Martha C. Phillips and Thomas Milas Phillips. The common source of title is James J. Phillips, who died intestate, seized of the land, while occupying it as his home with his family, consisting of the defendant Martha C., his wife, and five minor children, of whom her codefendant is one. Another child was born shortly after his death. The plaintiff claims through a deed dated April 8, 1898, and recorded the next day, whereby Mrs. Phillips conveyed what she designated as her life interest in the land in controversy, together with an undivided one-eleventh interest in 200 additional acres, to James E. Smith, William R. Smith, and Charles M. Smith, the organizers and stockholders of the plaintiff corporation, to which they afterward conveyed it. The consideration named in this deed was \$2,000. It is admitted that the land in controversy was not worth more than \$1,500 at the time of the death of James J. Phillips.

The defendants filed separate answers, both denying generally the allegations of the petition, and pleading the general statutes of limitations of 10 years. Thomas Milas also pleaded the special statute of limitations of 10 years with reference to proceedings for the recovery of dower. Martha C. denied this, and pleaded that the deed of April 8, 1898, under which plaintiff claims, was obtained from her by fraud on the part of the grantees, and asked that it be canceled and set aside. The new matter in both answers was denied by replication. Reply to the answer of Martha C. also pleaded the statute of limitations to the equitable relief asked by her.

The defendant Martha C. Phillips was married to one Taylor August 8, 1903. They

continued to live together as husband and wife until April 5, 1907, when she obtained a divorce from him. Jessie, the youngest child of James J. and Martha C. Phillips, was the last to reach her majority, which occurred in 1914.

The three Smith brothers entered upon the land under their deed from Martha, and the plaintiff corporation, under its deed from them, continued in possession. On August 21, 1899, Martha C., the widow, being duly qualified as guardian of her children, brought ejectment in their name against the Smith brothers and one Presson, their tenant, and recovered judgment therein, which was affirmed by this court. Phillips v. Presson, 172 Mo. 24, 72 S. W. 501. She immediately entered with her children under the judgment, and she and her son and codefendant, Thomas Milas Phillips, have remained on the land ever since.

No dower has ever been admeasured or assigned to Mrs. Phillips or to any person representing her dower estate; nor has any proceeding been had to set off the homestead to the widow or children, unless that was the effect of the ejectment determined in this court in 1902.

On August 24, 1899, Mrs. Phillips brought suit in equity to cancel her deed to the Smith brothers, which was dismissed at the following October term. The judgment was for the defendants on the ejectment issue, from which the plaintiff has prosecuted this appeal. The court also, by the same judgment, found the issue tendered by the cross-petition of Mrs. Phillips for the plaintiff, and refused the equitable relief asked, from which she has appealed. These appeals have been separately docketed and argued in this court, and are therefore separately considered.

1. The only question arising upon this appeal is whether by the deed of Mrs. Phillips to the Smith brothers, dated August 8, 1898, and their deed to the plaintiff corporation, the latter had, on August 16, 1917, the date of the beginning of this action, any possessory interest in the land, which it might recover thereby. The converse of the same proposition is whether, but for that conveyance, Mrs. Phillips, the grantor, would now have any possessory interest in the land recoverable in any form of action she might bring. The land was the homestead of her deceased husband. In 1895 she and her six children were, by his death, left on the land, and it was then their family homestead. By virtue of this statute a freehold estate to the whole immediately vested in her under the Homestead Act of 1895 (R. S. 1899, § 3620), subject to be defeated by her remarriage, and also subject to the "joint right of occupation" by the children during their minority. This being the only land of which he died seized, and not exceeding in value the sum of \$1,500, the homestead estate vest-

ed in herself and children included all the dower to which she could in any possible event be entitled, unless she should remarry. In that event her interest in the homestead would cease by the terms of the act which created it.

The appellant's sole claim of title is founded upon the deed from the widow made in April, 1898, purporting to convey her life interest. We will assume that through this deed it became clothed with all her interest in the homestead, and her alternative right or dower should she remarry, and also, in that event, her right to quarantine until dower should be admeasured and assigned to her. *Chrisman v. Linderman*, 202 Mo. 605, 100 S. W. 1090, 10 L. R. A. (N. S.) 1205, 119 Am. St. Rep. 822. This deed gave, so far as she was concerned, an immediate possessory right jointly with her children, and immediately upon its execution the grantees made an arrangement with her by which she not only vacated the homestead herself, but took her children with her to a farm in New Madrid county, owned by the grantees, who entered upon the homestead themselves, and remained in exclusive possession thereof by themselves, their grantee the plaintiff corporation, and its tenant until ousted by the children in pursuance of the judgment of this court in *Phillips v. Presson et al.*, 172 Mo. 24, 72 S. W. 501. It thus happened that on August 8, 1903, while the minor children were, by their mother, duly qualified as their guardian, in possession, the homestead title was extinguished by the marriage of Mrs. Phillips. The question thus presented is whether this plaintiff, upon the title acquired through the deed of Mrs. Phillips to the Smith brothers, being out of possession, are now entitled to recover the possession of the land or any interest therein in this suit. It does not claim the homestead interest vested in Mrs. Phillips by the death of her husband, but plants itself upon the proposition that by her remarriage in 1903 she would, but for her conveyances to the Smith brothers, have become seized of the right to have dower assigned to her and that this right was vested in plaintiff through her deed.

[1, 2] That the right of the widow to dower is assignable by deed after the death of the husband is the settled law of this state. *Chrisman v. Linderman*, supra; *Jordan v. Rudulff*, 264 Mo. 129, 174 S. W. 806. In those cases it was held, in substance, that, notwithstanding the fact that by the provisions of the Homestead Act of 1895 the widow might forfeit her homestead by remarriage, her rights of quarantine and dower remained unaffected by the intervention of the homestead estate. In the *Jordan Case* we held that the assignment of the homestead under the act of 1895—

“carried with it the primary right of possession, so that if the homestead exceeded in extent the amount of land to which she would be

entitled as dower in the absence of a homestead right, nothing was left to be assigned as dower unless and until a subsequent marriage should divest her homestead estate with its right to the possession of the whole.” 264 Mo. 137, 174 S. W. 808.

In that case the heirs had, after the death of the husband and before the remarriage of the widow, brought a suit in partition to which she was made a party, and in which the homestead was assigned to her to an extent greater than the amount to which, upon her subsequent remarriage, she was entitled as dower. After her remarriage the heirs, who were children and grandchildren of the deceased husband, entered upon the homestead, deforcing her, as she alleged, of her dower, and the action then before us was instituted to recover it out of the land included in the homestead, and to have damages for the deforcement. In sustaining her right to the remedy we also held that, as a party to the partition, she had been entitled to have her interest ascertained and declared by the court the same as would any other party to the proceeding having a contingent interest that might at some time develop into a possessory right, and, her homestead having been already set out in the partition suit, and adjudicated to be greater in extent than her dower, she was entitled by statute to recover it when deforced by the wrongful entry of the heirs upon the entire homestead tract.

The case involved a more or less critical examination of these statutes, and we find no reason to modify the rule we then applied, and therefore reaffirm it in so far as it may have any application to the facts of this case. Although this suit is ejectment for the recovery of the homestead, which includes all the lands of which the husband and ancestor died seized, and out of which any dower might be demanded, we will, for the purpose of getting to the merits of the real controversy, treat it as involving the right of the plaintiff, as assignee of the “life interest” of the widow, to have her dower in any form of action available to it for that purpose. For that reason we will refer to some features of our statutes relating to homestead and dower which were not necessarily involved in the questions before us in the *Jordan Case*.

[3] 2. The law relating to the transmission of the homestead of a deceased housekeeper or head of a family for a long time previous to 1895 was embodied in section 5439 of the Revised Statutes of 1889, as follows:

“If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged

thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow; and such homestead shall, upon the death of such housekeeper or head of a family, be limited to that period."

The most striking feature of this section lies in its indefiniteness as to the estate of the children of an intestate homesteader succeeding the death of the widow, who naturally becomes the head of the family by his death. In the absence of statutory provisions on that subject, the children, irrespective of their age, would take the entire inheritable estate upon the death of their ancestor, subject to the widow's dower, which would be extinguished by her death. Should the statute be so construed as to preserve the entire homestead estate to the last minor until he should attain his majority, and the widow should die during his minority, his guardian would constitute the head of the family of which he would be the sole member. It is unnecessary to demonstrate the complications which might arise in the application of such rule, otherwise than to note that it attracted the attention of the General Assembly, which in 1895 amended the section by defining the nature and duration of the estate of the minor children by the addition of the following clause which we italicize to suit our purpose:

"That is to say, the children shall have the *joint* right of occupation *with the widow* until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the *heirs of the husband*."

This amendment was not an inadvertence, but exhibits a deliberate purpose, in well chosen words, to limit the estate of minor children to the joint right of occupation with the widow, who has become the natural head of the family, and at her death or remarriage to pass it by descent as if no homestead law existed. By the operation of this amendment the homestead estate was extinguished by the remarriage of the widow in 1903, and the six children, or their assigns, were clothed with the entire estate of their ancestor, subject to the dower estate of his erstwhile widow, held by plaintiff through the conveyance from her to the Smith brothers, whose right, as well as the right of the plaintiff corporation, is only coextensive with hers. The question is whether the plaintiff in that capacity may maintain a suit for the recovery of her dower in the premises, notwithstanding the provisions of section 391 of the Revised Statutes of Missouri of 1909, which was in force at the time of the death of the owner, which is the event upon which the claims of both parties are founded. The section last cited is as follows:

"All actions for the recovery of dower in real estate, which shall not be commenced within ten years from the death of the husband,

through or under whom such dower is claimed or demanded, shall be forever barred."

3. In the recent case of *McFarland v. McFarland*, 278 Mo. 1, 211 S. W. 23, we said that this statute—

"exhibits the intention to limit the quarantine of the widow to 10 years and such further time as is necessary to perfect the judicial assignment of her dower, and also to put an end to the uncertainty which hangs over every title in which a deed appears which does not contain a release of dower."

This evident intention affords valuable aid in its application to the facts of each particular case involving its application. Since its enactment in 1887 legislative changes have been made affecting the recovery of dower which present questions not within the contemplation of the Legislature at that time, and it may become the duty of the court to determine whether they come within the reason of the enactment, and call for its remedial application.

[4] The section quoted requires actions for the recovery of dower to be commenced within 10 years after the death of the husband under whom it is claimed. After its enactment, and in 1895, another act was passed by which the widow, who remarried after the death of the husband under whom she claimed and enjoyed a homestead, forfeited it, and was remitted to her action for dower in the same premises. This leads us necessarily to inquire as to the effect, if any, of the special limitation imposed by the act of 1887 as finally incorporated, with amendment, in section 4558 of the Revision of 1889, upon the recovery of dower by the widow in such a case. In *Investment Co. v. Curry*, 264 Mo. 483, 175 S. W. 201, this court held directly that section 4558 of the Revision of 1889 repealed all the saving provisions of the act of 1887 by dropping them from the Revised act, so that the disability of coverture was no longer an excuse for the failure of the doweress to commence her action for the recovery of her dower within 10 years from the death of her husband, as required by said section 4558. That case simply held that the disabilities enumerated in the general statute of limitation did not apply to the special limitation imposed by this section upon actions for the recovery of dower.

In *Jordan v. Rudluff*, supra, reported in the same volume, we held with equal distinctness that the possession of the homestead by the widow and minor children under the provisions of the act of 1895 was equivalent to the enjoyment by the widow of her dower in the lands of her husband where the homestead exceeded in extent the dower to which she would have been entitled but for the existence of the homestead right. This decision proceeded upon the principle that, upon the extinguishment of the homestead by the marriage of the widow, her

right arose to have her dower in all the lands assigned out of the lands which she had theretofore possessed by her right of homestead, the entire homestead, subject to her dower, having descended to the heirs under the provisions of the act of 1895. It was upon her death or remarriage that the act devolved the title upon the heirs of the husband. Laws 1895, p. 186. The entire title and possession became as if no homestead law had ever existed. It consisted of the right of dower consummate in the widow and the estate of inheritance cast upon the children by the death of their father.

This subject was before us in *McFarland v. McFarland*, supra. In that case the widow, upon the death of the husband, made an arrangement with the heirs by which the lands of the deceased husband were to be held and managed for the benefit of all, she receiving one-third of the value of the rents and profits annually. This arrangement was carried out for 10 years, at the end of which the heirs refused to recognize her right under the agreement by paying her the agreed share of the rentals. We held that the heirs were estopped from repudiating the agreement for the purpose of availing themselves of this same special statute of limitations, and that for that purpose the arrangement amounted to a voluntary assignment of dower under which the widow had enjoyed her statutory right, and that the repudiation of the agreement constituted such forfeiture of her dower as entitled her, to bring her action, notwithstanding that more than 10 years had elapsed since the death of the husband through whom she claimed it.

[5] We hold upon the authority of these cases construing the act of 1895, from which we have quoted, that the homestead created and vested in the widow and minor children of the deceased Phillips ceased as to all of them upon the remarriage of the widow; that thereupon and thereafter the children were in possession by right of inheritance from their father and not under the homestead act, and that the right then accrued to the widow or her assignee to sue for and have her dower in the same lands admeasured and assigned to her. It only remains to determine whether the plaintiff, as such assignee, has lost this right by lapse of time under the provisions of this or any other statute of limitations of this state.

[6] 4. Section 5439 of the Revised Statutes of 1889, from which we have already quoted, provides that the probate court should, when necessary, appoint three commissioners to set out the homestead of the deceased householder or head of a family, and the next

section required that the commissioners should first set out the homestead, and from the residue of the real estate of the deceased set out the dower, which should be diminished by the value of the interest of the widow in the homestead, and that if such interest should equal or exceed her dower no dower should be assigned to the widow. The homestead being all the real estate of which Mr. Phillips died seized, and it being admitted that it did not exceed in value \$1,500, it was unnecessary to appoint commissioners, and no dower was assigned. The homestead having been extinguished by her remarriage on the 8th day of August, 1903, her right to dower from the same lands then accrued against the heirs, whose title by inheritance had become complete subject to such dower, to plaintiff, through the widow's deed to the Smith brothers dated April 8, 1898. This suit was instituted on August 16, 1917, more than 14 years after the homestead title of the widow and minor children became extinct, and 20 odd years after the death of the husband.

[7] 5. In this state the right of quarantine depends upon the provisions of section 4533 of the Revised Statutes of 1889, which provides that—

“Until dower be assigned, the widow may remain in and enjoy the mansion house of her husband, and the messuages or plantation thereto belonging, without being liable to pay any rent for the same.”

This is an incident to the right to have dower assigned, and when that right ceases the right to quarantine also disappears. Were it otherwise, the failure of the doweress to institute a proceeding for the recovery of her dower within the time limited would have the effect to give her the right of possession of the mansion house and messuages or plantation thereto belonging in perpetuity. The question is whether the right to sue for dower is barred by the statute of limitation of 10 years, and of that there can be no doubt.

It follows that the judgment of the circuit court for Mississippi county denying the plaintiff the relief asked in its petition is right, and it is therefore affirmed.

RAGLAND and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

All the Judges concur; JAMES T. BLAIR, C. J., in the result.

**C. M. SMITH BROS. LAND & INV. CO.  
v. PHILLIPS et al. (No. 21517.)**

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921. Rehearing Denied  
July 23, 1921.)

**1. Dower §75—Right of widow in possession  
as guardian of children held barred.**

Where a widow, after conveying her life estate in the lands left by her deceased husband, recovered possession thereof from her grantee, as the guardian of her minor children, on the ground that the premises constituted the homestead, her action was an admission that her right to possession with the children had passed by her deed, and her claim of dower rights in the homestead property is barred in 10 years after her remarriage, which terminated the homestead, as effectively as were the rights of the grantees under her deed.

**2. Appeal and error §1073(1)—Failure to  
cancel deeds claimed to be fraudulent to parties  
whose rights were barred held not prejudicial.**

In ejectment where plaintiff claimed the dower rights of a widow under a deed from her which she asked by cross-bill to have set aside for fraud, and where the plaintiff's action was dismissed because the widow's dower rights were barred by limitations, the judgment denying cancellation of deed was not prejudicial to the widow where she made no claim against her child, to whom the property had descended subject to her dower.

Appeal from Circuit Court, Mississippi County; Frank Kelly, Judge.

Ejectment by the C. M. Smith Bros. Land & Investment Company against Martha C. Phillips and another, in which the named defendant filed a cross-petition seeking equitable relief against the plaintiff. From a judgment denying the relief prayed by the cross-petition, the named defendant appeals. Affirmed.

See, also, 233 S. W. 413.

Haw & Brown, of Charleston, for appellant.

R. L. Ward, of Caruthersville, and Russell & Joslyn, of Charleston, for respondent.

**BROWN, C.** Two appeals were taken in this case and separately docketed for hearing in this court. The first of these (No. 21516, 233 S. W. 413) was taken by plaintiff, who sued in ejectment, from a judgment denying it the relief asked, and this is an appeal by the defendant Martha C. Phillips from the judgment dismissing a cross-petition filed by her asking equitable relief against the plaintiff. It asked no relief against her codefendant Thomas Milas Phillips, and no issue between the two defendants was presented by the pleadings.

We have held, in a separate opinion considering the matters involved in the plaintiff's

appeal, that it had no cause of action, and affirmed the judgment of the Circuit Court to that effect, and will not reconsider any matter so determined in passing upon the single question presented by this appeal, namely, the right of the appellant to the affirmative relief sought by her in her cross-petition. In all other respects the holdings of the court as expressed in that opinion are equally conclusive as to all the parties to these appeals.

The suit is plain ejectment, and the petition is in the conventional form, charging both defendants alike with possession of the premises. At the trial plaintiff claimed through a conveyance executed by this appellant April 8, 1898, to the Smith brothers, its predecessors in title, conveying her "life interest" in the 80 acres of land in question as the widow of James J. Phillips, who died intestate in 1895 while domiciled upon the land with his wife and their minor children. The appellant having remarried August 8, 1903, and no dower having been assigned, the plaintiff claimed all right to the possession which appellant, but for her conveyance, would have had as doweress by virtue of her statutory quarantine, and not otherwise. We held, in considering the plaintiff's appeal, that more than 10 years having elapsed after the death of appellant's husband and her remarriage on August 8, 1903, and the institution of this suit, the plaintiff was barred of recovery upon that title by the terms of the special statute of limitations relating to the recovery of dower. This holding put the plaintiff out of the case. It was founded upon the theory that appellant's conveyance was valid and sufficient to transfer all her interest as doweress which might spring from her subsequent remarriage, and that those interests had become forfeited by its inaction.

The appellant, by her cross-action now under consideration, undertakes to present a theory not involved in the plaintiff's appeal. She asserts, with much force and detail, that her conveyance to the Smith brothers, through whom plaintiff claims, was void for fraud perpetrated upon her by the grantees in its procurement, and that she, having been in possession adverse to plaintiff's claim through her deed, was not barred by the statute of limitations from presenting it as a defense when that possession should be attacked. In other words, she contends, as we understand, that, the deed being void for fraud, she was not bound to act upon the presumption that the holders intended to enforce it, but might rest upon the assurance of their honest recognition, by inaction, of her right. Without questioning the general rule that matters barred by the statute of limitation as ground of recovery may nevertheless be used as weapons of defense in proper cases, we will consider it with reference to the facts before us.

When appellant made the deed to Smith brothers in 1898 she occupied the land with her six minor children as the homestead left her by her deceased husband. She immediately surrendered its possession to Smith brothers, the purchasers, and moved with her children to a farm which they provided for her occupation. On August 21, 1899, after qualifying as guardian of her children, she brought suit in ejectment in their name against the tenant of Smith brothers to recover possession of the homestead, and on the 24th of the same month she sued Smith brothers in equity to set aside her deed to them for fraud. The last-mentioned suit was dismissed by her at the first term while the ejectment suit was prosecuted to final judgment, which was affirmed by this court on February 18, 1903 (Phillips v. Presson, 172 Mo. 24, 72 S. W. 501), and she took possession under the judgment for her children, the youngest of whom attained her majority about the beginning of the year 1914.

[1] The fact that she instituted the ejectment suit for her children without joining herself as a plaintiff can only be explained as a clear admission that her right to possession with them under the homestead act had passed by her deed to the Smith brothers. Her suit to cancel that deed, instituted three days afterward, although indicating a disposition to reinstate herself in her homestead right for the same fraud which she now pleads, her prompt dismissal of that suit indicates a deliberate purpose to abandon the position that her deed was invalid for fraud perpetrated upon her by the grantees, and stand upon the right of her children alone. Her final recovery in the Presson Case was in right of her children alone, and we find nothing in this record indicating that she changed her position in that respect by denial of the validity of her deed to Smith brothers or otherwise until the filing of her amended answer in this suit, or that she had asked or received from her children, the heirs of the fee, any assignment of, compensation for, or other recognition of her dower. She is as clearly barred of her action therefor under the special limitation of 10 years as was the plaintiff claiming through Smith brothers, her grantees.

[2] The plaintiff being out of the case, the only use this appellant could make of her cross-bill would be to aid her in procuring an assignment of her dower as against her co-defendant, Thomas Milas Phillips. She asks no remedy against him, and the pleadings make no issue whatever between them. She only asks a useless judgment against the plaintiff.

The subject-matter of this suit being confined to the title of the parties to the particular tract of land in suit, the plaintiff having been defeated by the judgment of the circuit

court to the effect that it has no possessory right whatever in or to the premises, and no issue being raised by the pleadings as between the defendants, we can see no reason why that judgment does not settle the entire controversy.

The 19 year old cause of action presented by the cross-petition of this appellant having been unnecessary to her complete defense, she was not prejudiced by the general finding of the court against her on the issue so presented. Although it appears that the deed involved in this part of the controversy purported to convey some interest in other lands, such lands were in no way involved in this suit, nor are they described in the pleadings. No claim is made that the grantees in the deed and their successors, if any, have not been in undisturbed possession of such lands from the date of its execution in 1898.

The judgment seems to afford appellant all the relief to which she is entitled upon the pleadings, and we see no reason for disturbing it to let in a new trial in her favor which, so far as her appeal shows, cannot add to the relief already granted her. The finding and judgment of the circuit court upon her cross-petition is therefore affirmed.

SMALL and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

All the Judges concur.

#### SHAFIR v. SIEBEN et al. (No. 20866.)

(Supreme Court of Missouri, in Banc. May 24, 1921. Motion for Rehearing Denied July 22, 1921.)

1. Appeal and error  $\S$  917(1)—Whether recited fact in pleading demurred to exists is immaterial on appeal.

The motion of a city, defendant in an action for injuries resulting from obstruction of a street, to dismiss the writ of error on the ground that the record did not show that notice was given to the city, as required by Acts 1913, p. 545, was without merit, where the cause was tried on general demurrer to the petition; the question presented by the writ of error being simply whether the petition stated a good cause of action and the statement in the petition that such notice was given was conclusive.

2. Appeal and error  $\S$  414—Notice of writ of error need not be given to defendants against whom cause was dismissed.

Where a cause was voluntarily dismissed by plaintiff as to certain defendants, who were therefore in no sense "adverse parties" to the final judgment entered on demurrers, and against which the writ of error was directed, Rev. St. 1909,  $\S$  2054-2066, did not require that such defendants be given notice of the suing out of the writ of error.

### 3. Appeal and error ⇐349—Application by infant for writ of error held timely.

Where final judgment was entered against a minor plaintiff on demurrers June 16, 1916, and he became of age on December 12, 1917, his petition for writ of error presented December 28, 1917, was timely; the action having been instituted by plaintiff's guardian ad litem which involved a finding by the circuit court of his minority and the presumption that it continued until rendition of final judgment arose from its entry in that form, and the court's finding as to the time he became of age being conclusive.

### 4. Appeal and error ⇐165—Motion to dismiss writ of error because of pendency of other suit held without merit.

Where a minor plaintiff instituted suit by guardian ad litem, and on judgment being rendered against him an appeal was taken, which later was dismissed and another suit instituted on the same cause of action during his minority, which suit was dismissed, and plaintiff on arriving at his majority promptly took out a writ of error, defendant's motion for dismissal of the writ of error on the ground that another suit was instituted on the same cause of action and dismissed for want of prosecution, on the theory that pendency of the new suit at the time of the issuance of the writ of error amounted to an abandonment of the suit in which the writ was issued, *held* without merit.

### 5. Negligence ⇐62(3)—Proximate cause of injury by independent act of third person.

Where the direct and immediate cause of the injury, although the independent act of a third person, belongs to a class against which defendant is legally bound to protect the plaintiff as one of the general public, defendant will be liable for such injury for his failure to afford such protection.

### 6. Municipal corporations ⇐775 — Use of street for moving and placing of building materials authorized.

The law authorizes the use of a street to a necessary and reasonable extent for the moving and placing of material to be used in an adjoining improvement.

### 7. Municipal corporations ⇐816(1)—Petition for injuries caused by obstruction of street held sufficient.

Petition in an action against a city for injuries resulting from obstruction of street and sidewalk by building materials, causing plaintiff to be struck by an automobile, *held* to sufficiently allege knowledge of the city, express or implied, and that the obstruction placed by the contractor and owners was unnecessary and unreasonable, and that the city was negligent in permitting its maintenance.

### 8. Municipal corporations ⇐808(2)—Right of owners of the adjoining property to obstruct street.

The dedication, construction, and maintenance of public streets is for the benefit of the adjoining owners as well as the general public, and the right of such owners to obstruct the public in their use does not arise out of any title adverse to the public, but is an easement of necessity subordinate to the public control.

is limited by the necessity out of which it arises, and must be reasonably exercised.

### 9. Municipal corporations ⇐800(1)—Pedestrian compelled by obstruction to go into street, where he was struck by automobile, entitled to damages proximately resulting.

Where a pedestrian was unlawfully excluded from the use of the sidewalk by reason of obstructions placed by a building contractor and adjoining owners, and compelled to go into the street, where he was struck by an automobile, he was deprived of a legal right, and entitled to damages proximately resulting therefrom.

### 10. Municipal corporations ⇐808(2) — All participants held jointly liable for damage resulting from the street obstruction.

Where a pedestrian was required to walk in the street, owing to obstructions placed on the sidewalk by building contractors and adjoining owners, and was injured by the wrongful act of an automobile driver, the two causes of the injury become commingled, and all participants were negligent, and jointly liable.

### 11. Torts ⇐22—All tort-feasors jointly liable.

Every tort-feasor, whose wrongful act concurs in inflicting an injury, is jointly liable for the resulting damage.

Graves and Elder, JJ., dissenting.

Error to Circuit Court, Jackson County; O. A. Lucas, Judge.

Suit by Joe Shafr against Henry Sieben, Ralph J. Smiley, Martin J. Carroll, Olem B. Altman, Frank G. Altman, and Kansas City, Mo. Demurrers of defendants Carroll, Altman, and Kansas City were sustained, the cause dismissed as to defendants Smiley and Sieben and final judgment entered for the remaining defendants, and plaintiff brings error. Reversed and cause remanded.

Park & Brown and Achtenberg & Rosenberg, all of Kansas City, for plaintiff in error.

E. M. Harber and Francis M. Hayward, both of Kansas City, for defendant in error Kansas City.

Chas. M. Bush, of Kansas City, for defendant in error Carroll.

Hogsett & Boyle, of Kansas City, for defendant in error Altman.

BROWN, C. This is a suit for personal injuries in which Joe Shafr, a minor, is plaintiff, and Henry Sieben, Ralph J. Smiley, Martin J. Carroll, Olem B. Altman, Frank G. Altman, and Kansas City, Mo., are defendants. The defendants Altman are sued as owners of a lot fronting the south side of Fifteenth street at or near the east side of Troost avenue. The defendant Carroll was a building contractor engaged in constructing a building on said lot, for the owners. The defendant Sieben was the owner of an automobile which struck and injured the plaintiff, and Smiley was his employee driving the machine at the time of the injury. Troost



avenue was a street in said city running north and south, and Fifteenth street crossed it, running east past the place of the accident, which occurred east of and near Troost avenue. The travel was heavy on both streets, and on Fifteenth street it was customary to run automobiles at a very high rate of speed, which was known to the defendants.

After stating these things, the petition alleges in substance, that before the injury the defendant Carroll, the contractor, and the Altmans, the owners, had, with the knowledge of the defendant city, completely obstructed the sidewalk on the south side of Fifteenth street east of Troost avenue with building material piled upon it, and which extended from the sidewalk nearly to the center of Fifteenth street; that at about 2 o'clock on the morning of January 9, 1916, the plaintiff was lawfully passing northwardly on the east side of Troost avenue, and when he reached the south side of Fifteenth street turned on the sidewalk, which he found obstructed and impassable on account of said building material, and was compelled to go out into Fifteenth street to pass around it; that as he was going eastward on Fifteenth street for that purpose, his view being obstructed by numerous other persons around him, the automobile of the defendant Sieben being driven for him by defendant Smiley, his employee, coming from the west across Troost avenue at a speed of more than 30 miles an hour, struck the plaintiff, and inflicted injuries of so serious a nature as to permanently disfigure and disable him. The petition also pleads notice to the city of the accident and intention to bring suit in time and manner required by the statute. No objection to the form of the petition is made.

The defendants Kansas City, the Altmans, and Carroll filed their several general demurrers on May 16, 1916, one of which, a fair specimen of all, is as follows:

"Now comes the above-named defendant, Kansas City, and demurs to the amended petition of the plaintiff herein, and says that the same is insufficient in law, for the reason that on its face it does not state facts sufficient to constitute a cause of action against this defendant."

These demurrers were, on June 15, 1916, sustained, and the cause was dismissed by plaintiff as to Sieben and Smiley. Final judgment was entered for the remaining defendants, from which plaintiff duly prosecuted an appeal to this court, which was, on May 17, 1917, dismissed by plaintiff, and on December 28, 1917, he sued out this writ of error, upon which the cause is again brought to this court.

The petition for this writ of error stated plaintiff had, on December 12, 1917, become of full age. On December 30, 1919, the defendant Kansas City filed its motion in this

court to quash the writ of error upon the following grounds: (1) That it does not appear that any notice of the claim had been given the city as provided by the act of March 21, 1913; (2) because the writ of error was prosecuted against Sieben and Smiley, who had been dismissed from the case, and Frank G. Altman, who has since died, all of whom were without notice of the writ; (3) that there was no evidence in the record as to when the plaintiff became of age; and (4) that, after the dismissal of his appeal in this case, plaintiff had brought a new suit upon the same cause of action, which remained pending in the Jackson Circuit Court until October 21, 1919, when it was dismissed for want of prosecution.

[1] 1. The motion of Kansas City to dismiss the writ of error seems to be founded to some extent upon misapprehension of facts as well as of law. The first ground assigned is that it does not appear in the record that notice was given the city as required by the terms of the act of March 21, 1913. Acts 1913, p. 545. The cause having been tried upon general demurrer to the petition the question presented by the writ of error is simply whether it stated a good cause of action. We cannot go outside the allegations of the petition in determining it. If that pleading failed to state that such notice had been given, the question would arise whether such statement was necessary—that is to say, whether the fact could be shown without pleading it. This would be a pure question of law. Examining the petition, however, we find that it does state the fact that the notice was given, and this statement is conclusive for any purpose which can be served by this writ.

[2] The next ground assigned is that the plaintiff sued out his writ of error against all the defendants, and, having failed to notify Sieben, Smiley, and Frank G. Altman, he has lost his right to prosecute the writ against the other defendants, and especially against the defendant Kansas City. This assignment is also founded on a mistake. The record shows that notice was given to Frank G. Altman, who has since died, and that the cause was voluntarily dismissed by plaintiff as to defendants Sieben and Smiley, who are therefore in no sense parties to the final judgment entered upon the demurrers, and against which the writ of error is directed. We find nothing in the statute authorizing the writ (R. S. 1909, §§ 2054 to 2066, inclusive) requiring them to be brought into a controversy having no existence as to them. They are in no sense "adverse parties" to a writ of error sued out by the unsuccessful plaintiff who dismissed them, under the provisions of section 2071 of the same statute.

[3] Nor is there anything in the third as-

signment of this motion, which is predicated upon the assumption that the plaintiff was too late in making application for the writ. Final judgment was entered against him upon the demurrers June 16, 1916. His petition for the writ was presented December 28, 1917, and the writ was allowed and issued on the same date. The action was instituted in plaintiff's behalf by his guardian ad litem, which involved a finding by the circuit court of his minority, and the presumption that it continued until the rendition of final judgment arose from its entry in that form. This being true he was in ample time with his application for the writ, on December 28, 1917. R. S. 1909, § 2056. His petition for the writ averred that he became 21 years old on December 12 of the same year, and so far as is necessary to uphold the writ, this court found that to be the fact, and it must so stand unless overthrown in a proper proceeding for that purpose. No such showing is made or offered here. On the contrary the city says that it is ignorant as to whether the statement upon which this court acted in issuing the writ was true or false, and for that reason alone asks it to be dismissed.

[4] The city also states as a ground for the dismissal of the writ that another suit was instituted in the Jackson circuit court by the same plaintiff, against the same defendants, upon the same cause of action, which suit was afterward, and before the filing of the motion, dismissed for want of prosecution. Its theory evidently is that the pendency of the new suit at the time of the issue of this writ amounted to an abandonment of the suit in which the writ was issued, so that the writ was void ab initio.

The defendants have made no argument, cited no authority, nor given any reason in support of their contention that the writ of error should be dismissed on any of the grounds stated, and we fail to find any authority on those questions. The record shows that the plaintiff, a minor, instituted this suit by his guardian ad litem; that the judgment before us was rendered against him, and that through his guardian ad litem an appeal was taken to this court; that afterward the appeal was dismissed, and another suit instituted on the same cause of action during his minority; that this suit was very promptly dismissed, and that plaintiff upon arriving at his majority promptly took out this writ. The only adjudication of the subject-matter is the adjudication in this case, and at the time he became of age and took out this writ no other action was pending involving his right. Without determining whether there might not be circumstances in which the pendency of another action upon the same cause might affect the right of a plaintiff to a writ of error to a former judgment against him, there is no such case

presented here. The writ is sufficient in the respects urged in the motion to entitle the plaintiff in error to a review of the judgment against him in this court.

2. It seems to be assumed by both parties that the question considered by the trial court in sustaining a general demurrer to this petition was that, whatever may have been the rights of the parties with reference to the obstruction in Fifteenth street to which the plaintiff attributes his injury, it was not the proximate cause of the injury, which resulted from the negligent operation of an automobile belonging to Sieben and operated by Smiley, original defendants in this case, against whom it was dismissed. Both parties suggest in argument that the reason of such dismissal was that neither of them is financially responsible, so that further proceedings against them would be useless. In this connection it is also assumed that this is only one of a number of injuries inflicted at the same time and place (some of which were fatal) by the operation of the same machine. One of these cases, *Dane-schocky v. Sieble*, 195 Mo. App. 470, 193 S. W. 906, resulted in a judgment for these defendants upon demurrer to a similar petition, from which an appeal was taken to the Kansas City Court of Appeals, which reversed the judgment and remanded the cause. The propriety of that decision is directly involved here. The point in issue was stated by that court as follows:

"In order to sustain an action for negligence, it is necessary that such negligence should be the proximate cause of the injury, and the controversy here is whether the allegations as above summarized show that the negligence of the defendant was the proximate cause of the injury."

That is a correct statement of the proposition now before us. This question of what constitutes the proximate—that is to say, the immediate and direct—cause of an actionable injury to persons or property sounds easy in theory, but is involved in great difficulty in its application to the facts of particular cases, and has been discussed by the courts from innumerable standpoints of fact, with results that are difficult and sometimes impossible to reconcile. We may illustrate its nature by supposing that one should tie another hand and foot and fasten him to a stake in the highway constantly used for the passage of vehicles, and the victim should, while helpless in this position, be run over and injured. The question would arise whether the act of the one placing him in this position or the act of the driver of the vehicle passing over him would be the proximate or immediate and direct cause of the injury. Much legal learning has been brought to bear in arriving at different and

irreconcilable conclusions upon principles involved in more or less similar conditions.

Sometimes courts have held that the intervention of an independent agency in the actual infliction of the injury breaks the causal connection between the original wrong and the infliction of the injury, so that the first wrongdoer escapes liability for the indirect result of his unlawful act. The fact that the latter is sometimes negligent in the final act is often dwelt upon as a reason for this interpretation in specific cases, but it is difficult to understand this reasoning in cases where the original act was an unlawful one and actually contributed to the unfortunate result. It may be said, in such cases, that the result was an exceptional one, and not in contemplation of the first wrongdoer. This court has stated the law in this respect in *Buckner v. Horse & Mule Co.*, 221 Mo. loc. cit. 710, 120 S. W. 770. Referring to *Dean v. Railroad*, 199 Mo. loc. cit. 411, 97 S. W. loc. cit. 910, we said:

"The liability of a person charged with negligence does not depend on the question whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of; but he may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission."

This reasonable statement of the rule was again approved by us in *Obermeyer v. Logeman Chair Co.*, 229 Mo. loc. cit. 111, 129 S. W. loc. cit. 212, where, quoting with approval from *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248, we said:

"If a person, while observing due care for his personal safety, be injured by the combined result of an accident (as the inadvertent or careless act of another) and the negligence of a city or village, and the injury would not have been sustained but for such negligence (of the city or village), yet, although the accident (or wrongful act of the third person) be the primary cause of the injury, if it was one which common prudence and sagacity could not have foreseen and provided against, the negligent city or village will be liable for the injury."

In *Miller v. United Railways Co.*, 155 Mo. App. 541, 134 S. W. 1049, the St. Louis Court of Appeals stated the same doctrine as follows:

"When it appears, as in this case, that the injury would not have befallen plaintiff but for the negligent act of either party in the first instance, such negligence is viewed in the eye of the law as a proximate and efficient cause of his hurt, though it concurs with that of another independent actor which may intervene in point of time subsequently thereto."

See, also, *Benton v. St. Louis*, 248 Mo. 98, 154 S. W. 473.

[5] From these and many other Missouri

cases bearing more or less directly upon this point we consider the rule to be well established in this state that where the direct and immediate cause of the injury, although the independent act of a third person, belongs to a class against which the defendant is legally bound to protect the plaintiff as one of the general public, defendant will be liable in damage for such injury for his failure to afford such protection.

3. The law divides the streets of cities into separate ways for the accommodation of footmen and vehicles, and the necessity for the maintenance of such division constantly increases from the increase of heavy vehicles carrying their own propelling power and running lawfully at a speed which would, in earlier times, have been considered reckless and unlawful for vehicles drawn by horses. For instance, the maximum speed of 20 miles per hour for automobiles on the street in question between crossings, authorized by the ordinance of Kansas City pleaded in this case, would not ordinarily be excelled by a runaway team, so that the protection of pedestrians by sidewalks for their exclusive use is an absolute necessity.

[6, 7] It is true that the law authorizes the use of the street to a necessary and reasonable extent for the moving and placing of material to be used in an adjoining improvement; but the petition states that it negligently and unnecessarily used for that purpose, to the exclusion of the public, the entire sidewalk and nearly half the street. Even the most massive buildings may be and constantly are erected without such inconvenience to the public. It also states that the traffic along Fifteenth street was heavy at that point, and that it was in constant use by automobiles traveling at an excessive and dangerous speed. The accident happened in the night, when it is most difficult to ascertain the position and movements of automobiles and other dangerous vehicles. The knowledge of the city, express or implied, is sufficiently alleged. Under these circumstances, the petition imposed upon these defendants in error the duty of answering to the charge of unlawfully obstructing the street.

[8, 9] The duty of the city to maintain the sidewalk in a safe condition for the use of footmen rests principally upon the necessity of preserving them from the inconvenience and danger of mingling with the traffic that resulted in this particular injury. The dedication, construction, and maintenance of the public streets is for the benefit of the owners of adjoining property as well as of the general public, and these owners assume the duties incident to their position as such. Their right to obstruct the public in their use does not arise out of any title adverse to the public but is an easement of necessity

subordinate to the public control, and is limited by the necessity out of which it arises and must be reasonably exercised. The petition sufficiently charges that the obstruction placed and maintained in this street by the contractor and owners of the adjoining lot was unnecessary and unreasonable, and that the city in permitting its maintenance in violation of law was negligent. This is sufficient to sustain the liability of all these parties for damages resulting therefrom and therefore called for an answer. The duty to keep the sidewalk free from unnecessary and unreasonable obstruction is imposed for the special benefit of pedestrians using it, or attempting to use it, in traveling along the street, and the plaintiff belonged to this class. When he was unlawfully excluded from the use of the sidewalk and compelled to go into the street, he was deprived of a right to which he, as well as all others similarly situated, was lawfully entitled, and is also entitled to such damages as may have been the proximate result thereof. The thing that happened was the very thing from which the imposition of this duty was designed to protect plaintiff. This brings us back to the question stated by the Kansas City Court of Appeals.

[10, 11] 4. The cause of the injury in this case necessarily consisted of two elements; (1) The presence of the plaintiff in the path of the automobile which struck him; and (2) the blow it delivered against his body. Both of these causes were present and in full operation at the instant of the injury. According to the allegation of the petition, his presence was due to the wrongful act of these defendants, and the blow was delivered by the wrongful act of the driver of the machine. Neither would or could have occurred without the operation of the other at the same time. Both were commingled in the single act of the injury. The argument by which it is attempted to separate them is specious and artificial. All were negligent in their participation, and no principle of law has a deeper foundation or is more firmly established in this state than that every tort-feasor whose wrongful act concurs in inflicting the injury is liable for the resulting damage. The completed wrong is the joint act of all, so that the man who holds the victim is jointly guilty with the man who beats him.

This precise question was before this court in *Applegate v. Railroad*, 252 Mo. 173, 158

S. W. 876, which was a suit against the railroad company for personal injuries sustained by an employee of one Davis in handling cars upon a side track serving the warehouse of the latter. The petition alleged negligence in the construction and maintenance of the track upon a grade of 1 per cent. The defendant contended that it resulted from the negligence of Davis in handling a car on this track. The court instructed the jury, in substance, that if they found the defendant was negligent, and the plaintiff was himself exercising due care, then, if the negligence of defendant combined and united with the negligence of some one else to cause the injury, it would not defeat recovery. In sustaining this instruction the court said:

"It is a hornbook doctrine of the law of torts that, if B., C., and D. unite in negligently [or willfully] injuring A., A. may recover against all or any one of them. If he sue B., B. may not defend on the theory C. or D., or both, contributed. The same principle applies where some form of vis major or other independent instrumentality aids the event."

It is unnecessary to attempt the further clarification of this statement. It explains and speaks for itself, and has been definitely stated by this court in numerous cases, a few of which are the following: *Buckner v. Horse & Mule Co.*, supra; *Obermeyer v. Logeman Chair Co.*, supra; *Reynolds v. Kinyon*, 222 S. W. 476; *Campbell v. United Railways*, 243 Mo. 141, 147 S. W. 788. The Kansas City Court of Appeals in *Daneschoky v. Sieble*, supra, a case arising upon the same facts and presented upon demurrer to a similar petition, in an interesting and exhaustive review of authorities on this question, arrived at the conclusion that the petition stated a cause of action, and reversed the judgment of the trial court for defendant upon demurrer to the petition. We think the judgment of the Court of Appeals was clearly right.

The judgment of the Jackson circuit court is accordingly reversed, and the cause remanded to that court, for further proceedings in accordance with the views herein stated.

RAGLAND, C., concurs.

SMALL, C., not sitting.

WALKER, C. J., and WOODSON, HIGBEE, and DAVID E. BLAIR, JJ., concur.

JAMES T. BLAIR, J., concurs in result. GRAVES and ELDER, JJ., dissent.

**STATE ex rel. SOUTHWESTERN BELL  
TELEPHONE CO. v. PUBLIC SERVICE  
COMMISSION et al. (No. 21930.)**

(Supreme Court of Missouri, in Banc. May 24,  
1921. Motion for Rehearing Denied  
Aug. 1, 1921.)

**1. Public service commissions §11 — Must  
conform to prescribed procedure.**

The Public Service Commission, in the exercise of its defined powers, must conform to the procedure prescribed in the act creating it or that of the general law where applicable to render its findings regular and to afford the corporation to be affected ample opportunity to present its objections to the proposed action.

**2. Public service commissions §7—Fixing of  
public utility rates is based on police power.**

The primary power of fixing reasonable rates to be charged by a public utility corporation finds its origin in the police power of the state recognized in Const. art. 12, § 5.

**3. Constitutional law §62—Power to fix rates  
may be delegated to commission.**

The Legislature may delegate the power of fixing rates for public service corporations to the Public Service Commission.

**4. Telegraphs and telephones §33(1)—Charges  
subject to control of public service commission.**

Rev. St. 1919, § 10502, authorizes the Public Service Commission to determine just and reasonable rates and charges to be made by a telephone company and the power of the company under section 10128 to make reasonable charges for services rendered is subordinate to the power conferred upon the commission.

**5. Telegraphs and telephones §26¾, New,  
vol. 7A Key-No. Series—Federal control  
merely suspended power to fix rates.**

Act Cong. July 16, 1918, placing telephone lines under federal control, merely suspended until its repeal by Act July 11, 1919, and did not abolish the power of the state Public Service Commission to establish rates, especially in view of Rev. St. 1919, § 10434, relative to the effect of the orders of the commission.

**6. Telegraphs and telephones §33(1) —  
Grounds for attacking rates fixed by Commission stated.**

The reasonableness of an order of the Public Service Commission fixing telephone rates, regular upon its face, may be questioned on the ground that the rates are so low as to be confiscatory, and hence to take property without due process of law, that they were fixed, arbitrarily and unjustly, without regard to the preponderance of the competent evidence, or that they were fixed in such an unreasonable manner as to cause the shadow and not the substance to determine the validity of the exercise of the power.

**7. Public service commissions §32 — Court  
proceeds as in review of equitable proceedings  
in reviewing acts.**

The Public Service Commission acts as an administrative body in fixing rates, and when

their acts are called in question the courts are required as in the review of equitable proceedings to hear and determine the matter involved in such manner as to do full and complete justice in the premises.

**8. Public service commissions §33—Findings  
given much consideration, and deferred to  
when not unreasonable, arbitrary, or capricious.**

Under Rev. St. 1919, § 10534, providing that orders of the Public Service Commission shall be prima facie lawful and reasonable, and section 10535, providing that the burden of proof shall be upon the party seeking to set aside any order of the commission, though, on review of an order fixing rates, the entire evidence will be reviewed, much consideration is to be given to the findings of the Commission, and they will be deferred to if reasonable and not arbitrary or capricious.

**9. Telegraphs and telephones §33(1)—Reasonableness of rate question of fact for commission.**

What is a reasonable rate to be charged by a public utility such as a telephone company is a question of fact, calling for the exercise of the common sense and sound judgment of the Public Service Commission, which is not bound by any hard and fast rule, nor required to fix rates according to any general formula.

**10. Telegraphs and telephones §33(1) —  
Percentage allowable as return in fixing rates  
depends on circumstances.**

The question as to what percentage of the value of the property of a telephone company should be allowed as a return in fixing rates must be made dependent upon the facts and circumstances of the particular case.

**11. Telegraphs and telephones §33(1)—Company  
required to show fairness of allotment to  
local exchanges on account of messages handled.**

On review of an order of the Public Service Commission fixing telephone rates, the burden of proof as to reasonableness of rates rested upon the company; and where it appeared that it allowed to local exchanges for services rendered in receiving and transmitting long-distance calls 25 per cent. of the total charge on calls originating at such exchange and transmitted over the company's lines, but only 15 per cent., with a maximum charge of 20 cents, on each message transmitted over the lines of a parent company, it was incumbent upon the company to show the fairness of such allotment, and where it failed to do so, and the order of the Commission was on its face reasonable, it could not be disturbed.

**12. Telegraphs and telephones §33(1) —  
Rates held not confiscatory in view of gross  
and net returns.**

Telephone rates prescribed by the Public Service Commission, which would allow a gross return on the value of the telephone company's property of 12.81 per cent., and a net return of 6.81 per cent. after allowing 6 per cent. for depreciation were not confiscatory.

13. Telegraphs and telephones ¶33(1)—Refusal to allow installation charge not error when rates produced reasonable return.

The refusal of the Public Service Commission to allow a telephone company to make a charge for installing and moving telephones and changing names was not error where the rates prescribed by the Commission allowed a reasonable return on the value of the property of the company.

14. Telegraphs and telephones ¶33(1)—Commission held not to have acted arbitrarily or capriciously in fixing rates.

Where it was the purpose of the Public Service Commission in fixing telephone rates to regard each exchange as a separate unit, and it fixed temporary rates by making a tentative or temporary valuation of the property of the exchanges at St. Louis, Springfield, and Caruthersville, and used such valuation in testing the correctness of the company's estimates of the cost of reproduction of the property of other exchanges, it did not act arbitrarily or capriciously, especially where, on termination of federal control, it accorded the company a hearing instead of enforcing the order then in force.

15. Telegraphs and telephones ¶33(1) — Hearing not prerequisite to enforcement of rates in force upon termination of federal control.

Upon termination of federal control of telephone lines, an opportunity to a telephone company to show cause why it should not charge the rates previously fixed by the Public Service Commission, instead of those fixed by the Postmaster General, was not a prerequisite to the exercise of the Commission's power to enforce the order then in force.

16. Telegraphs and telephones ¶33(1) — Rates held based on proper valuation of property.

Where, in fixing telephone rates, the Public Service Commission gave primary consideration to the original cost of the plant, the estimates of the company's engineers of the cost of reproduction, the depreciation, and the working capital for a plant of that capacity, but they also considered the items of engineering, supervision, interest during construction, insurance, and promotion and development expenses, and also reached the same result by taking the book value of the property, deducting property not used, working capital, and depreciation reserve, and adding 10 per cent. for intangibles, it followed a proper rule.

17. Telegraphs and telephones ¶33(1)—Valuation of property for rate purposes should not be based on cost of reproduction at abnormal prices.

Where the Public Service Commission, in valuing a telephone company's property for the purpose of fixing rates, allowed for money actually spent and material actually purchased at war-time prices, it properly refused to base the rates on the reproduction cost of the telephone system, less depreciation estimated at war-time or abnormal prices.

18. Telegraphs and telephones ¶33(1)—Commission held to have acted fairly on claim for rental of instruments, etc.

In fixing telephone rates, the Public Service Commission did not act unfairly in refusing to allow the full amount paid a parent company as rental on the receivers and transmitters and induction coils consisting of 4½ per cent. of the gross revenue of the subsidiary company, where, after hearing evidence, the Commission found that after allowing for repair and depreciation the cost to the subsidiary company for rental would be less than such percentage of the gross revenue.

19. Telegraphs and telephones ¶34—Charges for installing and removal, not discriminatory.

Reasonable charges by a telephone company for installation, removal, etc., are not discriminatory or unlawful.

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

Writ of review by the State, on the relation of the Southwestern Bell Telephone Company, against the Public Service Commission and others. From a judgment affirming an order of the Commission, the relator appeals. Affirmed.

D. A. Frank, of Dallas, Tex., and J. W. Glead, and T. O. Stokes, both of St. Louis (Jeffries & Corum, of St. Louis, of counsel), for appellant.

R. P. Spencer, of Jefferson City, for the Commission.

James D. Lindsay, Asst. Counsel, of Jefferson City, and H. A. Hamilton, of St. Louis, for cities of Missouri having local exchanges.

WALKER, C. J. The appellant owns and operates telephone exchanges and toll lines connecting with its own and other systems in this state. It is the corporate successor of various antecedent companies, systems of exchanges, and toll lines which represent generally and collectively what was known as the Bell Telephone Company. In July, 1918, the federal government, under a congressional resolution, assumed control of all telegraph and telephone companies and continued such control until July, 1919. During the period of control the telephone and telegraph systems were operated under the orders of the Postmaster General. In November, 1918, the Postmaster General ordered that on and after December 1, 1918, certain charges for the installation and moving of phones be authorized. December 13, 1918, he authorized an increase of toll charges to be made by appellant for intra- and inter-state service. Thereafter he made an order, effective May 1, 1919, authorizing increased charges for local exchange service in 65 local exchanges of appellant in this state. The Public Service Commission resisted in the state courts the imposition of in-

creased toll charges for service, and in the United States District Court a suit was instituted by the Postmaster General to enjoin interference with the increase of rates in appellant's local exchanges in this state. The decision of the Supreme Court of the United States in *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. 910, 4 A. L. R. 1623, settled adversely to the state all the issues involved in that action, and established the contention that, while the telephone systems were controlled by the Postmaster General under the war powers of the United States, his right to make rates was complete, and excluded state supervision and control.

At midnight, July 31, 1919, government control of the telephone systems ceased, and the companies resumed the operation of their lines under the provisions of the act of Congress of July 11, 1919. This act, in restoring the telephone properties to their owners, contains the following proviso, significant in its application to the case at bar:

"That the existing toll and exchange telephone rates as established or approved by the Postmaster General on or prior to June 6, 1919, shall continue in force for a period not to exceed four months after this act takes effect, unless sooner modified or changed by the public authorities—state, municipal, or otherwise—having control or jurisdiction of tolls, charges, and rates or by contract or by voluntary reduction."

The new rates, and increase of rates mentioned, affecting the appellant, were increased established or approved by the Postmaster General prior to June 6, 1919, and therefore were within the terms of the proviso above quoted. The rates thus authorized by the Postmaster General in the emergency of war had suspended the theretofore existing rates, established by the Commission, for service in the various local exchanges of appellant, and for its toll service.

Prior to the taking of possession of the telephone systems by the federal government, each one of the local exchanges owned and operated by appellant was treated by the Public Service Commission as a separate and independent unit for rate-making purposes, and the rates specified for each local exchange were based upon the facts applicable to that exchange.

In view of the situation and of the terms of the federal act returning the properties to the companies and prescribing the limitations upon the federal rates, the Commission on August 4, 1919, issued its order directing the appellant to appear and show cause why it should be permitted to continue to charge the rates put into effect by the Postmaster General for telephone service rendered within this state. Pursuant to this order hearings were had and testimony was taken and

considered by the Commission to provide for the conditions arising immediately upon, and by virtue of, the expiration of the four months' period, when, by express enactment and limitation, the rates prescribed by the Postmaster General would cease to be authorized, even where not, within the four months' period, changed or modified by state authority.

The appellant offered testimony as to the value of its property in the state. It furnished the estimates of its engineers of the cost of reproduction of its local exchanges and of its toll properties, and submitted evidence of actual cost of the properties according to the books of the company.

The Commission, previous to this proceeding, had undertaken through its own experts to make a complete and formal valuation of three of the appellant's local exchanges, those at Caruthersville, at Springfield, and at St. Louis, and the respective findings are shown in its official reports. Re Southwestern Tel. & Tel. Company, 2 Mo. P. S. C. 492; Re Missouri & Kansas Telephone Company, 6 Mo. P. S. C. 279; and Re Southwestern Telegraph & Telephone Company, 8 Mo. P. S. C. 433. The time available rendered it impossible for the Commission, it is claimed, to make formal inventories and valuations of all of the numerous exchanges and units constituting the appellant's property in the state, if such course be deemed a prerequisite to the action of the Commission. Having before it the results attained in the cases mentioned, and confronted with the necessity of acting upon the situation presented, the Commission employed the results reached in those formal valuation cases as a mean of testing the conclusiveness of the estimates of reproduction cost offered by the appellant in respect of other exchanges. The appellant's estimate of the total reproduction cost new of its properties within the state was \$35,100,071 and the reproduction cost, less depreciation, \$31,355,278. The book cost of the properties was given as being \$22,888,942.

This was an adjusted or so-called "prorated book cost," and had reference to a book adjustment by the appellant of estimated over and under values, and to the fact that in the process of the acquisition of property in the various towns and cities of the state the appellant, in order to eliminate competition, sometimes paid a price much in excess of value, and sometimes, because of discouraging conditions affecting operation by a competitor, purchased a plant at far below actual value.

The appellant's estimate of the cost of its properties at St. Louis, Springfield, and Caruthersville is as follows:

Reproduction cost new.....	\$18,971,011
Reproduction cost new, less depreciation..	16,918,673

The combined value for rate-making purposes, as fixed by the Commission at St. Louis, Springfield, and Caruthersville, plus additions to date, amounted to \$11,033,898.

The Commission, for the purpose of reaching a reasonable valuation adapted to the conditions before it, reduced the estimates of the appellant for its whole property in the same ratio as its estimates at St. Louis, Springfield, and Caruthersville were reduced in determining the value of those plants for rate-making purposes. Following this method the Commission obtained the following results:

Based on cost of reproduction new.....	\$20,400,000
Based on cost of reproduction less depreciation .....	20,350,000

The Commission also arrived at a value by making certain deductions from the book value as given by the appellant. Said book value, as adjusted by the Commission, being \$20,458,631.33. With these three sums before it, the Commission fixed a value of \$20,400,000 upon appellant's property in Missouri.

The Commission expressly disclaimed the purpose of doing more than adopting a tentative or temporary valuation, and did not undertake finally, or authoritatively, to fix the value of the property, and so declared in its report. The Commission permitted the toll rates established by the Postmaster General to stand, discontinued the installation charges, and lowered the rates for local service furnished to both residences and business houses in some of the appellant's exchanges. The changes downward, as disclosed by the record, were small. The reductions of local rates in the entire state aggregated the sum of \$91,194.30, and the disallowance of installation and moving charges reduced the revenue of the appellant company in Missouri in the sum of \$118,000 approximately. Appellant claims that this reduction aggregated \$200,000.

The appellant is owned and controlled by the American Telegraph & Telephone Company, which owns and controls the Bell Telephone system extending throughout the United States. The American Telegraph & Telephone Company earns and pays to its stockholders a dividend of 8 per cent. per annum, and has done so for several years past.

The local exchanges involved in this litigation handle a great number of outgoing and incoming long-distance messages for the American Telegraph & Telephone Company. Appellant's general manager stated that for these services the local exchanges were allowed 15 per cent. of the toll charged for sending such messages, not to exceed 20 cents on any one message. This charge, it seems, was on outgoing messages only. For handling an incoming message of the American

Telegraph & Telephone Company nothing was allowed. This charge is not based upon any scientific or other analysis by appellant of the service rendered by the local exchange, but is fixed arbitrarily.

The determination of the value of the property devoted to a public use, and the probable net revenue that will be derived from the rates fixed by the Commission, are, as the appellant concedes, the only questions confronting us for solution.

After an application for rehearing upon the Commission's order had been overruled, the case, by writ of review under section 10522, R. S. 1919, was certified to the circuit court of Cole county, where it was heard upon the record and exhibits introduced before the Commission; and on January 30, 1920, the circuit court affirmed the order of the Commission. Thereupon this appeal was taken. The record here is the same as that before the circuit court.

[1-3] *I. Power to Fix Rates.*—It is contended with seeming seriousness that the Public Service Commission is not authorized to establish rates, in that this power is vested in the appellant. Much space is employed and many authorities cited and discussed to sustain this contention. They fall short of that end. There is no ground for controversy that the Commission, as is the case with every board or organization for the control and supervision of public service corporations, must, in the exercise of its defined powers, conform to the procedure prescribed in the act of its creation, or that of the general law where applicable, to render its findings regular and to afford the corporation to be affected ample opportunity to present its objections to the proposed action. It is not necessary, therefore, in determining whether the Commission has power to fix rates, that the wholly foreign question as to the elementary rule of construction of statutes in *pari materia* be discussed, nor that the finding of the Commission be sustained by proof introduced at the hearing—a correct conclusion, where relevant, but in the instant case beside the question—as to the Commission's authority to act, because a hearing was given and evidence introduced. The matter at issue, as disclosed by the relevant portion of this contention, is the power of the Commission to fix rates for telephone companies. The existence of this power, not only as applied to telephone, but to other public utility corporations, has been settled here and elsewhere in such a conclusive manner as to leave no room for further controversy. We but repeat what we have frequently said before; that the primary power of fixing reasonable rates to be charged by a public utility corporation finds its origin in the police power of the state. *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 10 S. W. 197, 2 A. L. R. 278, 9 Am. St. Rep. 370; *State ex*



rel. *Garner v. M. & K. Tel. Co.*, 189 Mo. 83, 88 S. W. 41. This power, inherent in sovereignty, has been given express recognition in our organic law in the declaration that the right of the state to exercise this power cannot be abridged, nor can the law-making power contract it away. Section 5, art. 12, Const. Mo. In addition, we have held many times that the fixing of rates for public service corporations is an exercise of the police power, and that the Legislature may delegate this power to the Public Service Commission. *State ex rel. Sedalia v. Pub. Ser. Com.*, 275 Mo. 201, 204 S. W. 497; *City of Fulton v. Pub. Ser. Com.*, 275 Mo. 67, 204 S. W. 386; *City of Joplin v. Wheeler*, 173 Mo. App. 590, 158 S. W. 924; *State ex rel. Rhodes v. Pub. Ser. Com.*, 270 Mo. 547, 194 S. W. 287; *Iowa Tel. Co. v. Keokuk (D. C.)* 226 Fed. 82.

[4] Such a delegation of power as is necessary to authorize the Public Service Commission to determine the just and reasonable rates and charges which should be made by telephone companies has been given in the statute defining the powers of the Public Service Commission. Section 10502, R. S. 1919. The power thus delegated is in no wise limited by the general statute (article 6, c. 90, R. S. 1919) defining the powers of telegraph and telephone companies (section 10128, R. S. 1919), in which they are authorized to make such reasonable charges for services rendered as they may establish. This power is to be construed as subordinate to that conferred upon the Commission in determining the reasonableness of rates. There is no merit, therefore, in the contention that the Commission is not clothed with the power to fix rates.

[5] Notwithstanding the power of the Commission to fix rates, it is contended in some manner not definitely defined that Congressional legislation placing the telephone lines under federal control has in some way affected the Commission's power. The proceeding at bar in which is involved the opposition of the appellant to the rates established by the Commission, grows out of an order of the Commission requiring the appellant to show cause why it should not change the rates fixed by the Postmaster General during the period of federal control and charge the rates established by the Commission. The Postmaster General's action was based on the authority of a joint resolution, or, if it may be so designated, an act of Congress, passed July 16, 1918. U. S. Stats. vol. 40, c. 154, p. 904. This legislation had its origin in the exigencies of war. This act has been construed by the Supreme Court of the United States in *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. 910, 4 A. L. R. 1623, in which it was deemed sufficient, in upholding its validity, as in *Northern Pacific Railway v. North Dakota*,

250 U. S. 185, 39 Sup. Ct. 502, 63 L. Ed. 897, to assign as a reason therefor that—

"It was a war measure involving executive discretion, and hence not within the cognizance of the judiciary."

With the reasoning employed to sustain this conclusion we are not concerned here further than to say that, in the absence of war as a reason, and its termination as a definite limit upon legislation of this character, it cannot be reasonably concluded that the act would have stood the test of judicial construction.

While the illustration is perhaps more in the nature of a historical parallel than a decisive ruling, the reason for the creation of the provisional government in this state during the Civil War is not dissimilar from that which prompted the enactment of the congressional resolution here under review. Each had its origin and the excuse for its existence in the disturbed condition of public affairs due to war. When that ceased, and governmental affairs and business conditions assumed their accustomed courses, there no longer existed either reason or necessity for the continuance in the one instance of the improvised form of state government, or in the other of the further operative effect of the congressional resolution. In recognition of the temporary character of these expedients, for they were nothing more, their existence was by the acts of their origin limited to the conditions under which they were created. As applicable to the instant case, when the war ceased the legal force and the purpose of the congressional resolution ceased in accordance with its terms, and became inoperative upon the passage of the act repealing same. Rates fixed by the Postmaster General became, as a consequence, inoperative; and those theretofore established by the Public Service Commission went into effect. In short, the Commission's rates were not abolished by congressional action, but were simply held in abeyance during the existence of the congressional act, or until the repeal of same July 11, 1919. U. S. Stats. 66th Cong. Sess. 1, c. 10, p. 157; section 10434, R. S. Mo. 1919.

[6] II. *Reasonableness of Rates.*—In fixing telephone rates it is enjoined upon the Commission to have—

"due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service." Subdivision 1, § 10502, R. S. 1919.

For the reasons stated we are not concerned, except as a subject of comparison, with the rates fixed by the Postmaster General during the period of governmental control. They passed beyond the plane of judicial vision, so far as it may be sought to render them a basis for the present complaint or

our guidance, when the act authorizing them was repealed. What we are concerned in is the reasonableness, within the meaning of the law, of the rates established by the Commission, in the determination of which no better formula can be prescribed than that given by the Supreme Court of the United States in *Interstate Com. Com. v. Union Pacific R. Co.*, 222 U. S. loc. cit. 547, 32 Sup. Ct. 108, 56 L. Ed. 308, in which it is said, in effect, that the reasonableness of an order of a rate-making body, regular upon its face and such as is here involved, may be questioned if: (1) The rates are so low as to be confiscatory and hence inimical to the constitutional provision against taking property without due process of law; or (2) that the rates were fixed arbitrarily and unjustly without regard to the preponderance of the competent evidence; or (3) that they were fixed in such an unreasonable manner as to cause the shadow, and not the substance, to determine the validity of the exercise of the power.

[7] The fact that the Interstate Commerce Commission is clothed with certain judicial powers not possessed by the Public Service Commission does not render inapplicable here the succinct rules above stated in determining the reasonableness of the rates in question. Both the national and the state Commissions are, in the main, administrative bodies, and their orders are to be so classified in the fixing of rates. When, therefore, their acts in this regard are called in question, the courts are required, as in the review of equitable proceedings, to hear and determine the matter involved in such a manner as to do full and complete justice in the premises. *State ex rel. Wabash Ry. Co. v. Pub. Serv. Com.*, 271 Mo. 155, 196 S. W. 369; *A. T. & S. F. Ry. Co. v. Pub. Serv. Com. (Mo.)* 192 S. W. 460; *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703; *Int. Com. Com. v. Ill. Cent.*, 215 U. S. loc. cit. 470, 30 Sup. Ct. 155, 54 L. Ed. 280; *Int. Com. Com. v. Nor. Pacific*, 216 U. S. loc. cit. 544, 30 Sup. Ct. 417, 54 L. Ed. 608; *Int. Com. Com. v. Ala. Mid. Ry.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414; *Van Dyke v. Geary*, 244 U. S. 39, 37 Sup. Ct. 483, 61 L. Ed. 973; *Penna. R. Co. v. Towers*, 245 U. S. 6, 38 Sup. Ct. 2, 62 L. Ed. 117, L. R. A. 1918C, 475. The question involved is one of fact; the ultimate matter to be determined is, Did the Commission act within its powers as above defined?

[8] In determining what constitutes the greater preponderance of the probative proof, so far as concerns the reasonableness of the rates, we are authorized by the statute (section 10534, R. S. 1919) to regard those fixed by the Commission as *prima facie* lawful, and hence reasonable. In addition, the elementary rule that the burden of showing to the contrary rests on the appellant or the person seeking to set aside or annul the rates is also given express statutory recognition

and judicial approval. *Section 10535, R. S. 1919; Cinn., etc., Ry. Co. v. Int. Com. Com.*, 206 U. S. 154, 27 Sup. Ct. 648, 51 L. Ed. 995; *Int. Com. Com. v. U. Pac. R. R.*, 222 U. S. loc. cit. 546, 32 Sup. Ct. 108, 56 L. Ed. 308; *State Pub. U. Com. v. Springfield Gas Co.*, 291 Ill. 209, 125 N. E. 891.

The statutes declaring rates fixed by the Commission to be *prima facie* reasonable until that presumption is removed by one seeking their annulment are but a proper recognition of the power and purpose of the Commission, without which its acts would be mere empty declarations, whose effective operation would, in each instance, have to await judicial approval. Such a conception of the nature and powers of the Commission is wholly unauthorized. Organized, as the statute creating the Commission clearly declares, for the purpose of supervising and regulating public service corporations, the courts, in reviewing its actions, proceed upon the assumption that the experience of the members of the Commission has especially fitted them for dealing with question concerning the powers and activities of such corporations; and, despite the fact that the entire evidence will be reviewed, much consideration is to be given to the findings of the Commission, which, if reasonable, and neither arbitrary nor capricious, will be deferred to. *N. Y. & Q. Gas Co. v. McCall*, 245 U. S. loc. cit. 347, 38 Sup. Ct. 122, 62 L. Ed. 837.

The foregoing interpretation of the statutes as to the power of this court to review the rulings of the Public Service Commission is in harmony with our former declarations on this subject, and accords with the power declared by the Supreme Court of the United States in reviewing the findings and orders of the Interstate Commerce Commission, as is attested by many cases. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; *Baltimore & Ohio R. Co. v. Pittsford Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Kansas City So. Ry. Co. v. United States*, 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1; *Louisiana R. R. Com. v. Cumberland T. & T. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577; *Int. Com. Com. v. Union Pacific R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594.

The case of *Louisiana Railroad Commission v. Cumberland T. & T. Co.*, 212 U. S. loc. cit. 421, 29 Sup. Ct. 357, 53 L. Ed. 577, is not unlike that at bar. The contention was there made that the rates established were so low as to be confiscatory, and that they were not established upon investigation into the question of their sufficiency, but by a mere arbitrary conjecture of the Commission, and that the order made by it establishing the rates was illegal and void; hence that there was no presumption as to the correct-

ness of the rates such as generally obtains in relation to rates adopted by the Legislature of a Commission appointed by it. The evidence adduced was of the same character as that before the Commission in the instant case, though not so complete. It consisted, as in this case, of the reports of the company filed with the Commission showing generally the character and operation of the business of complainant, its income, operating expenses, and investments in Louisiana. The court disposed of this contention in the following language:

"Now it may be true that these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that upon the investigation the commission may have come to a mistaken conclusion by reason of erroneous inferences from the evidence furnished by complainant's own returns, but that is far from showing that the commission had by a merely arbitrary order, promulgated certain rates without making the slightest effort to obtain any knowledge whatever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and as a result the rates adopted were not merely arbitrary conjectures, but based on reasons which while they may have been insufficient, cannot be described as resulting in a decision wholly without evidence to support it. The rates, therefore, promulgated must be regarded as *prima facie* fair and valid, or, in other words, the onus was upon the complainant to show that they were what it asserts, confiscatory or unreasonable."

[9, 10] As to what is a reasonable rate, in any given case, is, as we have stated, a question of fact calling for the exercise of the common sense and sound judgment of the Commission, which is not bound by any hard and fast rule, nor required to fix rates according to any general formula. Even the question as to what per cent. of the value of the property in use should be allowed as a return must be made dependent upon the facts and circumstances of the particular case. *Duluth Street Ry. Co. v. R. R. Com.*, 161 Wis. 245, 152 N. W. 887; *State Pub. Util. Com. v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 125 N. E. loc. cit. 896.

[11] The burden of proof as to the reasonableness of the rates resting upon the appellant, it became incumbent upon it to show that the local exchanges were allotted a sum sufficient to reimburse them for services rendered in receiving and transmitting interstate calls—not only those made but those received in this state. Otherwise local subscribers would be required to pay the expense of interstate messages. Without the information, which has not been furnished by appellant, as to what compensation is allowed, local exchanges for their services in connection with interstate business, and the

basis on which this compensation is fixed, no proper solution can be obtained from the data furnished by appellant as to its local rates in Missouri.

In the case of the *Louisiana R. R. Com. v. Cumb. T. & T. Co.*, supra, a United States Circuit Court enjoined the enforcement of rates fixed by the Louisiana Commission. Upon a review of this ruling by the United States Supreme Court the decree of the Circuit Court was reversed and a new trial ordered. The Commission contended in the trial court that the telephone company raised more money in certain years for depreciation than was actually used for that purpose, and that the excess was carried to the capital account, and was a part of the property upon which the company was seeking a return. The Circuit Court held that the proof was insufficient to sustain this contention, but the United States Supreme Court, in its review on appeal, ruled that the burden of proving that this had not been done was on the telephone company, where the books showed that such an excess had been collected, and that this proof had not been made.

The rule thus fixing the burden of proof finds its appropriate application in the instant case. The testimony shows that 25 per cent. of the total charge for transmitting a long-distance call was allotted to the exchange where the call originated, but that nothing was allowed on calls received. Whereas on long-distance messages originating with a local exchange, and transmitted over the American Telegraph & Telephone Company's lines, but 15 per cent. was allowed, the charge in no event was to exceed 20 cents per call; and upon such messages delivered by local exchanges nothing was allowed. The evidence further discloses that the American Telegraph & Telephone Company controls the stock of the appellant; that, at the time of this hearing, it paid, and for some years prior thereto had paid, an annual dividend of 8 per cent. on its stock; that when the government took over the telephone lines, it contracted with the American Telegraph & Telephone Company, and not with the subsidiary companies; that such contract did not contemplate a return separate and apart from that made to the subsidiary companies; that the parent company has two lines running east and west, and lines running north and south, and diagonally across the state; and that the appellant connects with these lines and places its local exchanges at the disposal of same for the purpose of transmitting outgoing and receiving incoming calls; that a great portion, if not all, of this is interstate business. For its service in this behalf a local exchange of the appellant receives but 15 per cent. commission on calls originating with it, with a maximum charge of 20 cents, and no compensation for calls delivered through it.

The appellant allots to its local exchanges

for its own long-distance business 25 per cent. of the tolls collected. This, said appellant's general manager, "is the standardized figure generally accepted as a fair compensation to the local company for the work done in connection with toll messages." The Commission desired to ascertain and was entitled to know why 25 per cent. of the toll was allotted to a local exchange by the appellant for long-distance messages transmitted over its own lines, while but 15 per cent., with a maximum charge of 20 cents, was allotted for long-distance messages transmitted over the parent company's line. The investigation developed the fact that these allotments were arbitrary, which means that these rates were fixed without reference to the amount of service actually rendered by local exchanges in transmitting and delivering long-distance messages over the parent company's wires. As compared with the 25 per cent. charge, it appears upon its face to be insufficient. To the extent that it is insufficient, it is a burden upon the local business. It was incumbent upon the appellant to show the fairness of these charges, and that they were proper allotments. This is the rule, both under the statute and the cases cited, and this the appellant failed to do. Its failure, as contended by respondent—which contention we regard as well founded—constitutes a tenable ground for not disturbing the order of the Commission, provided that order is, on its face, reasonable. *Cumb. T. & T. Co. v. R. R. Comm. La. (C. C.)* 156 Fed. 823; *R. R. Comm. v. Cumb. T. & T. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577. Probative force is given to this conclusion in view of the relation of the appellant to the American Telegraph & Telephone Company.

[12] Allowance being made for the interest on appellant's bonded indebtedness, the gross return upon its property at the Commission's valuation is 12.81 per cent. Allowing 6 per cent. for depreciation, the net return is 6.81 per cent. This, to our mind, is a fair return, and under no reasonable construction can be said to be confiscatory. The United States Supreme Court has held a less or a like amount ample compensation in cases similar to that at bar. A smaller return was approved in *Wilcox v. Con. Gas Co.*, 212 U. S. loc. cit. 48, 29 Sup. Ct. 192, 53 L. Ed. 382, 43 L. R. A. (N. S.) 1184, 15 Ann. Cas. 1034; and in *Lincoln Gas & Elec. Light Co. v. Lincoln*, 250 U. S. loc. cit. 267, 39 Sup. Ct. 454, 63 L. Ed. 968, a scant 7 per cent. was held sufficient, and the court refused to interfere with that rate as fixed by an ordinance. Furthermore, the Congress directed the Interstate Commerce Commission to allow the railroads a return of but 5½ per cent. upon their valuation for a term of two years from March 1, 1920. Interstate Commerce Commission Act (Govt. Ed., 1920) § 15a, p. 48.

[13] In addition to the regular monthly

rates paid by all subscribers, appellant contends that it should be permitted to levy against all new subscribers a connection charge to be paid before service will be rendered. This contention is based upon the theory that a number of subscribers use telephones but a short time, and should be required, in addition to the usual exchange rates, to pay additional charges towards reimbursing the company for the cost of installations. In short, after being allowed a reasonable return for its service, it is contended that it should be permitted to mulct its new subscribers for one of the possible losses incident to the nature of its business. The effect of the allowance of this contention would be to require new subscribers to pay more for the same service than is paid by those who became subscribers prior to the levy of the service connection charge. This would constitute a discrimination not authorized by the statute creating the Commission and defining its powers relating to telegraph and telephone companies. Article 5, c. 95, R. S. 1919.

This statute, both in its context and subject-matter, not only indicates, but provides, that the rates, rentals, and charges made by such companies, when approved by the Commission, shall be for services rendered, and hence uniform in amount when of like character. Both of these requisites would be violated in the recognition of the charge here contended for. It might well be held that the schedule of rates authorized by this statute comprehends and constitutes the compensation authorized to be charged by these companies under several well-recognized rules of statutory construction, and in view of the fact that section 10496, R. S. 1919, provides that such instrumentalities and facilities shall be provided by the companies as are in all respects just and reasonable. No other rational application can be made of this requirement than that it has reference to senders and receivers without the use of which telephone service is impossible. But it is not necessary to rule upon this suggested limitation of the statute here. Subdivisions 2 and 3 of said section 10496, supra, embody in their terms a definite prohibition against special rates, rebates, or undue or unreasonable preference. We have shown that this proposed charge discriminates against the new subscriber to his prejudice, and hence merits condemnation. We so ruled in regard to a similar question in *State ex rel. Columbia Tel. Co. v. Atkinson*, 271 Mo. loc. cit. 38, 195 S. W. 741. The ground stated therein as to the invalidity of the charge for installation was, it is true, different in some respects from that stated here, but each is based upon the unreasonableness of the charge which, under either state of facts, will suffice to authorize the overruling of the contention. *Bradford v. Citizens' Tel. Co.*, 161 Mich. 885, 126 N. W. 444, 137 Am. St. Rep. 513,

[14] III. *Course Pursued in Fixing Rates.*

—As shown from the statement of facts, the rates fixed, of which appellant complains, were temporary, the purpose of the Commission being to regard the exchanges as separate units, and to determine the value of appellant's property at each according to the conditions there existing. This had been done in regard to the exchanges at St. Louis, Springfield, and Caruthersville. Until such examinations had been made and the values ascertained at other exchanges, the purpose of the Commission was to continue in force the rates fixed by it. That these further examinations were contemplated is evident from the Commission's orders. Its purpose, thus clearly defined, lends little countenance to the contention that the Commission acted or was contemplating arbitrary or capricious action, and its proposed course is referred to only to exemplify that fact.

[15] In addition, the Commission's order requiring the appellant to show cause why it continued to charge the rates fixed by the Postmaster General instead of those fixed by the Commission further attests the fact that its purpose was not to proceed arbitrarily or capriciously, but to accord the appellant a hearing and afford it an opportunity to demonstrate, if the facts warranted, that the established rates were unreasonable. In passing, it may be said that this order was purely one of grace on the part of the Commission, prompted evidently by a desire for fairness, and not a prerequisite to the exercise of its power in enforcing its order then in force.

[16] Preliminaries and irrelevant matters disposed of, we are confronted with the question, the answer to which, in addition to what has been said, will be determinative of this case, viz.: Was the valuation of appellant's property by the Commission a fair one, and are the rates fixed as a consequence of such valuation reasonable? As set forth at length in the statement of facts, the Commission, as a basis for its total valuation, made an examination of the property of three of appellant's exchanges at St. Louis, Springfield, and Caruthersville. To determine these values it took into consideration in each instance the original cost of the plant, the appellant's engineers' estimate of the cost of reproduction as of that date, the depreciation, and the working capital for a plant of that capacity. While these items were given primary consideration, the fact that the plants were going concerns was not ignored, and the additional items of engineering, supervision, interest during construction, insurance, and promotion and development expenses were also included. In short, it is apparent that the Commission sought to include within its purview all elements of value, tangible and intangible.

The Commission, having before it the valuations of the three properties ascertained in the manner stated, employed the result ob-

tained in testing the correctness of the appellant's estimates of the cost of reproduction in respect of its other exchanges, and for the purpose of reaching a total valuation adapted to existing conditions, reduced the appellant's estimate of the value of its entire property in the same ratio as its estimates of its properties at St. Louis, Springfield, and Caruthersville had been reduced in determining the value of those plants for rate-making purposes. The Commission reached a like result by taking the book value of appellant's property, or, as will be found specifically set forth in the statement of facts, by taking the total amount of the value of appellant's entire property, including working capital, and deducting therefrom property not used, working capital, and depreciation reserve, and to this remainder adding 10 per cent. for intangibles. Taking these different methods into consideration the Commission fixed the value of appellant's property in this state at \$20,400,000. After a laborious review of the record we regard this valuation as reasonable and amply supported by the testimony. The course pursued by the Commission in reaching this valuation followed the rule prescribed in *Smyth v. Ames*, 189 U. S. loc. cit. 548, 18 Sup. Ct. 434, 42 L. Ed. 819, in which it was said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present, as compared with the original, cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Later cases determined by the United States Supreme Court are of like import. *San Diego Land Co. v. National City*, 174 U. S. loc. cit. 755, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. loc. cit. 89, 22 Sup. Ct. 30, 46 L. Ed. 92; *Minnesota Rate Cases*, 230 U. S. loc. cit. 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Wood v. Vandavia R. Co.*, 231 U. S. loc. cit. 7, 34 Sup. Ct. 7, 58 L. Ed. 97.

[17] Doctrinaires may have criticized the

basis on which the Smyth-Ames and subsequent cases rest, but it has not been overruled nor subjected to serious judicial criticism. To vary from this rule, which comprehends within its scope all reasonable items of value and elements of cost, and to hold, as is insisted by appellant, that the rates to be established should be based upon reproduction cost new, less depreciation, estimated at a time when prices were at high tide and rapidly fluctuating, does not accord with reason, and would be unjust to the public. The reasoning of the respondent in opposition to this insistence meets with our approval, and is therefore appropriate in this connection:

"We are unable to discern how any well-balanced mind can adjust itself to the theory that the proper valuation to be placed upon a utility plant for rate-making purposes may be obtained by making an inventory of its component parts already in place, and estimating their aggregate cost by giving to each part the value that it has on the market as a detached article ready for use anywhere. Included in such a scheme is the proposition that the public must pay a return upon, not the actual sums spent for labor at the time the plant was assembled, but upon such sums for labor as would be required to assemble the plant to-day.

"In the main, the constituent parts of an assembled plant of a utility in operation, have been dedicated to a specific use in which the public has an interest. They are available for no other use, and are without any considerable value to all persons except the company operating the plant and the public served by it. A telephone post, for instance, deep and firmly set in the ground, is dedicated to a particular use, and has no market value as a post. It is not on the market. So it is with the wires and cables of a telephone company, and so it is with respect to all the constituent parts of a plant except its real estate and its buildings, and frequently these buildings are designed for the company's peculiar use and are worthless for any other use."

The lucid distinction between industrial valuation and public utility valuation made by Dr. John H. Gray, of the Department of Economics of the University of Minnesota, in the *Public Utilities Magazine*, January, 1917, is persuasively pertinent to the matter at issue. His conclusions are as follows:

"For better or for worse, both in our philosophy and in our law, we have taken what are known as public utilities out of the category of unrestricted private property. It is very true that, in a purely technical sense, in law, they remain private property; but this has not the slightest economic significance, since the law has essentially taken from this property the chief attribute of private property—the chance of speculative gains. The doctrine of a fair return in public utilities forever separates such property economically from ordinary private property.

"In fact, we shall never come to a clear view of the object or reason for regulation

until we make the clear distinction between one's rights over property which is devoted to a public use, and one's rights over this same property when it ceases to be so dedicated.

"The methods of arriving at a fair value are entirely different in the two cases. In the one case the property is subject to an incumbrance; in the other it is unincumbered. In the one case it is free to seek the most profitable employment; in the other it is restricted to a single use.

"This is the foundation stone of regulation, and must be considered as a part of every contract, and every charter, and every act of a public utility."

Of like persuasive force is the fact that not only the respondent, but other state commissions, have adopted the reproduction cost new, less depreciation, plus the value of the plant as a going concern, as bases in reaching a valuation for rate-making purposes, but in so doing they have uniformly used normal pre-war prices in estimating the cost of labor and material. Money actually spent and materials purchased at war-time prices were so allowed, as was done in this case; but such a valuation as is insisted upon by appellant, based upon war-time or abnormal prices, has been considered as grossly unjust, and has not been followed. The curious will find the cases in this behalf cited in the respondent's brief.

[18] The appellant further contends that the Commission should have allowed the full amount paid by it to the American Telegraph & Telephone Company for rental on the receivers, transmitters, and induction coils used by the appellant, and essential to the service rendered by it. This contention received consideration by the Commission, not in the allowance of the full amount claimed, but in the following manner: Evidence had been taken in regard thereto in the *St. Louis Case*, and it was found, after allowing for repairs and granting 10 per cent. for depreciation, that the cost to appellant for rental would be 55 per cent. less than the  $4\frac{1}{2}$  per cent. allowance on the gross revenue, as claimed by the appellant. Upon the basis thus established the rental allowance for the instruments used in plaintiff's entire system in this state was estimated, and the result ascertained was taken into account in determining the reasonableness of the rates. *Public Service Com'n v. Southwestern Bell Tel. Co.*, 8 P. S. C. R. 494. We are not prepared to say from the evidence adduced that the method adopted by the Commission was not a fair one. While not determining the right of the appellant to a reasonable allowance for rental of the instruments mentioned, it does not appeal to us that the percentage basis, which seems to be purely arbitrary, is either scientific or satisfactory. An investigation of this subject shows no unanimity of either judicial or administrative opinion on this subject. The percentage

method has, we find, in the main, been approved by 2 courts and 11 commissions; but 4 or 5 other commissions have either disapproved the method or the amount claimed has been reduced or disallowed for rate-making purposes. On account of differences in the facts the rulings or findings in these cases are not decisive of the matter at issue, and hence their citation is unnecessary.

Without the facilities afforded by the instruments in question, the telephone companies could not do business. The question presents itself, therefore, whether the very instrumentalities which enable the appellant to render its business profitable, or at least give it an earning capacity, should be considered in determining the charges or rates it exacts for its service. The reason and justice of the rental claim, however, need not be taken into consideration here, as a fair rental allowance was made by the Commission, and there is no just ground of complaint in this behalf.

IV. *Conclusion.*—Reviewing the appellant's assignments of error, as we have done in reaching the foregoing conclusions to determine the correctness of the judgment of the circuit court, we find: That the rates established by the Commission were lawful, just, and reasonable, and hence not in violation of any law, organic or statutory; that appellant, as a condition precedent to the determination of the reasonableness of its rates, was not entitled to a credit for the full sum paid by it to the American Telegraph & Telephone Company as a rental; that the manner in which the Commission reached its conclusion in regard to the unreasonableness of appellant's rates is not subject to just criticism; that the Commission's ruling in refusing to allow the appellant to charge for installation, moving, and changing of names was not error, in view of the reasonableness of the rates established; that the cost of establishing plaintiff's business and making its plants going concerns on the basis insisted upon by appellant was properly disallowed by the Commission in estimating the fair and reasonable value of appellant's property; that the Commission's orders in this behalf are supported by the evidence, and are in conformity with the law, and hence are neither discriminatory, unreasonable, or unlawful; that the value of appellant's "intangibles," as ascertained by the Commission, accords with the facts; that the rates established by the Postmaster General, except for the purpose stated, are determinative of no issue here involved; that the Commission's total valuation of appellant's property was arrived at as to method, time of estimation, and amount, in a regular and authorized manner, and afforded substantial basis for the fixing of the rates and the consequent judgment of the circuit court affirming the Commission's action.

In the absence of prejudicial error, the judgment of the circuit court is affirmed, and it is so ordered.

GRAVES, J., concurs in separate opinion, in which WOODSON and HIGBEE, JJ., concur.

JAMES T. BLAIR, J., concurs in separate opinion, in which HIGBEE, J., concurs.

ELDER, J., concurs in result.

DAVID M. BLAIR, J., not sitting.

GRAVES, J. [19] I concur in the opinion and the result thereof, with one exception. My objection to the opinion relates to that portion of the opinion which denominates installation charges as unlawful. The Commission in its majority opinion held that we had so ruled in *State ex rel. Columbia Tel. Co. v. Atkinson*, 271 Mo. loc. cit. 36, 195 S. W. 741, and the opinion of my Brother relies upon that case, and the case of *Bradford v. Citizens' Tel. Co.*, 161 Mich. 385, 126 N. W. 444, 137 Am. St. Rep. 513. Neither of the cases covered the question of installation, removal, and other kindred charges involved in this controversy. It is said that the installation charge discriminates against the short-term user of a telephone, in that it requires him to pay more for the services which he receives. In my judgment the failure to allow such charge discriminates against the long-term user of the phone, and to obviate such discrimination, reasonable charges for installation, removal, etc., should be sanctioned by the Commission. To fix a rate the Commission must have in view (1) the value of the property in the public service, (2) the gross earnings of the property, (3) the gross expenses of operation and upkeep, and (4) a fair return to the owners. The rate established must reflect all these things. Every installation and removal is an item of expense, and must find a place in the expense account of the business. When it does find this place, it effects the rate fixed. The additional expenses, means an addition to the rate, and this addition must be borne largely by the long-term users of phones.

To illustrate, a man blows into one house and orders a phone, the installation of which goes into the expense of the business. The next month he goes to another house, and additional expense of removal is occasioned. He continues these moves for a year, and in the end the phone company has paid out more upon this subscriber than it gets from him. The long-term users of phones have to pay this expense, because it is reflected, or should be reflected in the rate which they pay for the phones they use. So that the failure to allow such installation and removal charges in fact discriminates against the long-term users (estimated at 85 per cent. of the total number), rather than the

short-term user. In my judgment, the idea of charges in force by the general government with reference to these things, are just and equitable, and should receive the approval of our Public Service Commission. But the majority of the Commission says, and my learned Brother says that we outlawed such charges in the Columbia Case, 271 Mo. loc. cit. 36, 195 S. W. 741, supra. The facts of that case do not bear out that contention. The \$3 charge there was in the nature of a deposit to induce the continuance of the use for a year, because at the end of a year he received full credit for the advanced \$3. The charge here involved is an absolute payment, which never gets back to the subscriber. The Columbia case discusses no question involved here and in no wise supports the Commission or my learned Brother. If it did support either, it should be overruled; but it does not, and may be well enough on the questions involved in that case.

The Michigan case, mentioned supra, does not deal with installation or removal charges at all. There the company had a great number of subscribers under contracts to pay for home phones at the rate of \$15 and business phones at the rate of \$24. It then raised its rate to \$18 and \$30, respectively, for all new subscribers. It was therefore charging two rates for the same service. The old patrons (some with 10-year contracts) paid \$15 and \$24. The new subscriber was required to pay \$18 and \$30. Phones "were placed free to all patrons, whether new or old subscribers." It was held that this constituted a discrimination in violation of a Michigan statute, and the opinion is sound. But this case touches neither side nor bottom of the question here involved.

If the rate allowed by the Commission is a reasonable rate for the company, this question may not be in this case except in a very limited way. But the opinion condemns as unlawful these installation, removal, and similar charges, and to this I do not agree. On the contrary, the refusal of the Commission to establish and recognize such charges is the thing that works the wrong. Nor does the charge violate any provision of the Public Service Commission Act. Their refusal comes nearer working the discriminations condemned by that act. I therefore concur, with the reservation herein set forth.

HIGBEE and WOODSON, JJ., concur in these views.

JAMES T. BLAIR, J. (concurring). I do not concur in that part of the opinion which seems to adhere to certain former decisions to the effect that in a rate case which has come here from the Public Service Commission this court will, on its own view of the weight of the evidence, overturn findings of fact made by the Commission and supported

by substantial evidence. In the decision (Int. Com. Com. v. Union Pac. R. Co., 222 U. S. loc. cit. 547, 32 Sup. Ct. 108, 56 L. Ed. 306) from which the opinion takes the summary of what is to be considered in determining the reasonableness of a finding of fact to the Commission is to be found a holding which contradicts the conclusion which seems to be reached in the opinion in this case, and shows that the opinion misinterprets that decision in summarizing it. In the opinion in that case, immediately following the summary partially reproduced in the opinion in this, is the following:

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Ill. Cent. v. I. C. Co., 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In the case cited in the foregoing quotation it was also said:

"And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to 'knowledge of conditions, of environments and of transportation relations,' has had the witnesses before it and has been able to judge of them and their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the circuit court." 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128.

In I. C. Co. v. Ill. Cent. R. R., 215 U. S. loc. cit. 470, 30 Sup. Ct. 160, 54 L. Ed. 280, cited in the majority opinion, appears the following:

"Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

In B. & O. v. Coal Co., 215 U. S. loc. cit. 494, 495, 30 Sup. Ct. 164, 54 L. Ed. 292, also cited in the majority opinion, the rule in the next previously cited case was approved. It



was also approved in *Knapp v. Trust Co.*, 216 U. S. loc. cit. 554, 30 Sup. Ct. 412, 54 L. Ed. 610, which the majority opinion next cites. The decision in *I. C. C. v. Railway*, 168 U. S. loc. cit. 175, 18 Sup. Ct. 45, 42 L. Ed. 414, is not in point. Interpreted as it is in the majority opinion, it is overruled by the other cases cited therein. In *Van Dyke v. Geary*, 244 U. S. loc. cit. 49, 37 Sup. Ct. 487, 61 L. Ed. 973, also cited, the court said: "We cannot say 'that it was impossible for a fair-minded board to come to the result \* \* \* reached'"—and affirmed the judgment. There is nothing in *Penn. R. R. v. Towers*, 245 U. S. 6, 38 Sup. Ct. 2, 62 L. Ed. 117, L. R. A. 1918C, 475, which contravenes anything in the above excerpts. *N. Y. & Q. Gas Co. v. McCall*, 245 U. S. loc. cit. 348, 38 Sup. Ct. 122, 62 L. Ed. 337, is in harmony with the other cases cited from the same court. In *K. C. So. Ry. v. U. S.*, 231 U. S. loc. cit. 456, 34 Sup. Ct. 136, 58 L. Ed. 206, 52 L. R. A. (N. S.), 1, the court said of the Interstate Commerce Commission:

"So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review."

In *I. C. C. v. Railroad*, 222 U. S. loc. cit. 555, 32 Sup. Ct. 114, 56 L. Ed. 308, the court concluded its opinion thus:

"Considering the case as a whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to presumptions arising from the long continuance of the low rate, when the carrier was not earning dividends; *nor that there was no evidence to support the finding. If so, the Commission acted within its power and, in view of the statute, its lawful orders cannot be enjoined.*" (Italics ours.)

*Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594, is not out of harmony with the rest. Neither is *La. R. R. Co. v. Tel. Co.*, 212 U. S. loc. cit. 421, 424, 29 Sup. Ct. 357, 53 L. Ed. 577, et seq. In *State Public U. Com. ex rel. v. Gas & Electric Co.*, 291 Ill. 209, 125 N. E. 891, also cited, it was held:

"The fixing of rates is not a judicial function, and the right to review the conclusion of the Legislature or of an administrative body, acting under authority delegated by the Legislature, is limited to determining whether or not the Legislature or the administrative body acted within the scope of its authority, or the order is without substantial foundation in the evidence."

In that case various decisions of Illinois and other states to a like effect are cited. In *Herrmann v. Newtown Gas Co.*, P. U. R. 1918D, loc. cit. 611 et seq., will be found scores of decisions of the same kind, from many jurisdictions. In fact, the previous decisions of this court sound practically the

only discordant note. No effort is here made to examine the various decisions from other jurisdictions cited in the majority opinion further than to show that they do not support any view that this court can examine the evidence and overturn the finding of the Commission on the single ground that it is against what this court deems to be the weight of the evidence.

Counsel on both sides of this case invoke the rule of the cases as that rule appears from the above quotations. Counsel for appellant cite more than 50 decisions as sustaining the rule. A few quotations from these may be pertinent.

"The principle on which the court acts in determining whether or not an order of the Commission is reasonable, have been the subject of much controversy, but the law on that subject is now pretty well settled. The Legislature never intended that the court should put itself in the place of the Commission, try the matter anew as an administrative body, substituting its findings for those of the Commission. A statute which so provided would be unconstitutional as a delegation to the judiciary of nonjudicial powers. [Citing numerous cases.] \* \* \* The courts must not usurp legislative or administrative functions by setting aside a legislative or administrative order on their own conception of its wisdom." *State v. Great Northern Ry. Co.*, 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201.

"If the order made by the Commission does not contravene any constitutional limitation, is within the constitutional and statutory authority of that body, and *not unsupported by testimony* [italics ours], it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the commission." *Penn. Co. v. U. S.*, 236 U. S. loc. cit. 361, 35 Sup. Ct. 373, 59 L. Ed. 616.

With respect to the function of a court in reviewing an administrative order, the Court of Appeals of Maryland (*Penn. Co. v. Towers*, 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144) quoted with approval the following from the decision in *M., St. P. & S. Ry. v. R. R. Com.*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821:

"The function of a court 'is not to determine whether rate or service fixed by it is reasonable and just, but to determine whether the order is unreasonable or unlawful. If the order is found by the court to be such that reasonable men might well differ as to its correctness, it cannot be said to be unreasonable.'"

This judgment was affirmed in *Penn. Co. v. Towers*, 245 U. S. 6, 38 Sup. Ct. 2, 62 L. Ed. 117, L. R. A. 1918C, 475. With respect to the Interstate Commerce Commission it was said by a District Court (three judges sitting) in *St. L. & S. W. Ry. Co. v. U. S.* (D. C.) 234 Fed. loc. cit. 675, that:

"Whatever view the court might entertain upon it, or upon the expediency or wisdom of the order, is not material. The court cannot interfere with the rates fixed, or practice es-

published, by the Commission, unless it is made plainly to appear that the orders are void, as violative of the Constitution, or wanting in conformity to statutory authority, or has been arbitrarily exercised; and the duty of the court is to determine the sole question, whether or not the order of the particular case is based upon substantial evidence, heard and considered by the commission."

In *C. & St. P. Ry. Co. v. Com.*, 268 Ill. 49, 108 N. E. 729, the Supreme Court of Illinois said:

"The power to fix rates is legislative, whether exercised by the Legislature directly or by an administrative body under delegated authority. The fixing of rates is not a judicial function, and the right to review the conclusion of the Legislature or an administrative body is limited to determining whether the board acted within the scope of its authority or the order is without foundation in the evidence, or a constitutional right of the carrier has been infringed upon by fixing rates which are confiscatory or insufficient to pay the cost of the traffic and return the carrier a reasonable profit on the investment."

"Reviewing courts will examine the facts upon which the order is based, and if there is substantial evidence to sustain the order—not a mere scintilla of proof—the order will be sustained." *Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill. 320, 122 N. E. 477.

In *State Public Utilities Com. v. R. R. Ass'n*, 281 Ill. 181, 118 N. E. 71, the rule laid down in *C. & St. P. Ry. Co. v. Com.*, supra, is applied, and many cases cited in its support. In *City v. Appleby*, 219 N. Y. 78, 113 N. E. 797, the same principle was approved. This judgment was affirmed in 245 U. S. 345, 38 Sup. Ct. 122, 62 L. Ed. 337. In *Lima Tel. & Tel. Co. v. Com.*, 98 Ohio St. 110, 120 N. E. 330, it was said:

"It is well settled that this court will not substitute its judgment for that of an administrative body \* \* \* within its province. Before the court will interfere with an order of the Public Utilities Commission it must appear from a consideration of the record that the action was unlawful or unreasonable. *Hocking Valley Ry. Co. v. Com.*, 92 Ohio St. 362."

The same view (as in the preceding decision) as to its functions in reviewing an order of the Public Service Commission of Pennsylvania was taken by the Supreme Court of that state in *Borough v. Water Co.*, 260 Pa. 289, 103 Atl. 744. Numerous decisions are cited. Other decisions which may throw some light on the matter, and which also are cited by appellant, are: *Sayers v. Railroad*, 90 Vt. 201, 97 Atl. 660, Ann. Cas. 1918B, 1050; *Oshkosh Waterworks Co. v. Com.*, 161 Wis. 122, 152 N. W. 859, L. R. A. 1916F, 592; *San Joaquin L. & P. Corp. v. Com.*, 175 Cal. 74, 165 Pac. 16; *Pub. Service Com. v. Ry. Co.*, 122 Md. 393, 90 Atl. 119; *State v. Ry. Co.*, 71 Fla. 433, 71 South. 543.

Counsel for respondent, as already stated,

join appellant's counsel in contending for the same rule. Some decisions which announce the same doctrine are omitted because of constitutional or statutory provisions in the state in which they were rendered which account for them independently of the doctrine itself. Further the question in decisions affecting orders of the Interstate Commerce Commission decisions, though analogous, is not identical with the question in this case. It is nevertheless true that the overwhelming weight of authority, in fact practically all the decisions, supports the rule. The decisions cannot be read without the conclusion being induced that an order of the Public Service Commission is, when supported by substantial evidence, immune from attack in so far as the finding on the facts is concerned. These cases make it plain that the Legislature cannot constitutionally confer power upon this court to review the weight of the evidence in passing upon the validity of an order of the Commission. That would amount to transforming the court, *pro hac vice*, into an administrative board, and thereby taking it out of the field of its constitutional power, and, for the time, making it a part of another magistracy. The Legislature can no more do this than it can confer a part of this court's judicial authority upon the executive. Our former decisions are violative of this principle. Heretofore, in some of our decisions, reliance has been placed upon the statute as justifying the substitution by this court of its judgment for that of the Commission on the weight of the evidence as to the facts found by that body. As shown by the cases cited and referred to, this amounts simply to the usurpation of administrative functions. The statute could not confer such power even had that been attempted. The Legislature cannot impose upon this court and this court cannot accept as a court, duties of a legislative or quasi legislative character, such as rate making for public service corporations. But the statute does not attempt to confer such power. Sections 10534 and 10535, R. S. 1919, read as follows:

"Sec. 10534. All rates, tolls, charges, schedules and joint rates fixed by the Commission shall be in force and shall be *prima facie* lawful, and all regulations, practices and services prescribed by the Commission shall be in force and shall be *prima facie* lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

"Sec. 10535. In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the Commission, the burden of proof shall be upon the party adverse to such Commission or seeking to set aside any determination, requirement, direction or order of said Commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of

the Commission complained of is unreasonable or unlawful as the case may be."

Under this last section the question presented in this court on an issue of fact is whether there is "clear and satisfactory evidence" that the action of the Commission was (1) unreasonable or (2) unlawful. So far as I have been able to find, in no decision in this state has it ever been held, prior to the establishment of the Commission, that an order of any administrative body was either unreasonable or unlawful merely because it was not supported by what seemed to the reviewing court to be the weight of the evidence. In such cases the test of reasonableness and unlawfulness, so far as its support by evidence is concerned, is simply whether there is substantial evidence to support the finding upon which the order rests. This is what the statute applicable in this case prescribes. It is also the gist of the decisions on the point existing when the statute was enacted—and of those since rendered—in which a rule like that of this statute is really discussed. It is the rule of the cases from other jurisdictions cited in the majority opinion, and others cited or referred to in this, and of almost numberless others.

In the cases in this state in which it is held that an order of the Commission will be set aside upon this court's coming to the conclusion that it is against the weight of the evidence, as weighed by this court, it does not appear that these sections of the statute have had consideration. Those decisions are based upon the last sentence in section 111, Laws 1913, pp. 641, 642. The same sentence appears at the close of section 10522, R. S. 1919. That sentence is:

"The circuit courts of the state shall always be deemed open for the trial of suits brought to review the orders and decisions of the Commission, as provided in this chapter, and the same shall be tried \* \* \* as suits in equity."

This last clause contains the language relied upon. In the first place, this sentence applies to circuit courts, and is not directly applicable to this court. Section 10525 refers to this court, and contains no language similar to that quoted from section 10522. In the second place, the language of this quoted sentence is general. That of sections 10534 and 10535 is particular. There are several things characteristic of a trial or hearing in equity other than the duty of the chancellor to decide according to the weight of the evidence. This general language ought not to be held to expunge the particular provisions of sections 10534 and 10535, in any event. In the third place, to construe this general language as an attempt to give to this court, on its view of the weight of the evidence, the power to substitute its findings of fact for those of the Commission, and therefore to overturn the findings of that

body when they are supported by substantial evidence, is to construe it as an attempt to authorize this court to step outside its judicial functions and employ itself in administrative duties—a meaning which renders the provision violative of the Constitution. In the fourth place, it convicts the Legislature of the absurdity of providing a board of specialists in the matter of regulating public service corporations and then authorizing a tribunal, composed of men who are certainly not specialists in that field, to impose its view of the weight of the evidence in all matters upon those who are designed to be and doubtless are skilled in such matters of regulation.

The previous opinions of this court upon this question, in some of which the writer concurred, do not contain any evidence of a real examination of the issue. Those decisions are opposed to practically all decisions in the country on the point, are obviously incorrect, and should be overruled without further delay. If the majority opinion is to be understood as reaffirming them, which matter its language leaves rather in doubt, I do not agree to that reaffirmance. If that opinion is to be understood as adopting the rule of the cases cited from other jurisdictions in support of the rule it states, then its language should be changed to adopt that rule in plain terms, and expressly overrule our former decisions upon this question.

II. (2) With respect to the installation charge which is discussed, the question of its allowability is not involved in this case. If the holding of the majority opinion, that the rate fixed will produce an adequate return, is sound, appellant will receive from that rate all to which it is entitled. If it does so, the details of its operating expenses need not be taken up one at a time to determine whether each is a valid basis of an allowable charge in proper circumstances. All such expenses, including those for installation, are covered by the rate fixed, on the hypothesis that the opinion is correct in holding that the rate will yield an adequate return. The subscribers who occasion less than the average installation expense are not here complaining, because the whole of that expense is included in the return from the general rates of which they pay a part. A complaint from them might present the question. The company is not injured by an inequitable distribution of the expense among the subscribers. It is concerned more with the question whether the total return from the whole body of subscribers will give it the sum to which it is entitled. The opinion holds the total return is adequate.

III. Appellant apparently approaches the principal question on the theory that the question of fact in the case concerns the reasonableness of the rates in force before the order presented for review was made. The statute set out in a preceding paragraph

requires this court to inquire whether the order was unreasonable or unlawful, and confronts appellant with a presumption that it is neither, but both reasonable and lawful. I concur in the result reached.

HIGBEE, J., concurs herein.

**On Motion for Rehearing.**

ELDER, J. On motion for rehearing appellant contends that under the opinions filed herein we have left the matter of service connection charges in such an unsettled state as to cause "confusion in the minds of the Commission and the telephone utilities of the state as to whether or not the service connection charges are held to be discriminatory, or otherwise, by this court." While I concurred in the result of the opinion filed by my learned associate, Chief Justice WALKER, I expressed no opinion upon the question now urged. In order to clarify the subject somewhat, I add to my concurrence the view that such charges, when just and reasonable, are neither discriminatory nor unlawful. While upon first impression they might seem to impose an unfair burden upon the individual subscriber applying for the installation or removal of a telephone, nevertheless, if subjected to a thorough analysis, they will be found to be in furtherance of an equitable distribution of operative costs among all subscribers.

**Ex parte OPPENSTEIN et al. (No. 22925.)**  
(Supreme Court of Missouri, in Banc. July 22, 1921.)

1. Constitutional law §45—Court has no power to change Constitution, but only to interpret.

In determining whether Const. art. 8, § 3, relative to election by ballot, permits the use of the ballots in evidence in judicial proceedings, the court can only construe the Constitution, and cannot substitute a policy which it deems better than that prescribed in the Constitution.

2. Elections §28—Constitutional provision of voting by ballot held to require secrecy.

Section 3 of article 8 of the Constitution, providing that all elections by the people shall be by ballot, requires secrecy of the ballot, and such secrecy cannot be violated in any judicial proceedings except those specifically mentioned in the Constitution.

3. Elections §28 — Provision for numbering ballots does not warrant violation of secrecy of ballot; "election by ballot."

As section 3 of article 8 of the Constitution provides that all elections shall be by ballot, which means of a secret ballot, the further provision that the ballots must be numbered, although removing the veil of secrecy

of the ballot to some extent, does not entirely destroy the secrecy of the ballot so as to permit the examination of the ballots in proceedings other than those therein specified.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Election by Ballot.]

4. Elections §28—That election officers may testify as to how voters voted does not authorize examination of ballots.

Under section 3 of article 8 of the Constitution, requiring elections to be by ballot, which means a secret ballot, and further providing that an election officer may not disclose how any voter shall have voted except as a witness in a judicial proceeding, the permitting of election officers to testify in a judicial proceeding cannot be construed as allowing the use of ballots as evidence.

5. Elections §28—Ballot may be examined only in election contest.

Under section 3 of article 8 of the Constitution, providing that in election contests the ballots may be counted, compared with a list of voters, and examined under legal safeguards and regulations, examination of ballots as evidence is limited to election contests only.

6. Constitutional law §16—Rejection of proposition by constitutional convention shows intended construction of present provision.

Where the constitutional convention rejected a proposition that all ballots should be subject to inspection and examination in all cases of contested elections and judicial proceedings and limited inspection of ballots to election contests, this is conclusive of the question of intent of the convention as to the interpretation of the present provision.

7. Elections §28—Statute providing for examination of ballots held without force in part, as contrary to the Constitution.

Rev. St. 1919, § 5403, providing that ballots may be examined in investigations and trials is without force, except as to ballots cast in primary elections and as to election contests, in view of Const. art. 8, § 3.

8. Elections §28—Although ballots had been examined in contest over one office, they may not be used as evidence in another judicial proceeding.

Where the ballots had been examined and counted in an election contest for the office of mayor, but votes for other officers were kept secret, and even if secrecy of the ballot as to other officers was illegally violated, this will not justify examination of ballots as testimony in a judicial proceeding not an election contest.

9. Elections §28—Statute prohibiting disclosure of information that would tend to show who voted any ballot valid.

Although section 5403, Rev. St. 1919, so far as it permits examination of ballots, is without force as conflicting with section 3, art. 8, of the Constitution, except as to primary elections and election contests, since there is nothing in section 3 prohibiting the Legislature from enacting that the ballots shall not be used in evidence in proceedings other than contested

elections, the provision in section 5403 that ballots shall not be used or information disclosed in a way that would tend to show who voted any ballot is valid.

**10. Elections — Proposed use of ballots held to violate statute.**

Under Rev. St. 1919, § 5403, providing that election ballots shall not be used or any information disclosed tending to show who voted any ballot, ballots cannot be used as evidence in a criminal case, even if not prohibited by the Constitution, where the numbers and names of the voters who cast them are on file in the office of the clerk of the court in connection with an election contest, as this would tend to show who voted the ballots.

Higbee and David E. Blair, JJ., dissenting.

Original petition in habeas corpus by Louis Oppenstein and others against John L. Miles, Marshal of Jackson County. Petitioners discharged from custody.

Frank W. McAllister, Chas. M. Blackmar, Armwell L. Cooper, and Edward J. Curtin, all of Kansas City, for petitioners.

Cameron L. Orr, of Kansas City, Pros. Atty., for marshal of Jackson county.

**JAMES T. BLAIR, C. J.** Petitioners constitute the board of election commissioners of Kansas City. They have sued out a writ of habeas corpus to obtain their release from custody upon a commitment for contempt because of their refusal to obey a subpoena duces tecum which commanded them to produce in the criminal court of Jackson county the original ballots, poll books, register, and certificate of the result of the election in the Fifth precinct of the Second ward of Kansas City, used, made, and certified in that precinct at the municipal election in April, 1920.

The question presented by counsel is whether the Constitution of the state permits the ballots in question to be used in evidence in the manner in which it is attempted to use them in this case. An agreed statement of facts upon one phase of the case is referred to, as far as necessary, in the opinion.

[1] I. In cases of this kind it is usual for the argument to be made that unless this court holds that ballots, etc., may be freely used in evidence, frauds may go unproved, and election crooks go unpunished. This case is no exception to the rule. In his brief counsel says:

"We believe the time has come when this court should fearlessly announce that nothing shall be permitted to stand in the way of the prosecution of a crime against the ballot box. Unless we have honest elections, then government by the people is a farce, and it seems trite to say that no rights of an individual elector should be considered when the rights of the whole people are assailed by false ballots or by

false count and returns on the part of election officials."

The question the parties present in this case is whether the Constitution of the state permits the use in evidence of the ballots, and the like, used in an election to which the Constitution applies. Counsel does not deny, nor could it be denied, that the people have power by constitutional provision to prohibit their use in the manner in which counsel seeks to use them. Of course, if the people have not prohibited such use, the quoted argument has little application to the question in this case. It is therefore clear that what the argument in fact invites this court to do is that, if it shall find the Constitution does prohibit such use, it shall "fearlessly announce" that it will not "support the Constitution of this state" (section 6, art. 14, Const. Mo.) in so far as concerns section 3 of article 8 of that instrument. That counsel really intends that the court shall yield to this argument is beyond belief. It was doubtless but a slip of the pen, which was, perhaps, induced by previous slips of other pens in like cases.

The question in this case is not what the people ought to have put into the Constitution. The question is, What does the provision mean which they did put into the Constitution?

II. When the constitutional convention came to the business of drafting the article on suffrage and elections, and the people came to the business of adopting the article the convention had drafted, then the question of policy was for consideration, and then the arguments, pro and con, were made and heard. The convention proposed the adoption of the policy provided in section 3 of article 8, and the people adopted that policy when they adopted the Constitution the convention had drafted. Good or bad, for better or for worse, it was written into the Constitution, and this court has no power to change it. The court may decide what policy was adopted, but it may not displace the policy adopted and substitute one which it or counsel may deem to be better. It may not amend the Constitution. It must apply it as the people wrote it.

III. The history of the adoption of the ballot as a method of voting has often been written. Constant repetition of arguments based upon the assumption that there can be no consideration of sound policy which could support a provision for an absolutely secret ballot, will excuse some reference to the conditions and arguments which confronted the constitutional convention and the people on this head. The method of voting viva voce once prevailed in this state and elsewhere. The literature of the times, both legal and other, demonstrates that this method had resulted in coercion, corruption, and intimidation, and was attended by rioting, violence,

and disorder. The bribe giver had certain means of determining whether the votes he bought were cast as agreed. Employers, creditors, landlords, organizations of all kinds, could and did require employees, debtors, tenants, members, and others to vote as directed, or suffer such punishment or inconvenience as the circumstances permitted. These were conditions and not theories. Discussions of them and references to literature on the subject can be found in the *Australian Ballot System*, by Wigmore, published in 1889. Statesmen became much concerned. The system of election by ballot was designed to cure these evils. The heart of the system was secrecy. There was opposition to it. The arguments made now were made then, and others as well. The new system was rapidly adopted. At the time the convention of 1875 was held these arguments had been developed and amplified, pro and con. The fragments of the debates in the convention which are still available show they were considered in that body. With these arguments before it, the convention adopted section 3 of article 8.

At that time it was already settled beyond doubt that election by ballot meant an election by secret voting. There is practically no difference of opinion as to that. The history of the origin of the system precludes any other view. Counsel does not deny this. Many of the decisions are collated in 6 C. J. pp. 1173, 1174, and 9 R. C. L. §§ 64, 65, pp. 1046, 1047. Among these are found decisions of this state which many years ago, construed the words "election by ballot" in entire harmony with the construction almost universally given them elsewhere.

The text-books have always announced the same doctrine. Judge Cooley, whose great ability is universally esteemed, expressed himself thus:

"The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in a position, to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in the case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information in the courts on the subject. Public policy requires that the veil of secrecy should be impenetrable. Unless the voter himself voluntarily determines to limit it, his ballot is absolutely privileged; and to allow evidence of its contents when he has not waived the privilege is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that, while the law from motives of public policy establishes the secret ballot with a view to conceal the elector's actions, it at the same time encourages a system

of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public." Cooley on Constitutional Limitations (17th Ed.) pp. 912, 913.

Numerous decisions support this text. This language is quoted and approved in *McCrary on Elections* (4th Ed.) §§ 488, 489.

In *People v. Cicott*, 16 Mich. loc. cit. 312, 97 Am. Dec. 141, *Christiancy, J.*, with whom *Cooley, C. J.*, and *Graves, J.*, concurred, said:

"The object of this requirement [that all votes 'be given by ballot'] when considered with reference to the history of our country and the whole theory of popular governments, \* \* \* is too plain to be misunderstood. It was to secure the entire independence of the electors, to enable them to vote according to their own individual convictions of right and duty, without the fear of giving offense or exciting the hostility of others. And with this view the right is secured to every voter of concealing from all others, or from such of them as he may choose, the nature of his vote, or for what person or party he may have voted. This important object, vital as I think it is in our system of government, would be substantially defeated if the voter could be compelled to disclose, even in a court of justice, how he has voted. The Constitution, and our statutes which have followed out its spirit, have thrown over the voter an impenetrable shield, under which he may keep the secret of his vote until he shall see fit to disclose it. \* \* \*

"How an elector may have voted is, under the Constitution and the law, a fact which no man has a right to learn, in this or any other manner, till the elector himself may choose to make it public."

[2] The proposition then, that a simple provision that "election shall be by ballot" introduces absolute secrecy is established by the decisions of the courts, the views of the text-writers, the history of the origin of voting by ballot, and the nature of the evils it was intended to remedy, and is not questioned by counsel for respondent, as we understand him. Further, as this court long ago pointed out, the people who adopted our Constitution and who have the power to amend or revise it, or adopt another in its stead, have not by any of these methods indicated dissatisfaction with section 3 of article 8, as construed by this and (like provisions) practically all other courts of the country.

IV. These principles were before the convention and the people when the Constitution of 1875 was adopted. It is therefore apparent that the question of policy was not a one-sided one, as the argument of counsel in this case seems to assume. It was between policies that the convention and the people were called upon to choose. They did choose, and their choice is expressed in section 3 of article 8. When the meaning of that section is determined, this case is decided.

[3] V. The first clause in section 3 of arti-

cle 8 is that, "All elections by the people shall be by ballot." As already pointed out, these words, at the time they were written into our Constitution, had a definite and settled meaning. If they stood alone and unqualified, there could be no question about their meaning, and petitioners' position would have to be sustained without further ado. It is also true that the meaning of the quoted words cannot be held to be modified or affected by anything outside of the Constitution. The Constitution cannot be changed by the Legislature or the courts, or any other than the people who adopted it. It is useless labor, therefore, to look elsewhere than in the Constitution for the modifications of the quoted clause which, respondent's counsel contends, so qualify it as to justify the restraint of petitioners.

1. It is urged, since the Constitution requires the ballots to be numbered, that the ballot it prescribes is no longer a secret ballot, and therefore the ballot of any and all voters may be examined at will. Cases are cited. These are decisions from states in which the constitutional provisions in force merely provided that "elections shall be by ballot" or "by secret ballot," and in which the Legislature attempted to require that the ballots be numbered so that the ballot of any voter might be identified. *Williams v. Stein*, 38 Ind. loc. cit. 91, 10 Am. Rep. 97; *Brislin v. Cleary*, 26 Minn. 107, 1 N. W. 825; *Ritchie v. Richards*, 14 Utah, 373 et seq., 47 Pac. 670. These decisions are that elections by ballot necessarily mean elections by secret ballot, and that the Legislature may not provide a means whereby the secrecy secured by the Constitution may be invaded; and that numbering and listing the ballots may not constitutionally be required under such provision. These decisions do not support the contention counsel makes. As heretofore pointed out by this court, the provision in section 3 of article 8, that ballots must be numbered, "Of course removes the veil of secrecy to some extent," but in no wise destroys it entirely. *Ex parte Arnold*, 128 Mo. 256, 30 S. W. 768, 1036, 33 L. R. A. 386, 49 Am. St. Rep. 557. The provision for numbering has its uses in election contests, as the section expressly provides. The mere numbering of the ballots does not, of itself, in fact uncover the ballot of any voter; nor does that provision authorize any action by any one which would, of itself, disclose the character of any ballot. Except in cases of contested elections, no permission is given to compare the ballots with the list of voters. The fact that such permission is expressly given in election contests is certainly not any reason for saying that such a comparison may be made in proceedings which are not election contests. This exception in section 3 in no way aids respondent.

[4] 2. Section 3 of article 8 permits elec-

tion officers to testify in judicial proceedings concerning the way in which a voter voted. It has been suggested that it is absurd to think that the Constitution would permit secondary evidence and exclude the primary evidence, the ballots. The question is not the wisdom or consistency of what was done. The question is, What was done? It is clear that the permission to testify has nothing to do with the use of the ballots in evidence. It is merely an exception to the provision that election officers shall not disclose how any voter voted. The exception permits them to testify, and permits that only. When due consideration is given what was before the convention, the idea that this provision is absurd does not seem to be established as correct.

[6] 3. It is contended that the proviso that, "In all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law," in some way aids the argument that the ballots may be put in evidence in proceedings other than contested elections. This finally resolves itself into an argument that the quoted proviso does not limit the use of the ballots to cases of contested elections. Even if true, this could not aid respondent. The question is not whether this proviso itself limits the use of the ballots to contested election cases. Rather, it is whether the proviso extends the use of the ballots to proceedings other than contested elections. The limitation is found in other words of the section. It is too clear for argument that the proviso has no pertinence to any proceeding except cases of election contests. Upon this question *People v. Londoner*, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444, is cited. That decision is chiefly concerned with the question whether quo warranto could be employed to determine who had been elected to office. It was held the proceeding was authorized. With the greatest respect for the learned court which rendered that decision, we find our own decisions out of harmony with its principal ruling in the *Londoner* Case, and in harmony with the weight of authority elsewhere. *State ex rel. v. Francis*, 88 Mo. 557. See note to *State v. Ross*, 245 Mo. 36, 139 S. W. 451, Ann. Cas. 1913E, p. 982 et seq. In the portion of the decision upon which respondent relies, it is held that:

"The declaration in section 8, article 7, of the Constitution, that the ballots may be examined in contested elections, does not limit this examination to such proceeding. The right mentioned has always been freely exercised in quo warranto, which is the common-law method of inquiring into election frauds. And the purpose of this provision was to give, in the election contests authorized by section 12 of the same article, already considered, the privilege of inspecting \* \* \* ballots, not to withdraw it from the proceeding in which theretofore it

had been universally exercised. The leading object of said section 8 was to preserve the purity of the ballot by insuring its secrecy; but, lest the language indicating this intent should be carried too far, and become the means of perpetrating fraud, the privilege in question was carefully extended to election contests, in which, perhaps, it might otherwise have been challenged."

It is apparent that the court was deciding the question whether the provision for comparing the ballots with the lists of voters in contested election cases itself prevented such comparison in other cases. That it does not do so is clear enough, as we have already pointed out. That is not the question here. In this case the question is whether the proviso with respect to contested elections authorizes the use of the ballots in proceedings other than contested elections. The learned court which decided the Londoner Case did not approach the question from that angle. Counsel seem to have assumed that the proviso respecting contested elections in Colorado was the sole restriction which could be relied upon to prevent the use of the ballots in quo warranto proceedings. That contention the court answered, but that answer is not relevant to the question before us. Again, though the provisos respecting contested elections in section 3 of article 8 and in section 8 of article 7 of the Constitution of Colorado do not of themselves expressly and in terms prohibit the use of the ballots in other proceedings, yet the very fact that special provision was deemed necessary in the case of contested elections makes applicable the well-known canon of construction, "*Expressio unius, exclusio alterius.*" Ex parte Arnold, 128 Mo. loc. cit. 263, 264, 30 S. W. 768, 1036, 33 L. R. A. 386, 49 Am. St. Rep. 557. The effect of this rule is not discussed in the Londoner Case. This makes it still more apparent that the court was not called on by the briefs to consider a contention like that made here.

VI. It is argued that the decision in *Gantt v. Brown*, 238 Mo. 560, 142 S. W. 422, authorizes the use of the ballots, poll books, etc., in the trial of a criminal case. It is obvious that this is not a correct construction of that decision. No such question was before this court in that case. It is a poor compliment to our Brethren then upon this bench to attribute to them an effort to decide a question in no wise presented by the record before them. That case dealt with an election contest, and considered the meaning of the proviso to section 3 of article 8 of the Constitution, which proviso expressly provides that in "all cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined under such safeguards \* \* \* as may be prescribed by law." That the question in that case has no analogy to that presented by this record

is beyond cavil. The learned writer of the opinion in *Gantt v. Brown* concurred in the opinion in *re Feinstein*, in which the inapplicability of that decision to a case somewhat like this is pointed out. In the concurring opinion of Lamm, J. (in which a majority concurred) in *Gantt v. Brown*, 238 Mo. loc. cit. 581, 142 S. W. loc. cit. 429, that learned jurist summed up the holding thus:

"Our ruling does not mean that the secrecy of the ballot should be exposed except in so far as it may be absolutely necessary, under the allegation of the pleadings in an election contest, to show fraud, if any, and to that extent neither the Constitution nor the statute protects the secrecy of the ballot."

That this court in that case had no idea it was passing upon any question save that pertaining to contested elections is obvious from the record it had before it, the language of the opinion and the rule it announced, and by the subsequent course of the judges who participated in that decision. The case of *Gantt v. Brown* has no relevancy to the question counsel present in this case.

[8] VII. The constitutional convention, after having put section 3 of article 8 in the form in which it now stands, had before it the question of striking out that section and adopting the following:

"All elections by the people shall be by ballot, but all ballots shall be subject to inspection and examination, in all cases of contested elections and judicial proceedings, under such proceedings, regulations and safeguards as may be provided by law."

This substitute was rejected by a vote of 42 to 28. Three members were absent. The power to inspect and examine the ballots in "judicial proceedings" would have been given by this amendment. The convention rejected it.

It is clear from this that the constitutional convention had before it, in the proposed substitute section, the very question which counsel discuss. This substitute would have expressly given the authority now sought to be exerted. When the convention defeated it, it passed upon the question in this case. Its intent could hardly have been more clearly exhibited than by the vote upon the substitute section.

VIII. The decision in *re Massey* (D. C.) 45 Fed. 629, is cited. In that case the question was "whether, by the act of Congress and the laws of the state of Arkansas, the custodian of ballots cast at an election held for members of Congress, pursuant to said laws, may be compelled by a federal court, in administration of the criminal law of the United States, to produce the ballots cast at said election or not." After stating the question thus, the learned District Judge held the federal law was, in such a case, paramount, and that restrictions upon freedom of action under it could not be imposed by the



state. As he remarks, he might well have left the matter there as decided by the principle he had laid down. Nevertheless, he proceeded to discuss the question whether the laws of Arkansas made any provision which would permit the examination of the ballots in a case to which those laws applied. With great respect, we do not deem this part of the opinion deserving of great weight in the question in the instant case. First, it is clearly and admittedly obiter; second, it reaches a conclusion as to the construction of a law of a state which is in conflict with the construction of that law placed upon it by the highest court of that state; third, the learned judge obviously goes into the discussion of what the law should be, of what the proper policy is, rather than into the question of what the law means, i. e., what policy the state had adopted.

[7] IX. Section 5403, R. S. 1919, is cited. It is, of course, not restrained by counsel that this section can be held to give authority which is denied by the Constitution. In so far as it conflicts with the Constitution it is without force in this case. The Legislature had no power to authorize what the Constitution prohibits. This is not a primary election case. With respect to such elections the Legislature is not restrained by the Constitution since section 3 of article 8 does not apply to them.

[8] X. It is said that in an election contest in Kansas City the list of voters was made and the respective numbers of the ballots cast were shown in connection with the names on this list, and that it was also shown for whom each voter voted, and that all this is on file in the office of the circuit clerk of Jackson county. It is argued that these facts show that the ballots have already been exposed, and that "the veil of secrecy has been destroyed, and there is now no foundation for the contention that the ballots of any precinct, so exposed in the election contest, should not be produced in evidence." The agreed statement of facts shows that the contest referred to affected the office of mayor only. The ballots listed seem to have been those cast for contestant in that case. Many other officers were voted for and against in that election. The lists show what ballots were cast for contestant in the mayoralty race and who cast them. They could not legally have included a showing as to officers other than mayor. The only votes which lawfully could have been reported upon and made public in the contest case are those for mayor. The examination of ballots, in so far as they affect one race for office, which lawfully may be counted and compared with the list of voters in an election contest, in no wise authorizes the making public of the way in which those who cast such ballots voted on other offices. Further, if the votes pertaining to races other than that for mayor were unlawfully

made public, this unlawful act would not justify another violation of the Constitution in this proceeding. This is too clear to require argument.

[9, 10] XI. While section 5403, R. S. 1919, in so far as it conflicts with the Constitution, is inapplicable to ballots cast at an election which is such in a constitutional sense, it is entirely general in its terms, and applies to all ballots except to the extent to which the Constitution prevents such application. There is nothing in section 3 of article 8 which prohibits the Legislature from enacting that the ballots shall not be used in evidence in proceedings other than contested election cases. Therefore, even though it could be held that the Constitution did not prevent the use of the ballots in this case in the way in which it is sought to use them, still the effect of section 5403 would have to be considered. That section, among other things, provides that the ballots shall "in no way be used or any information disclosed that would tend toward showing who voted any ballot."

In this case it is proposed to bring into court and use in evidence ballots of which, as shown by the agreed statement of facts, the numbers and names of the voters who cast the particular ballots are already on file in the office of the circuit clerk of Jackson county. This record in the clerk's office, respondent insists, is a public record. To say that the use of the ballots in evidence would not, in these circumstances, "tend toward showing who voted any ballot" would require some hardihood. The statute prohibits their use.

XII. State ex rel. Kinsey (No. 18035), no opinion, which was referred to in State ex rel. Feinstein v. Hartmann (No. 22572) 231 S. W. 982, is not cited by respondent in this case. In the Feinstein Case enough was said of State ex rel. Kinsey to show that it was inapplicable in that case. There was no occasion to go further at that time. In this case it is sufficient to say that in the Kinsey Case the application for the writ was disposed of without opinion, and that it nowhere appears what reasons moved the court to deny the writ for which application was made. It is quite certain that the court could hardly be thought to have intended to overrule any of the previous decisions by merely marking an application for a writ "denied." It would be a remarkable departure from its customary practice if it did so intend. It is quite as certain that it did not intend to decide anything which would contravene the Constitution. It would have done both had it intended its action in denying the writ to be interpreted as counsel interpreted it in the Feinstein Case. Writs are frequently denied for reasons which do not arise out of substantive law.

XIII. Nearly all the arguments advanced by respondent have been considered hereto-

fore by this court in decisions cited in previous paragraphs. To some extent we have reconsidered these and given expression to our views upon them. If, as said in *State ex rel. Francis*, supra, the state of Missouri has tied her own hands, the court is not empowered to undo what she has done. Also, as said in *Ex parte Arnold*, supra, if one court may open the ballot boxes, then all courts may do so, and the ballot no longer is a secret ballot. So far as concerns the question urged by respondent, the people have chosen the policy they desired. They had full power to choose. Courts and Legislature must abide by that choice. The petitioners are discharged from custody.

All concur, except HIGBEE and DAVID E. BLAIR, JJ., who dissent.

**COCA-COLA BOTTLING CO. et al. v.  
MOSBY, State Beverage Inspector.  
(No. 22633.)**

(Supreme Court of Missouri, En Banc.  
July 22, 1921.)

**1. Food — Inspection laws within sphere of state's authority.**

Inspection laws designed to insure the purity of foods and drinks are within the sphere of the state's authority.

**2. Food — Soft drink inspection act not a revenue measure.**

Laws 1919, p. 379, providing for the inspection of nonintoxicating carbonated beverages, held an inspection measure, and not a mere revenue measure, in so far as its language is concerned.

**3. Statutes — 110½(3)—Title of soft drink inspection act complied with Constitution.**

Laws 1919, p. 379, providing for the inspection of nonintoxicating carbonated beverages, entitled "an act providing for and relating to the inspection of all nonintoxicating and carbonated beverages and so-called soft drinks," etc., held not violative of Const. art. 4, § 28, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title.

**4. Food — Act providing for inspection of samples of soft drinks not invalid.**

The soft drink inspection act (Laws 1919, p. 379), providing for the inspection of samples instead of entire products, held not on that account invalid as a mere revenue measure, and not an exercise of the police power.

**5. Food — Soft drink inspection act providing no penalty for manufacture not invalid.**

The Soft Drink Inspection Act (Laws 1919, p. 379) held not invalid because no penalty is prescribed for the manufacture of impure, unclean, and unwholesome products.

**6. Food — Soft drink inspection act not a revenue measure on account of fee prescribed.**

The Soft Drink Inspection Act (Laws 1919, p. 379), as amended by Laws 1921, p. 402, to

reduce the fee for inspection from 1½ cents to three-fifths of a cent per gallon on soft drinks, etc., held not, on account of excessive fees prescribed, a mere revenue measure, and not a legitimate exercise of the police power.

**Appeal from Circuit Court, Cole County:  
J. G. Slate, Judge.**

Suit by the Coca-Cola Bottling Company and others against Thos. Speed Mosby, State Beverage Inspector. From judgment for defendant, plaintiffs appeal. Affirmed.

Phillips W. Moss, of St. Louis, for appellants.

Jesse W. Barrett, Atty. Gen., and Merrill E. Otis, of St. Joseph, for respondent.

**WALKER, J.** This is a suit in equity, brought in the circuit court of Cole county, by certain incorporated companies engaged in the compounding and sale of what in common parlance, are termed "soft drinks." The purpose of the action is to restrain the State Beverage Inspector from enforcing the provisions of an act approved April 25, 1919 (Laws 1919, page 379), providing for the inspection of nonintoxicating carbonated beverages, and syrups, extracts, and flavors used in the preparation of same, requiring a monthly report of sales and the payment of fees by the manufacturers of those products, for inspection services and prescribing penalties for violations of the act. It is contended that the act is unconstitutional and hence void. Upon a hearing before the circuit court, there was a finding for the defendant, the injunction was denied, the petition dismissed, and an appeal perfected to this court.

Aside from the formal admission as to the corporate existence and the nature of the business of each of the plaintiffs, and the official character of the defendant, it was conceded in an agreed statement of facts that defendant had required plaintiffs to file monthly reports and pay fees upon their respective sales, based upon the rates fixed by said act; that during the period from April 25, 1919, to September 20, 1920, defendant had collected in fees from all sources under said act \$360,054.85, of which sum \$90,318.01 was received from bottlers of soda water and the remainder from manufacturers of other nonintoxicating beverages and from soda fountains; that the total expense of said defendant's office during the time stated was \$98,084.51; that during said time, chemical and bacteriological analyses were made in the laboratory of said defendant, of samples of the beverages compounded by plaintiffs and others engaged in a like business; and, in addition, a personal inspection was made of the places where such beverages were manufactured or sold in this state, upon an average of about once per month; that the value of the products of these plaintiffs and the price at

which they are sold is from 86 to 80 cents per gallon; that the value of the products of other manufacturers of like products is from 28 cents to \$1 per gallon.

I. The contention of the plaintiffs is that this act is a revenue, rather than an inspection measure, and consequently void, and that the word "inspection," wherever used therein, is but a subterfuge to conceal the real purpose, and free the act from the restrictions of the Constitution, which if applied to a revenue measure, would render it inoperative. Mere words will not, of course, suffice to determine the character of a legislative act; they are but milestones measuring the distance and marking the way to the goal of true meaning in all journeys of interpretation. Despite the frequency, therefore, of the use of any particular words in an act which, if properly used, are indicative of its character, its meaning and purpose are to be determined by an application of the tests recognized by the canons of construction. Among these tests of more than minor importance and perhaps sufficient within themselves to solve the question confronting us, may be mentioned the language employed, the intention of the Legislature as indicated by that language and the object and purpose of the act when construed as a whole. Novel preparations of both foods and drinks are constantly increasing in quantity and variety, often alluring in name and uniformly, whether justly or not, emblazoned with the hallmark of merit by the ingenious advertiser; their distribution soon becomes widespread, their reputed merits familiar, and their consumption general. Illustrative of this fact are the myriad forms of so-called breakfast foods, the nomenclature of which has well-nigh exhausted human fancy, and whose health-giving properties, measured by the modest claims of their makers, equal, if they do not excel, the magical effects of the waters of the padre's spring of San Joaquin, concerning the virtues of which Bret Harte charmingly invokes the aid of the Muse.

[1] Another illustration more pertinent to the matter at issue is to be found in the carbonated waters and their concomitants now so extensively manufactured and generally used, that they no longer require the aid of printer's ink to promote their sale. Consisting simply of water charged with carbon dioxide, to which is added an acid to create effervescence, and flavored oftentimes to simulate a fruit or herb whose parent stem was probably the alembic of a laboratory, and making no claim to merit other than the creation of a pleasant, but fleeting gustatory sensation, the extensive manufacture and general use of preparations of this character are akin to the remarkable. An English curate, after having met Lord Chesterfield, was asked what he thought of him. He said he might be lacking in many virtues, but "he certainly

left a pleasant taste in one's mouth." This, at least may be said of what we familiarly call soda water and other soft drinks, which, sparkling like the vintages of Champagne and Moselle, tickle the palate, but here the simile ceases. These observations, casually considered, might seem to indicate a wandering afield. But not so. The fact that these and other preparations, especially those intended for food or drink, are so extensively made and so generally used, is the moving cause of legislation of the character here under review. In short, it is but another illustration of the exercise of the police power, inherent in the state as a sovereignty, needing no organic grant for its existence, and demanding legislative aid only to give it form and provide a procedure for its operation. Many attempts have been made to define this power, the most comprehensive of which perhaps is that of Judge Cooley. *Q. v. Cooley's Con. Lim.* (7th Ed.) p. 289. It is not necessary to quote it here on account of its length. It will answer our purpose to say that by means of this power the Legislature exercises supervision over matters involving the public welfare, and enforces the observance by each individual of the duties he owes to others and to the community at large. The motto of this state, that the will of the people is the supreme law, is one of the fundamental principles involved in the exercise of the police power. Another upon which the power to a large extent rests is the maxim that you must so use your own as to not injure the rights of others. It is said that nearly every problem involved in the exercise of the police power finds its solution in the application of the principle embodied in this maxim. 6 R. O. L. p. 188, § 186; *Sings v. Joliet*, 237 Ill. 300, 86 N. E. 663, 22 L. R. A. (N. S.) 1128, 127 Am. St. Rep. 323; *Karasek v. Peter*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345. That inspection laws are within the sphere of the state's authority, in its exercise of the police power, is as clear as the power of Congress to establish regulations of commerce. *Foster v. Master & Wardens of Port of New Orleans*, 94 U. S. 246, 24 L. Ed. 122; *New York v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *Armour v. Augusta*, 134 Ga. 178, 67 S. E. 417, 27 L. R. A. (N. S.) 676. This is true because inspection, especially of foods or drinks, concerns itself with the purity of the article inspected, and hence is promotive of health in prohibiting the use of deleterious products. In the restrictions which follow the enforcement of inspection laws, we discern the application of the maxim above referred to, viz., *Sic utere tuo*, etc., in that, regardless of the manner in which you use your own, whether it be as an individual or as a manufacturer producing commercially an article for sale, that use must be such as to not injure the user. In other words, a prohibition may be placed by law upon the making and sale of any article deleterious to

the user, as in the case of impure articles of food or drink. There remains, therefore, nothing upon which the contention can rest that laws of the nature of that under review may not be enacted and enforced, subject, of course, to such restrictions as the Constitution has placed upon laws generally, as to reasonableness within which is included all of the objections urged by the plaintiffs against the validity of this enactment.

[2] II. Preliminary to the consideration of these constitutional questions, let us examine the language of the act to determine therefrom its character, viz. whether it is to be classified as an inspection or a revenue measure. It provides for and defines the duties of an official who is charged with the execution of its provisions; it prescribes specifically the products to be inspected; it prohibits the manufacture and sale of such products if not pure and wholesome; it requires samples of such products to be submitted for inspection by manufacturers, and requires sellers of products not manufactured in this state to file affidavits of the manufacturers with the inspector that he may determine the purity of the products; and requires the inspection of such products; it prescribes the fees for inspection; directs the keeping of records of the inspector's work, of the fees collected by him, and how reported and accounted for. Labels showing the nature of the beverage, and that it has been inspected as to its character and purity, are required to be placed upon all packages of same; a penalty being prescribed for a violation of this duty. Beverages manufactured in this state, but to be shipped out of it and sold elsewhere, are to be inspected free to the manufacturers. Certificates of inspection and labels are to be prepared and kept by the State Treasurer, to be delivered and charged to the inspector, who shall keep a record of and account for same to the Treasurer. A penalty is prescribed for the misuse of certificates and labels. Likewise a penalty is fixed for a failure by the inspector to perform his duties. Other provisions embody matters of procedure not necessary to be set forth here. From the foregoing epitome, the conclusion is inevitable that, so far as the subject-matter is concerned, this act, if words are to be read with their usual meaning, cannot be otherwise construed than as an inspection measure. Thus classified and defined, it follows as a necessary consequence that such was the intention of the Legislature in its enactment; and that the object and purpose of the act, as we have indicated in discussing general legislation of this character, was the public good, in that it tends to prevent fraud in the making of the products, is promotive of their purity, and hence helpful to health. As a result of this conclusion, unless it can be shown that the operation of the act is onerous and the result of its enforcement alien

to the purpose of its enactment, it will stand the test of judicial interpretation. *Monroe v. Lawrence*, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; *Bradford v. Jones*, 142 Ky. 820, 135 S. W. 290; *Parker v. Griffith*, 151 N. C. 600, 66 S. E. 585; *State v. Fargo Bottling Works Co.*, 19 N. D. 396, 124 N. W. 387, 26 L. R. A. (N. S.) 872; *State v. Danenberg*, 151 N. C. 718, 66 S. E. 301; *Sawyer v. Bottl*, 147 Iowa, 453, 124 N. W. 787, 27 L. R. A. (N. S.) 1007; *Commonwealth v. Henry*, 110 Va. 879, 65 S. E. 570, 26 L. R. A. (N. S.) 883.

[3] III. To these limitations let us give attention in the order in which they are urged by counsel for the plaintiffs. Before considering other matters, there is one relating to the form of the act which merits attention. It is contended that the title of the act insufficiently indicates its character, or, more concretely, that it should show in *hæc verba* that it is not a revenue measure. Without more ado, let the title itself answer this objection. It declares it to be "an act providing for and relating to the inspection of all nonintoxicating and carbonated beverages and so-called soft drinks, by whatever name called, also syrups, extracts and flavors of all kinds intended for use in the preparation and concoction of soft drinks," etc. Read even cursorily, the merest tyro cannot mistake the meaning of these words. So clearly do they define the object of the act that an attempt to explain them ends only in redundancy and possible confusion.

The state Constitution (section 28, art. 4) is read to little purpose if it be held to require that the title of an act must present the particularity of an itemized account or the minutiae of a chemical analysis. When the Constitution provides, therefore, that "no bill \* \* \* shall contain more than one subject, which shall be clearly expressed in its title," it simply means that the title shall indicate in an unmistakable manner the general contents of the act; it does not require, nor was it intended that it should descend into particulars, but that it will be sufficient if it defines the nature of the statute and thus informs the reader as to its purpose. The nature of this constitutional provision being thus understood, the tendency of the courts in numerous rulings has been to construe it liberally in aid of all well-directed legislative power. *State ex rel. v. Guinotte*, 275 Mo. 298, 204 S. W. 806; *Booth v. Scott*, 278 Mo. 1, 205 S. W. 633; *State ex rel. v. Roach*, 258 Mo. 541, 187 S. W. 1008; *State ex rel. v. Drabelle*, 258 Mo. 568, 187 S. W. 1016; *Burge v. Railroad*, 244 Mo. 76, 148 S. W. 925; *State v. Hanson*, 234 Mo. 583, 137 S. W. 968. There is no merit in this contention.

[4] IV. The provision for the inspection of samples, instead of the entire product, it is contended, constitutes a subterfuge which renders the act inutile as an exercise of the police power, and consequently invalid. A

like contention is made in the Bixman Case, 162 Mo. loc. cit. 34, 62 S. W. 828, in which the statute authorizing the inspection of beer was under review; in recognition of the beneficent purpose of the law and to further its object, the court construed it liberally, and held that the inspector might take a sample at random from the various cases, or go directly to the brewery and take a sample of the mash from the vats in making his tests. The reason for this ruling is apparent. It accomplishes the purpose of the act with a minimum amount of trouble and expense to the owner of the product inspected. Any other course would prove tedious, expensive, and impracticable. Inspection by sample is authorized, and has been satisfactorily practiced for many years in this state in the regulation of the sale of grain, milk, and other food products. This course has received legislative authority and judicial recognition elsewhere, and we fail to find any contention that it has not proved effective, or that it is counter to any constitutional provisions. *State v. Dupaquier*, 46 La. Ann. 577, 15 South. 502, 26 L. R. A. 162, 49 Am. St. Rep. 334; *Comm. v. Carter*, 132 Mass. 12.

[6] V. The validity of the act is assailed on the ground that no penalty is prescribed for the manufacture of impure, unclean and unwholesome products. This objection is purely finical. The purpose of the law is not to regulate the manufacture, but the sale of impure products. Lacking this requisite, the validity of the act as an exercise of the police power might well be questioned. In what manner can the use of these products prove injurious, within the meaning of the maxim, *Sic utere*, etc., unless they are dispensed or disposed of to others or, in a word, sold? As a condition precedent to their sale, it is required that they be inspected and for a failure to comply with this requirement the seller subjects himself to a penalty. So far, therefore, as the effectiveness of the act, or the furtherance of its purpose is concerned, it in no wise affects its validity that it contains a provision prohibiting the use of deleterious substances in the products included, but attaches no penalty to its violation.

[6] VI. Passing without considering other constitutional provisions relied upon by the plaintiffs as having been violated in the enactment of this act, and which cease to be centers of contention unless this be a revenue measure, we come to the question of the amount of the fees for inspection as indicative of the character of the act. Waiving, as it were, all other grounds of attack, counsel contend that the gross amount of the fees collected for inspection is such as to fix beyond a peradventure the character of the act as a revenue measure. If the amount alone of the fees collected during the term

stated, sufficed for this purpose, the contention might be conceded without further controversy. It does not, however. As we said in effect in the Bixman Case, *supra*:

"Under no circumstances are inspection fees restricted to the mere expense of the act of inspection."

It is the tendency, and not improperly so, of Legislatures to require the subject inspected to bear the expense of same. If it happens, as is not infrequently the case, that the amount of the fees is in excess of the expense incurred in the performance of the services, this will not of itself destroy the character of the act as an inspection measure. Especially if it appears, as it does here, that the Legislature, upon ascertaining the amount of the excess, reduced the fees as applied to future inspections. By an act adopted in 1921, the fee for the inspection of soft drinks was reduced from 1½ cents to three-fifths of 1 cent per gallon, and on syrups, flavors, etc., from 10 cents to 5 cents per gallon. Laws 1919, p. 381; Laws 1921, p. 402. It is impossible for a Legislature, in the enactment of a law authorizing the collection of fees in its enforcement, to determine the exact expense of its operation and nicely gauge the measure of the charge which should be required. The courts, cognizant of this difficulty, hold that what is a reasonable fee must depend largely upon the sound discretion of the Legislature. If the fee fixed proves excessive, this will not of itself render the law invalid, as it will be presumed that the Legislature, upon ascertaining the fact of the excess, will remedy the defect.

A recent ruling of a court of last resort upon this subject will be found in *State ex rel. Brewster v. Ross*, 101 Kan. 377, 166 Pac. 505, in which it is shown that during the first two years of the operation of the statute, there under review, the fees collected for inspection were nearly four times the expenses incurred. The Supreme Court of Kansas, in the discussion and determination of this question, said:

"The mere fact that the fees charged under such a statute exceed the expense of its execution is not enough to render it invalid. For instance, the difference between an income of from \$70,000 to \$75,000, and an outlay of from \$55,000 to \$60,000 has been said by this court not to afford a sufficient basis for avoiding such a statute. *State ex rel. v. Railway Co.*, 87 Kan. 348, 305, 125 Pac. 98. To have that effect one of two conditions must be met: Either the discrepancy must be so great that the court is forced to the conclusion that the Legislature in the first instance acted in bad faith and intended to produce a revenue under the pretext of requiring an inspection, or else the lawmaking body must have neglected an opportunity to revise the charges exacted after experience had demonstrated beyond controversy that as previously imposed they were unrea-

sonably and unnecessarily high. These principles are too well established to require extended discussion, but a brief reference will be made to the decisions on the subject."

In a case involving the validity of a state law imposing a charge of 25 cents per ton upon fertilizers to cover the cost of inspection, interstate commerce being incidentally affected, it was said by the United States Supreme Court:

"Entertaining these views of legislative intention, it does not appear to us that evidence tending to show that money collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of the act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the Legislature would moderate the charge. But, treating the question whether the charge of 25 cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question we are satisfied that, comparing the receipts from this charge with the necessary expenses, such as the cost of analysis, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected as to justify the imputation of bad faith and change the character of the act." *Patapasco Guano Co. v. North Carolina*, 171 U. S. 345, 353, 354, 18 Sup. Ct. 862, 865, 43 L. Ed. 191.

Expressions of other courts of last resort are to the same general effect, as follows:

"The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the Legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law." *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 55, 27 Sup. Ct. 1, 5, 51 L. Ed. 78.

"If the trial made of the act establishes the facts to be as asserted, that the exaction in question is excessive, the presumption is that in the orderly conduct of the public business of the state the necessary correction will be made to cause the act to conform to the authority possessed, which is to impose a fee solely to recompense the state for the expenses properly incurred in enforcing the authorized inspection." *Red 'C' Oil Co. v. North Carolina*, 222 U. S. 380, 393, 394, 32 Sup. Ct. 152, 155, 56 L. Ed. 240.

"Inspection necessarily involves expense, and the power to fix the fee, to cover that expense, is left primarily to the Legislature, which must exercise discretion in determining the amount

to be charged, since it is impossible to tell exactly how much will be realized under the future operations of any law. Besides, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fee exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the Legislature will reduce the fees to a proper sum. *Foot & Co. v. Maryland*, 232 U. S. 494, 503, 504, 84 Sup. Ct. 377, 379, 58 L. Ed. 698. \* \* \*

"It is not necessary that the Legislature determine with exact nicety the amount of the inspection charges required to carry its purpose into execution. This is manifestly impossible, owing to the varying fluctuations of trade. Mere excess in net surplus revenues is of itself no warrant in disturbing the law, nor would we feel disposed to hold that a flagrant excess in a single year over the expenses would invalidate it. What we do hold is that under the facts disclosed here, where it appears that the fees are not only excessive, but are being continued, yielding each and every year increasing net revenues, the natural operative effect of the inspection act thus shown is in direct violation of article 1, section 10, of the United States Constitution, and consequently void. *Castle v. Mason*, 91 Ohio St. 296, 305, 110 N. E. 463, 465, Ann. Cas. 1917A, 164."

As we have shown, the objections urged to the law as considered by the Supreme Court of Ohio, in the *Castle-Mason Case*, are met by the amendment in 1921 of the act here under review.

If the Legislature of this state had not enacted the amendment of 1921, *supra*, and in all other respects the act had possessed, as we have shown it does, the form and features of an inspection measure, this would not authorize a holding as to its invalidity, because of the presumption that the Legislature will reduce the fees upon acquiring a knowledge of their excess to a sum more nearly necessary to the expenses of inspection. *State v. Standard Oil Co.*, 100 Neb. 826, 161 N. W. 537, L. R. A. 1917D, 746; *State v. Bartles Oil Co.*, 132 Minn. 138, 155 N. W. 1035, L. R. A. 1916D, 193; *Lee Co. v. Webster* (C. C.) 190 Fed. 353.

While we have examined the other objections urged by counsel for plaintiffs, we have not deemed it necessary to formally discuss them, in view of our expressed conclusion as to the validity of the act. The judgment of the trial court is therefore affirmed.

All concur.

**MATHEWS v. O'DONNELL et al.**  
(No. 22134.)(Supreme Court of Missouri, Division No. 2.  
June 23, 1921. Rehearing Denied  
July 19, 1921.)**1. Appeal and error** ¶766—**Proper to dismiss for failure of brief to embody statement of facts.**

The Supreme Court might dismiss the appeal for failure to comply with its rule 15 (228 S. W. viii) in that appellant's brief does not contain a statement of the facts.

**2. Acknowledgment** ¶25—**Law relative to acknowledgments by married women requires merely substantial compliance.**

The law touching the acknowledgment of their deeds by married women requires no more than a substantial compliance with its terms.

**3. Acknowledgment** ¶37(1) — **Certificate of married woman sufficient, though not mentioning undue influence.**

Certificate of acknowledgment of deed of married woman omitting the words "or undue influence," reciting that "they executed and delivered the said deed freely and without compulsion of their respective husbands," *held* sufficient under Rev. St. 1855, c. 82, § 39, p. 363.

**4. Deeds** ¶41 — **Description by reference to other deed sufficient.**

A deed conveying the undivided interest of the grantor and seemingly not undertaking to convey the land itself, but referring to another deed for the description, *held* sufficient in such description by reference.

**5. Deeds** ¶101 — **Defective description cured by grantee taking and holding possession.**

Where the grantee took and retained exclusive possession of the tract conveyed by the deed, such action of itself cured the defective description.

**6. Deeds** ¶129(4) — **Deeds to mother and children held to have vested life estate only in mother.**

Deeds conveying three tracts to "F. A. D. M. and all her children she has now or ever may have" *held* to have vested a life estate only in the grantee mother, with a remainder in fee in her children.

**7. Life estates** ¶18—**Life tenant's successor under duty to pay taxes; purchase at tax sale inured to benefit of remaindermen.**

The payment of taxes on improved farming land was a charge on a life estate therein, it being the duty of the life tenant to pay them and protect the interests of the remaindermen, and purchase of the land by the life tenant's successor at tax sale inured to the benefit of the remaindermen operating as a mere payment of taxes.

**8. Life estates** ¶18 — **Trusts** ¶102(1) — **Single remainderman trustee for others in purchasing at tax sale.**

The successor of the life tenant occupied a fiduciary relation to the remaindermen in purchasing the land at a tax sale, and was bound

to exercise every reasonable precaution to preserve the property intact for transmission at the termination of the life estate, and not only him, but all who took title from him with notice of his violation of trust, were trustees *ex maleficio* for the remaindermen.

**9. Vendor and purchaser** ¶226(2), 242—**Burden to prove bona fide purchase from fraudulent grantor rests on defendant; price must be paid before notice to affect bona fide purchaser.**

The burden of proving a bona fide purchase from a fraudulent grantor rests on the defendant pleading it, and, to support such plea, defendants who so purchased must prove they bought without notice and paid the money also without notice.

**10. Evidence** ¶76 — **Silence of defendants, claimed bona fide purchasers, affords evidence of notice of fraud.**

The failure of purchasers from a fraudulent grantor to testify creates an inference that they refrained because the truth would not aid their contention of a bona fide purchase, and affords strong evidence of their notice of the fraud charged.

**11. Estoppel** ¶45—**Doctrine of after-acquired property or title by estoppel does not apply to married woman's deed.**

The doctrine of after-acquired property does not apply to a married woman's deed, certainly not if the deed was made prior to the Married Woman's Act of 1889 (Rev. St. 1889, § 6809), and, without regard to the form of the deed, only whatever interest she had at its date passes to her grantee.

**12. Remainders** ¶17(3) — **Statute does not begin to run against remaindermen until life estate terminates.**

A remainderman cannot go into court to recover possession of the land before the life estate has terminated, so that neither the 30-year statute of limitations nor any other statute begins to run against him until the life estate is lifted.

**13. Limitation of actions** ¶102(9) — **Statute would not run in favor of trustees *ex maleficio*.**

One of several remaindermen who purchased the land at tax sale and his grantees with notice being trustees *ex maleficio* for the other remaindermen, the statute of limitations would not run in their favor as against such other remaindermen.

**14. Judgment** ¶569 — **Order for payment of surplus money arising from tax sale not res judicata of title.**

Order sustaining motion of one of several remaindermen who had purchased at tax sale directing the sheriff to pay over the surplus money in his hands arising from the sale, having been made on a motion respecting a collateral question arising after judgment, was not res judicata as to claim of title to the land.

Appeal from Circuit Court, Jackson County; Willard P. Hall, Judge.

Suit by Porter Mathews against R. M. O'Donnell and another. From decree for plaintiff, defendants appeal. Affirmed.

Henry Lamm, of Sedalia, and John I. Williamson and A. N. Gossett, both of Kansas City, for appellants.

W. C. Hock, of Kansas City, and L. T. Dryden, of Independence, for respondent.

HIGBEE, P. J. Appellants have summarized the pleadings and evidence substantially as follows:

This is an appeal from a decree of the circuit court in a suit to determine title to lands. The first count of the amended petition was in ejectment, which plaintiff dismissed at the trial. The second count is in equity, and alleges that plaintiff is the owner of the lands in question, consisting of three adjoining tracts; that defendants are in possession and claim title thereto against plaintiff. It particularly alleges that one Joseph B. Kinney in 1871 became the owner of an estate therein for life of Fannie A. D. Mathews, and as such owner it was his duty to pay the taxes on the land, but in violation of said duty, and with the intent of acquiring the estate of the owners of the remainder in fee of said property, he neglected to pay said taxes and permitted them to become delinquent. Judgment was obtained by the state for said delinquent taxes, and sale made thereunder, and at such sale said Joseph B. Kinney bid in a part of these lands and caused a sheriff's deed thereto to be made to his mother, Matilda Kinney, thereby attempting to acquire the remainder estates against plaintiff. The defendants claim ownership under deeds made by said Joseph B. Kinney and his mother, Matilda, and had knowledge before the execution of such deeds of "the facts and circumstances herein recited."

The prayer is that the court set aside and hold for naught said sheriff's deed and to determine title, and for all proper relief as provided by section 1970, R. S.

To the second count defendants answered, admitting possession and denying any ownership in plaintiff; admitting that Matilda Kinney acquired title to a part of the land by virtue of a sale in a suit for taxes, but that defendants acquired such tax title as innocent purchasers for value without knowledge of any defect in her title; pleading the 10-year, 24-year, and the 30-year limitation and payment of taxes therefor by defendants and failure of plaintiff to pay any such; valuable improvements as occupying claimant; pleading also that the surplus money proceeds of the tax suit sale of the land was claimed by Joseph B. Kinney, and that plaintiff was estopped by that suit and proceeding from claiming title to those lands; laches on the part of plaintiff; and praying that the court

decree defendants to be the fee-simple owners of the lands in question.

The cause was heard by the court at the September term, 1917, and taken under advisement. At the September term, 1919, judgment was rendered setting aside and holding void the sheriff's deed on the tax judgment sale and adjudging the plaintiff to be the owner in fee of and entitled to the possession of  $5214/3200$  undivided part of two tracts of land, one originally containing 101.60 acres, and the other 38.93 acres, and  $5214/3200$  of an undivided one-half of another tract of  $4\frac{1}{2}$  acres, all in township 50, range 29, Jackson county.

The tract described in the petition and judgment as the southwest fractional part of the southwest quarter of section 5, originally containing 38.93 acres, appellants designate as "tract A," and that described as all of the southeast fractional quarter of section 6, originally containing 101.60 acres, as "tract B," and that described by metes and bounds, containing  $42\frac{1}{2}$  acres, as "tract C." This tract adjoins tract B at the northwest corner. (Mrs. Mathews also owned an undivided one-half in fee of tract C at the time the mortgage, at No. 12 of the abstract of title, *infra*, was executed.)

The lands sold in the proceeding for delinquent taxes are tract A and the west 8 acres of tract B. The Missouri river is the northern boundary of each tract.

The abstract of title shows the following transfers:

Tract A:

(1) September 7, 1838. Patent, United States to Joseph Roy.

(2) August 21, 1847. Warranty deed, recorded Book M, page 411, Joseph Roy and wife to Celia F. Robinson (afterward Cushenbury) and Fannie A. D. Cogswell (afterward Mathews, mother of plaintiff).

(3) June, 1856. Warranty deed, Book Y, page 529, Fannie A. D. Mathews and husband, James P., and Celia F. Cushenbury and husband, D. Cushenbury, to William Cogswell, the exact wording of the description being as follows:

"Also our undivided interest in a fractional piece of land deeded by Joseph F. Roy to Celia F. and Fannie A. D. Cogswell, now Celia F. Cushenbury, and F. A. D. Mathews, it being a part of the S. W.  $\frac{1}{2}$  of the S. W. — of section 5, township 50, range 29."

The certificate of acknowledgment of the female grantors to this deed is as follows:

"Being by me made acquainted with the contents of said deed, acknowledged on an examination apart from their respective husbands, and they executed and delivered the said deed freely and without compulsion of their said respective husbands."

On the offer of this instrument in evidence defendants objected because the description



was insufficient to identify tract A, and the acknowledgment did not recite that the married women had declared they executed "freely and without compulsion or undue influence" of their husbands.

(4) October 29, 1857. Warranty deed, Book 27, page 46, William Cogswell and wife to F. A. D. Mathews, the granting clause being as follows:

"Bargain, sell, and convey to the said F. A. D. Mathews and all her children she has now or ever may have the following described tract of land, to wit: [Here follows description of tract A.]"

The habendum clause reads:

"To have and to hold the same unto the said F. A. D. Mathews and her children as aforesaid and their heirs, but it is to be distinctly understood, if the said F. A. D. Mathews may hereafter conclude to sell the above-described tract of land, she is hereby empowered and authorized to do so by arranging it so that the proceeds of said land is to be laid out for other lands or property to be conveyed so as to put the right of title in the said F. A. D. Mathews and her children."

Tract B:

(5) June 1, 1868. Patent, United States to William Cogswell, containing 101.60 acres.

(6) April, 1856. Warranty deed, recorded Book Y, page 532, William Cogswell and wife to Fannie D. Mathews. The granting and habendum clauses are the same in this deed as in No. 4, supra.

Tract C:

$4\frac{1}{2}$ -acre tract described by metes and bounds (approximately 15 poles east and west by 42 poles north and south) in and out of the northeast corner of New Madrid claim survey at northwest corner of tract B.

(7), (8), and (9) are transfers which bring the title down to Jonathan Colcord.

(10) August 9, 1850. Warranty deed, Book P, page 477, Jonathan Colcord and wife to F. A. D. Cogswell and Celia F. Cushmanbury, daughters of Wm. Cogswell.

(11) June, 1856. Deed, Book Y, page 528, Celia F. Cushmanbury and husband, Daniel, conveying undivided interest of grantor in tract C to Fannie A. D. Mathews. (The granting and habendum clauses are the same as in No. 4.)

(12) July 14, 1866. Mortgage with power of sale. Book 46, page 407, filed September 16, 1866, Fannie A. D. Mathews and her husband to Joseph Kinney, conveying, among others, tracts A, B, and C. This mortgage recites that it is given to secure a note for \$7,280, due at 12 months, with the usual power of sale.

(13) May 15, 1871. Mortgagee's deed Book 89, page 41, Joseph Kinney, mortgagee, to Joseph Beeler Kinney. This forecloses No. 12.

(14) Suit was brought by the state on re-

lation of Daniel Murphy, collector, against Joseph B. Kinney, James P. Mathews, and Fannie A. D. Mathews, his wife, Porter H. Mathews, Andrew R. Mathews and Mary Eliza Mathews, a minor, to the March term, 1880, of the circuit court, to enforce the state's lien for taxes on tracts A and B for the years 1869 to 1878, inclusive. The return recites personal service on the defendants except Joseph B. Kinney, who filed answer. Guardian ad litem was appointed for the minor defendant, and such guardian filed answer. On March 27, 1880, judgment was rendered as prayed, adjudging the amount of taxes, interest, and fees on tract A, at \$111.96, and on tract B at \$373.42—total \$485.38. Special execution was issued on this judgment September 4, 1880, and the sheriff sold all of tract A for \$410 and 8 acres off the west side of tract B for \$480 to Matilda Kinney, out of which the sheriff paid the judgment and costs and had remaining \$245.68. Thereupon the defendant J. B. Kinney filed his motion setting up that he was the absolute owner of the lands sold and was entitled, as against the other defendants, to this surplus of sale proceeds, \$245.68. Notice of this motion was given to Porter H. Mathews by posting in the clerk's office, and the motion was sustained by the court on September 29, 1881. Sheriff's deed, dated October 25, 1880, recorded in Book 120, page 448.

(15) October 4, 1880. Warranty deed, Book 111, page 537, by James P. Mathews, Fannie A. D. Mathews, and Andrew R. Mathews to Mary E. Mathews, conveying tract A, 30.98 acres; also tract B, therein recited as 90 acres.

(16) December 14, 1882. Warranty deed, Book 130, page 143, consideration \$3,000, from J. B. Kinney, J. Kinney, and Matilda Kinney, his wife, to Mary E. O'Donnell, conveying tracts A, B, and C, containing a recital as follows:

"Should at any time the title be imperfect, and the above Kinneys unable to make it perfect, then said Kinneys agree to refund all money paid in original purchase, upon condition that Mary E. O'Donnell deed the said property back to them, and also give the said Kinneys possession of the land."

(17) August 12, 1885. Warranty deed from Joseph B. Kinney and Alice P. Kinney, his wife, to Mary E. O'Donnell, Book 141, page 94, consideration \$5 cash, conveying tracts A and B. (This deed evidently was made to release dower of Joseph B. Kinney's wife, Alice P.)

(18) September 13, 1882. Mortgage deed of trust, Mary E. O'Donnell to Joseph B. Kinney, trustee, to secure note of \$3,000 due eight years after date, bearing 8 per cent. interest, to Joseph Kinney, mortgaging tract B, recited to contain 80 acres.

(19) April 25, 1892. Warranty deed, recorded Book 186, page 367, Mary E. De Garmo, formerly Mary E. O'Donnell, and husband, Frank De Garmo, to Michael H. O'Donnell, Daniel C. O'Donnell, Richard M. O'Donnell, and Mounnie D. O'Donnell, consideration \$6,000, conveying tracts A and B, subject to deed of trust from Mary E. O'Donnell to Joseph B. Kinney, which the second parties assume and agree to pay.

(20) April, 30, 1900. Warranty deed, Book 226, page 254, M. D. O'Donnell to Richard M. and Michael H. O'Donnell, conveying tracts A and B and other lands.

(21) January 7, 1915. Warranty deed, Book 334, page 231, Daniel C. O'Donnell to Richard M. and Michael H. O'Donnell, conveying tracts A, B, and C.

J. B. Kinney, witness for plaintiff, by deposition testified on direct examination as follows: My full name is Joseph Beeler Kinney; Father's name Joseph Kinney; Mother's name Matilda Kinney; witness born July 25, 1846; married in 1882; business steamboating; father's and mother's home, which he called his home, was in Old Franklin, Howard county, Mo.; his mother died in 1896, his father two or three years previously; that he bought the land in question in this case at foreclosure sale under mortgage in which his father was mortgagee; could not remember when; did not remember what he paid; that he "left" Mathews stay on the place; he promised to keep up the place; he found that Mathews was tearing down the brick storehouse and selling the brick off the place; that witness then dispossessed him and put some one else on the place; that he then sold the land to Mary O'Donnell, whom he put in possession; could not remember what she paid for it; that he bought the place for himself to save the debt due his father, as he recollected it, and wanted to keep the land in the family; when he sold it to Miss O'Donnell she gave back a mortgage to secure a note payable to his father; asked how it came he "left" this property sell for taxes, he answered that there was a large amount of taxes on it and that he let it go to make the title better; that Judge Gates was instructed by him to buy it in at the sheriff's sale; supposes he paid the money, don't remember now; his mother was not present; that Mr. Mathews' lawyer also bid at the sale; that the land was bid up to nine hundred some odd dollars and the sheriff afterwards sent him a check for the surplus; did not remember whether it was bid in in his name; that only 47 acres of the land was sold for taxes; that Miss O'Donnell was very intimate with his family, and it was through them that the sale was made to her; witness did not remember ever talking to her about the title; he remembered making the deed and selling it to her; supposed his father and

mother joined him in the deed; did not remember making the deed in which his wife, Alice P., joined; that the \$3,000 note Miss O'Donnell made payable to his father was paid a long time ago; witness did not know what became of it; thought the administrator of his mother's estate was the last one that had it; did not know why the clause in the recorded deed to Miss O'Donnell was put in concerning refunding the purchase price.

Mary De Garmo, witness for plaintiff, by deposition testified: That her maiden name was Mary E. O'Donnell, sister of Daniel, Richard, Mounnie, and Michael O'Donnell; she was born November 3, 1861; knew Joseph Kinney, his wife, Matilda, and son, J. B. Kinney, and his wife; she first met them at a farm near Franklin, Howard county, Mo., where she and her parents lived and were neighbors with the Kinneys; was then about 18 years old; asked if she knew how the Kinneys came to own the property in question, answered, "I do," but that she did not like to go into details; that Capt. Kinney loaned money to Mr. and Mrs. Mathews on the farm at Cogswell's Landing, Jackson county, the old home name of the farm; that the Mathews did not pay back the money; they lost their home in St. Louis where they were living; Kinney moved them back on one of his boats to the place at Cogswell's Landing; Kinney let them have money to start again on the farm; Capt. Kinney had a deed of trust given by the Mathews for a part of the money he had loaned; witness had had all these papers, but had turned them over at the time she sold the place and thought the amount of the mortgage was about \$7,000; finally, after the Mathews stated their inability, Capt. Kinney brought a suit the nature of which she could not state; asked if it was to foreclose the mortgage, she replied that she did not know what it was called in law; Kinney's attorneys were Wallace & Gates, of Independence; thought they tried the case at Lexington or Independence; she thought it was a suit that went to the Supreme Court; that when Capt. Kinney loaned the money to Mathews she was teaching school as principal of the New Franklin public schools in Howard county; that a suit was brought for delinquent taxes; she thought it hung on for a couple of years; that Mr. Wallace told her about it in after years; the Kinneys handed her all the data relating to the matters she was testifying about, and she went over it; that Capt. Kinney was out some \$14,000 or \$15,000, including attorney's fees and expenses; that in addition to teaching school she was giving private educational services to the members of Capt. Kinney's family and became "sort of a clerical member" of the family; they brought out their various papers and various holdings at different times and she went over them,

and in that way she became acquainted with the story of the Mathews property, which was quite a heavy burden to Capt. Kinney; that he finally sold it or gave it to Joe Kinney, his eldest son, who bought it at the mortgage sale; she did not know at the time of the property being sold for taxes; did not know that Joe Kinney had bought it in at the mortgage sale; thought his father had given it to him; that she bought the place from Capt. and Mrs. Kinney not really knowing that Joe had an interest in it; later found out that he did have an interest in it; attention called to the fact that Joe Kinney joined in the deed with his father and mother, witness replied that such circumstances needed an explanation; that the first deed the Kinneys made was torn up; that, when she came to look over the papers after she had bought the property from the Kinneys, she heard that Joe Kinney had an interest in the property; that she gave the Kinneys \$3,000 and services rendered by her to them; that she went up on Capt. Kinney's boat to Cogswell's Landing to see the "wonderful place I had bought"; she found Mr. Mathews and his wife and Miss Fannie living on it; had long hours of conversation with them and found them cultured and intelligent people; during her visit Mr. Mathews said his wife had been willed the place by her father, definitely stating that Mrs. Mathews could sell the place and buy a home for herself and children, but that she could never mortgage it; she took the next boat back to Booneville to see Capt. Kinney; had not yet put her deed on record; by the time she had so returned Capt. Kinney and Mrs. Kinney had discovered that their son Joe Kinney had a title not covering every acre as witness understood, but that it was necessary for her to have a new deed from the son and wife, Alice Polk Kinney; that she consulted Pennington, a lawyer at Booneville, on both these propositions, and got an opinion from him addressed to Capt. and Mrs. Kinney stating that the deed she had could be used, but that in order to satisfy her he recommended that they have Joe Kinney and wife sign the deed and insert the clause about repaying the money if the title should prove impaired; that after several months this deed was signed and filed at Independence, witness taking it there with Capt. Kinney; that in the meantime Mathews, after her visit and talk with them, turned the farm over to a man named Isaiah Johnson; at any rate, he was there and Mathews and his family moved onto another farm; that it was on account of these claims made by Mathews after she bought the place by the first deed that she had this clause about returning the money put in the second deed; that she thought it was the year after buying the land that she put her father and mother

in possession; that her family remained, and her father and mother died on the place; that two of her brothers were still on this farm; that she did not discuss the title with Capt. Kinney fully until after she bought the property, which later discussion was the cause of the lawyer Pennington inserting the clause about the return of the money in the second deed; that at the time of the first deed from the Kinneys she gave the mortgage to secure the note to Capt. Kinney, dated September 13, 1882; that she paid part of that note, and her family paid the rest after she sold the place to them; that she did not think, and, if she did, she had completely forgotten, that she ever discussed the title with her people when she sold them the land; "I may have done it; you will have to ask them;" that while she was negotiating for the purchase of the land she was doing some clerical work for Kinney and saw various things and papers and became familiar with the details before the transaction was closed; did not remember whether she saw the tax deed or not; did not pay much attention to it, because she had the warranty deed; that she never had the title examined by an attorney before she bought it, and that was all she knew about that; she thought Capt. Kinney told her about a suit he had in court to get the property, but that it was after her talk with Mr. Mathews in which he (Mathews) expressed the question as to the title; when asked if that was brought out before the deed was finally made, answered, "Possibly before it was filed; it may not be however; the deed will show that;" that she had been teaching probably two years before she bought this place; she never talked to Joe Kinney (the son) about it; had barely met him; that he had brought his wife home on one occasion and stayed three days; he lived down South and was a captain on a steamboat.

Porter Mathews, plaintiff, testified that he was the son of James P. Mathews and Fannie A. D. Mathews; that his father died November 28, 1898, his mother August 22, 1915, and that he was the only surviving child; that none of the other children ever married, and none of them left any descendants; that he was born in 1851 and left the farm in 1871; that he moved to California in 1883 and had lived there ever since; that immediately before that he was in Denver, Colo., living there about a year and a half, and prior to that in Leadville about two years; that he had not lived in Missouri since 1878; in that year was at the old home place for a year; testified as to the buildings on the land in question; that the farm was under fence and some cross-fenced; witness did not know about some of the property being sold for taxes at the time it was sold, but afterwards knew it was sold; on his

asking what time it was sold and being told that it was some time in the year 1880, answered that he was in Colorado; that when witness was on the place in 1878 about 50 acres of the land was in timber; that when last on the place, about three months before the trial, he thought only about 8 or 10 acres was in timber and the other had been removed; that all of the place except the 7 or 8 acres in timber was in cultivation when he was last on the place, and in 1878 it was all in cultivation except the 50 acres then in timber.

Joe Cogswell testified that the land in question seemed to be pretty good level land lying along the river; thought it not subject to overflow except at very high waters; used mostly for grain lands; that he had been farming in that part of the county for about 20 years; supposed the money rental value to be about \$8 an acre; estimated the amount of the farm in cultivation as 80 or 90 acres.

Isaiah H. Johnson testified that he moved onto the land in question to occupy it in the latter part of August, 1881; that while living there he met Miss Mary O'Donnell in the summer of 1882; does not remember having any conversation with her relative to the title; did have some talk with members of the O'Donnell family about 1882, probably a year after; this talk was with the O'Donnell father in the presence of the boys, Dan, Michael, Richard, and Monty; thought they were all grown then except Monty, who was probably 15 years old; this talk was after 1882 and was concerning that Mr. Mathews was claiming the place; that it was a common thing to hear that talked about in the neighborhood; that the litigation over the title was talked about in the neighborhood; J. B. Kinney told him in the spring of 1882 that he had lawed Mr. Mathews for 14 years; this conversation was while witness was occupying this place; the O'Donnells moved on the adjoining place in the spring of 1882, and on this land in question in the latter part of 1882 by arrangement with the witness; described the buildings then on the place as a dwelling house, a storehouse, and some old tumble-down other buildings; the farm was fenced; that the adjoining land rents for \$10 an acre.

The testimony of B. F. Johnson was substantially the same.

For the defendants M. D. O'Donnell testified that he is one of the grantees of the deed to the land in question from his sister; that he was 10 years old in 1882, and his brother Richard was 12 years old; that all of the boys were minors with about 2 years' difference between their ages; that he recollected going on the farm with his father and mother; his sister was then living in Booneville; she never lived on this farm;

she visited the home during her vacations; the land was conveyed to the witness and his brothers by their sister Mary in 1892; that the witness did not then have any knowledge of any defect in her title; "We thought our title was all right;" that he had heard, after he and his brothers bought the place, a general gossip that the Mathews were questioning the title; that the postman at Levasy told him that some lawyer from Independence had spoken to him about it; witness thought it was from 2 to 5 years after they bought the place that he first heard this.

Defendants introduced in evidence an agreement between the parties as to the children of Fannie A. D. Mathews and the dates of their births and deaths, as follows.

	Born.	Died.
Porter H. Mathews (plaintiff),	April, 1851.	—
Andrew R. Mathews,	May 19, 1853.	1908.
Fannie J. Mathews,	Sept. 19, 1855.	April, 1873.
Ellen Mathews,	Jan. 3, 1879.	Mar. 14, 1859.
Mary E. Mathews,	April 25, 1862.	1906.
Cecil C. Mathews,	Aug. 8, 1865.	Sept. 5, 1865.
Sarah A. Mathews,	Aug. 30, 1867.	April 27, 1870.
(None of the children left descendants.)		

The husband of Mrs. Mathews, father of the children, died November 24, 1898.

Mrs. Mathews died August 22, 1915.

This is all the evidence. The defendants did not testify.

[1] 1. The appellants' brief does not contain a statement of the facts in this case, as required by rule 15 (228 S. W. viii). We might dismiss the appeal for failure to comply with the rule, but prefer to dispose of the case on its merits.

[2, 3] 2. The deed from Fannie A. D. Mathews and Celia F. Cushenbury and their husbands to their father, William Cogswell, conveying tract A, 38.93 acres, was executed in June, 1856.

Appellants' objection to this deed is that the certificate of acknowledgment omits the words "or undue influence." R. S. 1855, c. 32, § 39, p. 363, requires that the certificate of acknowledgment of a married woman shall set forth "that she executed the same freely and without compulsion or undue influence of her husband." The certificate recites that "they executed and delivered the said deed freely and without compulsion of their said respective husbands." The law touching acknowledgments requires no more than a substantial compliance with its terms. *Chauvin v. Wagner*, 18 Mo. 531; *Hughes v. Morris*, 110 Mo. 306, 19 S. W. 481; *Alexander v. Merry*, 9 Mo. 514. In *Gross v. Watts*, 206 Mo. 373, loc. cit. 393 (syl. 4), 104 S. W. 30, loc. cit. 36 (121 Am. St. Rep. 602), it was held:

"A certificate of acknowledgment is not defective because it does not recite that the deed was executed as the grantor's 'free act and deed.' The statute requires it to state the 'act of acknowledgment,' and where the cer-

tificate recites that the grantor 'duly acknowledged the execution of the same' it substantially complies with the statute."

See, also, *Ray v. Crouch*, 10 Mo. App. 324; *Hughes v. McDivitt*, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756; *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965.

The identical question was ruled adversely to appellants' contention in *Bohan v. Casey*, 5 Mo. App. 101, loc. cit. 110, where the court said:

"It is complained that the notary did not ask the wife as to 'undue influence,' and to have asked her as to 'compulsion' is not enough, but the notary asked her whether she executed the deed of her own free will, or whether her husband compelled her to do it. To the former question she replied 'Yes,' and to the latter 'No.' The words 'undue influence' do not appear to have been used, but it was not necessary to use the very words."

The object of the law, as Judge Scott said in substance, is to obtain the free and unconstrained consent of the wife to the deed alienating her rights. If this is done, the law is satisfied. The law has intrusted the writing of deeds and the taking and certification of acknowledgments to officials unskilled in the drafting of forms. It is a task beyond their powers from the want of skill. Under such circumstances it would be hard in courts to exact a rigorous compliance with forms. Such a course would disturb a great many titles, and that, too, in cases where no wrong has been done and where there had been entire acquiescence in the acts, conscious of their propriety, until the information of the technicality is found out by some prowling assignee, or some child who may make the mother who bore him sin in her grave. Dissenting opinion in *Chauvin v. Wagner*, 18 Mo. loc. cit. 556.

It is the policy of the law to construe them (certificates of acknowledgment of married women) liberally, and, where a substantial compliance appears clearly and affirmatively, the certificate will be held sufficient, no matter what the language employed. 1 C. J. 858, § 209. In the instant case Mrs. Mathews and her sister, owning the tract in common, conveyed it to their father, who reconveyed the whole of it to Mrs. Mathews and her children as a settlement. She accepted and retained possession, claiming title under this deed, and was satisfied.

[4, 5] 3. It is also urged that the description in the deed, at No. 3 of the abstract, is insufficient to identify 'tract A,' and that it is also bad "because it says our undivided interest" and did not undertake to convey the land itself, and the words "our undivided interest" describe nothing. If the deed did not refer to the Joseph Roy deed, the description would be indefinite, but it reads "our undivided interest in a fractional piece of land deeded by Joseph F. Roy to Celia F. and

Fannie A. D. Cogswell," etc. The reference to the Roy deed, where the tract is described, identifies the tract conveyed.

"The office of a description is not to identify the land, but to afford the means of identification, and when this is done it is sufficient. Generally, therefore, any description is sufficient by which the identity of the premises can be established, or which furnishes the means of identification. A conveyance is also good if the description can be made certain within the terms of the instrument, for the maxim, 'Id certum est quod certum reddi potest,' applies. So a description from which a surveyor can locate the land is good. A deed will not be held void for uncertainty of description if by any reasonable construction it can be made available. Extrinsic facts pointed out in the description may be resorted to to ascertain the land conveyed, and the property may be identified by extrinsic evidence, as in the case of records of the county where the land is situate." 18 C. J. 180.

"The property intended to be conveyed may be designated by the descriptive name of the tract by which it is generally known, or well known, or can be identified, or where there is no other tract of the same name in that locality, even though there are defects in other parts of the description." 18 C. J. 181.

See, also, *Bollinger County v. McDowell*, 99 Mo. 632, 13 S. W. 100; *Whitwell v. Spiker*, 238 Mo. 629, 142 S. W. 248.

The deed conveys "all our undivided interest," meaning the undivided interest of each grantor. Evidently the deed was written by an unskilled hand; yet the meaning is plain. The grantee took and retained exclusive possession of the tract conveyed. This of itself would cure the defective description. The defendants derive title through the conveyance. It passed the interests of the grantors. 18 C. J. 292, § 268.

[6] 4. Did the several deeds conveying the three tracts "to Fannie A. D. Mathews and all her children she has now or ever may have" vest in Fannie a life estate with remainder in fee to her children? In considering this question we should not overlook the habendum clause which is the same in each deed. If the parties understood that Mrs. Mathews took a fee-simple estate, why did they give her the power to sell on condition that the proceeds should be invested in other lands to be conveyed so as to put the title in her and her children?

Appellants are somewhat at sea. They contend that the deeds should be construed as either vesting a fee in Mrs. Mathews or an estate in common in her and her children, "the estate opening to let in each unborn child." In *Hamilton v. Pitcher*, 53 Mo. 334, the deed was to M. W. Pitcher and her children. It was held that she and her children in esse took as tenants in common. The same ruling was made in the case of a devise in *Allen v. Claybrook*, 58 Mo. 124. See, also,

Hall v. Stephens, 65 Mo. 670, 27 Am. Rep. 302.

It is obvious that neither of these cases lends support to either of appellants' contradictory constructions of the deeds in question. Here the grant is to Mrs. Mathews "and all her children she has now or ever may have." If the grantor intended the children to take a present interest, he doubtless would have expressed that purpose by naming them as grantees. The grant, however, has the indicia of a settlement. The habendum empowers her to sell the land, but expressly provides that in case of a sale "the proceeds shall be laid out for other lands or property to be conveyed so as to put the right of title in the said F. A. D. Mathews and her children"—that is, those born and unborn.

In the annotations to Rice v. Klette, 149 Ky. 787, 149 S. W. 1019, L. R. A. 1917B, 45, where the cases are collated, the learned editor says:

"It has been held that if, in addition to the bequest, there are any superadded words which import a desire that the property shall be settled, the court will lay hold of the words and infer a gift to the parent for life, with remainder to the children"

—citing Holt v. Bowman, 33 Ga. Supp. 129, where a devise to a woman and her children was held to give the mother a life estate and the children a remainder in fee, and Re Bel-lasis, L. R. 12 Eq. (Eng.) 24 L. T. N. S. 466, 19 Week. Rep. —, in which "an informal instrument creating a trust 'for my niece Mrs. Chas. Milford and her children' was held to create a trust for Mrs. Milford for life, with remainder to her children as joint tenants."

On this question our court has spoken in no uncertain terms. In Garrett v. Wiltse, 252 Mo. 699, 161 S. W. 694, Judge Lamm conclusively answered the contention that the mother and children take as tenants in common under these deeds, and gives the sanction of his approval to the same ruling by Judge Valliant. At the foot of page 710 of 252 Mo., of page 697 of 161 S. W., the learned jurist said:

"Look at it from another viewpoint. As said, there were three children in being born of Laura Alice by Richard, her husband, at the time of the Whitson deed. Now, in construing a deed it is sometimes worth while to take into account what the grantor would say, but does not say, as well as what he does say, in getting at his intent. This grantor, in making a conveyance on which, when spread of record, the world might act, named none of those children. If he desired them to take a present interest as tenants in common with their mother, why did he not say so and name them? Is that not the usual way? Why, in dealing with grandchildren, did he ambush and screen his intent by use of a term importing to the contrary? In speaking to that phase of the matter the

words of Valliant, J., in Tygard v. Hartwell, 204 Mo. loc. cit. 206, are apposite thus: 'It would be a very strained construction to say that it was the intention of the parties to this deed to convey the land to James F. White and his children as tenants in common. If such had been the intention, the natural course would have been to have inserted the names of the two children then living in the granting clause of the deed as grantees. If it was the intention to include not only those then in being, but those thereafter to be born, then the idea of tenancy in common must be excluded, because the unborn children could not be made tenants in common in an estate presently created. Kinney v. Mathews, 69 Mo. 520; Rines v. Mansfield, 96 Mo. 394.'"

It will be noticed that these rulings are based on Kinney v. Mathews, 69 Mo. 520. By referring to the opinion in that case, loc. cit. 524, it will also be seen that Judges Valliant and Lamm adopted the argument of Judge Napton.

After Kinney, on May 15, 1871, had purchased the three tracts of land involved in this action at the foreclosure of the mortgage given by Mrs. Mathews and her husband to Joseph Kinney, he brought an action of ejectment in July, 1876, against James P. Mathews. He did not claim that Mrs. Mathews owned the fee, but contended that the giving of the mortgage was a valid execution of the power of sale given her by the deed from her father. The venue was changed to Livingston county. In the circuit court it was held that the power was special and limited and did not empower her to execute the mortgage. On appeal this court considered the terms of the grant and the power to sell contained in these very deeds. Concerning the power of sale, Judge Napton, in an opinion handed down June 13, 1879, with the concurrence of all the judges, said:

"The power to sell was not a general one, but was restricted to a sale in which the proceeds should be invested in other lands or property to be settled for the uses specified in the original conveyance. The lands could only be sold or exchanged for lands previously settled or secured to the wife and children. \* \* \* The grantor, however, had an interest which she could convey. \* \* \* This renders it necessary to determine what interest Mrs. Mathews had, and upon this point it must be conceded that there is room for doubt. \* \* \* A tenancy in common could certainly not be claimed, except we reject the clause in the deeds which expressly includes future-born children."

After reviewing and distinguishing other cases, it was the judgment of the court that Mrs. Mathews had a life estate in the lands, which was vendible, with remainder in fee in her children, Henry, J., dissenting, Sherwood, J., expressing no opinion.

In the light of the foregoing authorities, we think it clear that the grants contained in the deeds in question manifest an intention to make a settlement, and that Mrs.

Mathews took a life estate only in the lands with a remainder in fee in her children.

5. Appellants complain that the court erred in setting aside the sheriff's deed pursuant to the judgment for taxes. This sale includes tract A and eight acres off the west side of tract B. The testimony shows very clearly that Mrs. Mathews and Kinney, the life tenants, allowed the taxes to go delinquent for the years 1869 to 1878. As we have seen, Joseph Kinney acquired the life estate of Mrs. Mathews at a foreclosure sale May 15, 1871, and arranged for Mathews to remain on the land as his tenant. After the opinion in *Kinney v. Mathews* was handed down, Kinney determined to let the land go to sale for delinquent taxes in order to acquire the title of the remaindermen. Suit was brought to the March term, 1880, and judgment rendered at that term, under which the land was advertised for sale, and on October 2, 1880, 47 acres were sold. Kinney employed Judge Gates to bid in the land at the sale. His mother, who lived in Howard county, was not present at the sale. He did not remember whether the deed was made to his father or to his mother, but supposed he paid the money.

[7, 8] The payment of the taxes was a charge upon the life estate. It was the duty of the life tenant to pay the taxes and protect the interests of the remaindermen. *Fountain v. Starbuck*, 209 S. W. 900; *Bone v. Tyrrell*, 113 Mo. 175, 188, 20 S. W. 796. The purchase of the land at the tax sale inured to the benefit of the remaindermen. *Peterson v. Larson*, 225 S. W. 704. It operated as a mere payment of the taxes. *First Congregational Church v. Terry*, 130 Iowa, 513, 515, 107 N. W. 305, 114 Am. St. Rep. 443; *Blair v. Johnson*, 215 Ill. 552, 557, 74 N. E. 747. Kinney occupied a fiduciary relation to the remaindermen and was bound to exercise every reasonable precaution to preserve the property intact for transmission at the termination of the life estate. *Gibson v. Brown*, 62 Ind. App. 460, 110 N. E. 716, 112 N. E. 894. Not only Kinney, but all who took title from him with notice of the violation of the trust, were trustees ex maleficio. *Case v. Goodman*, 250 Mo. 112, 156 S. W. 698. Mary O'Donnell and her brothers had constructive notice from the deed records that J. B. Kinney had only the life estate of Mrs. Mathews. The tax deed informed them that the life tenants had suffered the land to go to sale for delinquent taxes which the law required them to pay. *Loring v. Groomer*, 110 Mo. 632, loc. cit. 641, 19 S. W. 950. But it further appears from the evidence that Mary O'Donnell was an intimate member of Kinney's family, a clerical member; that she knew of the case in the Supreme Court, then of the suit for delinquent taxes, and of Kinney's purpose in letting the land go to sale, and that he was the real purchaser. She dealt with him, not with his mother. She

testified she had gone over the papers and was familiar with the details before closing the deal. She contracted for the purchase of the land without having seen it, giving her note for \$3,000 at eight years. After this, Capt. Kinney took her to see the "wonderful place I had bought." She learned from Mr. Mathews that Mrs. Mathews could sell the place and buy a home for herself and children, but could not mortgage it, the very conclusion reached in *Kinney v. Mathews*. She tore up the deed Kinney had given her and, on the advice of an attorney at Booneville, had another deed executed protecting her against failure of the title. It does not appear when or how much, if anything, she ever paid on her note, but in 1892 she sold the farm to her brothers, who assumed the payment of the note. Her father, mother and brothers had lived on the farm for ten years.

The condition of the title had been the subject of general neighborhood talk for many years. It could not well have been otherwise, in view of the decision of this court in *Kinney v. Mathews*. Mathews, as we have seen, told Miss O'Donnell how the title stood. It was generally known that the children of Mrs. Mathews would be entitled to the land when their mother died. The testimony of the Johnsons is that this was discussed in the O'Donnell family when the defendants were present in the winter of 1882. They heard this testimony and did not take the witness stand.

"Courts of equity, since their earliest foundation, have always recognized that the still, small voice of suggestion, emanating as it will from contiguous facts and surrounding circumstances, pregnant with inference and provocative of inquiry, is as potent to impart notice as a presidential proclamation or an army with banners." *Conn. Mutual Life Ins. Co. v. Smith*, 117 Mo. 261, loc. cit. 292, 22 S. W. 623, loc. cit. 629 (38 Am. St. Rep. 656).

[9, 10] It was held also in the case last cited, and indeed it is an elementary proposition, that the burden of proving a bona fide purchase from a fraudulent grantor rests on the defendant pleading it. 20 Cyc. 763. To support the plea that defendants were innocent purchasers, they must prove they bought without notice and paid the purchase money also without notice. *Halsa v. Halsa*, 8 Mo. 303; *Young v. Schofield*, 132 Mo. 650, 660, 34 S. W. 497; *Lincoln v. Thompson*, 75 Mo. 613, 638. The failure of the defendants to testify creates an inference that they refrained because the truth would not aid their contention and affords strong evidence of the fraud charged. 20 Cyc. 763; *Stephenson v. Kilpatrick*, 166 Mo. 262, loc. cit. 269, 65 S. W. 773; See, also, *Eck v. Hatcher*, 58 Mo. 235; *Burger v. Boardman*, 254 Mo. 238, loc. cit. 256, 162 S. W. 197. The learned court did not err in canceling the deed.

[11] 6. It is insisted by appellants that the

interests which Mrs. Mathews inherited from her deceased children subsequent to the execution of the mortgage, July 14, 1866, to Joseph Kinney, passed by virtue of section 3, c. 32, p. 355, R. S. 1855, now section 2266, R. S. 1919. In *Hendricks v. Musgrove*, 183 Mo. 300, loc. cit. 309, 81 S. W. 1265, loc. cit. 1267, it was said:

"In addition to this the rule in this state is that the doctrine of after-acquired property does not apply to a married woman's deed (at any rate if it was made prior to 1889 when the Married Woman's Act was passed), but that without regard to the form of the deed only whatever interest she had at the date of the deed passes. *Brawford v. Wolfe*, 103 Mo. loc. cit. 397; *Ford v. Unity Church Society*, 120 Mo. loc. cit. 509."

This ruling was affirmed in *Conrey v. Pratt*, 248 Mo. 576, loc. cit. 583, 154 S. W. 749.

[12, 13] 7. The statute of limitations did not begin to run against the plaintiff until the death of his mother on August 22, 1915. The remainderman cannot come into court to recover possession of the land before the life estate has terminated, and consequently neither the 30-year statute nor any other statute begins to run against him until the life estate is lifted. *Hall v. French*, 165 Mo. 430, 65 S. W. 769; *Bradley v. Goff*, 243 Mo. 95, loc. cit. 102, 147 S. W. 1012; *Dandiger v. Stone*, 278 Mo. 19, 27, 210 S. W. 865. Kinney and his grantees with notice being trustees ex maleficio, the statute would not run in their favor. *Case v. Goodman*, 250 Mo. 112, loc. cit. 115, 156 S. W. 693.

[14] 8. The claim that the order of the court sustaining Kinney's motion directing the sheriff to pay over the surplus money in his hands arising from the sale estops plaintiff to claim title to the land is without any merit. It has been seen that Kinney occupied a fiduciary relation and was under obligation to pay the taxes and protect the estate of the remainderman against the very proceeding he either instituted or allowed to be instituted for the avowed purpose of covinously defeating plaintiff's title. He will not be permitted to profit by his own wrong. The law regards that proceeding simply as a payment of the taxes by the tenant whose life estate was bound for their payment. In that view, the court rightly ordered the surplus money paid over to him. Moreover, the order was made on a motion respecting a collateral question arising after judgment. It is a bar to a renewal of any claim to the surplus fund. It is not *res adjudicata* as to plaintiff's claim of title to the land. 23 Cyc. 1224.

The judgment is affirmed.  
All concur.

On Motion for Rehearing.

In the motion for rehearing it is claimed that the court is in error in several important phases of the case.

1. It is said that Joseph B. Kinney acquired title May 15, 1871, at the foreclosure of the mortgage given by Fannie A. D. Mathews and her husband to Joseph Kinney, July 14, 1866, and that he did not get possession of the land until after the decision in the case of *Kinney v. Mathews*, 69 Mo. 520, at the April term, 1879. Kinney testified:

"I left Mathews stay there and kept telling him I did not want him to move off this place if he would only keep up the property, and he promised this and promised that, and finally some one wrote me that he was tearing down a brick storehouse and selling the brick off the place, and I went down to look at it, and saw that he was just letting the property go down and was selling the brick from the storehouse. \* \* \* I left him there for I don't know how long, but he seemed to be angry, mean and mad, and I sent a man down there and told him to get him right off the place and if he didn't get off to throw him off, and I put it in charge of some of the neighbors there.

"Q. Did you ever rent the place to anybody?  
A. I don't recall it now. I remember I told these people to go on there and take care of the place and they could have all they made off of it; but if I leased it I cannot remember."

The purport of this testimony is that Mathews became Kinney's tenant in the year 1871.

Mrs. Mathews, the life tenant, allowed the taxes to go delinquent for the years 1869 to 1879. The motion states that Mrs. Mathews was in possession of the land until Kinney got possession. It was improved, productive, farming land. When Kinney acquired his title and possession, he stepped into her shoes and into the fiduciary relation she sustained to the remaindermen. It was the duty of the life tenant to pay the taxes. The payment of the taxes was a charge upon the life estate, no matter who owned it. The fact that the taxes were delinquent when Kinney acquired possession is immaterial, whether it was at the time of the foreclosure in May, 1871, or at the end of the litigation in 1879.

Counsel cite authorities holding that it is not the duty of the life tenant of unimproved, unproductive land to pay the taxes. That rule has no application here, as all the evidence shows this was productive farming land.

2. We have again gone over the case of *Barkhoefer v. Barkhoefer*, 204 S. W. 906. In that case the testator devised to the children of his son, Henry W. Barkhoefer, a tract of land, provided that the testator's son, Henry W., have the use of the land during his life on certain named conditions. At the time the will was made Henry had two children. A third was born after the death of the testator. It was held that the children in esse at the death of the testator took a vested interest as tenants in common, subject to their fath-



er's life estate, "subject to open and let in after-born children who come into being during the existence of the prior life estate."

The ruling is not in conflict with *Kinney v. Mathews*, where the deeds in question were judicially construed, nor with the later cases cited in the opinion.

3. It is insisted that we have overlooked the real question involved in the defective acknowledgment to the deed at No. 3 of the abstract, conveying the 39-acre tract A, and have disregarded the majority opinion in *Chauvin v. Wagner*, 18 Mo. 532. The certificate recites that they (the married women) "executed and delivered the deed freely and without compulsion of their said respective husbands." The objection is that the words "or undue influence" were omitted, and exception is also taken to the quotation from the opinion of Judge Scott as not stating the law of the case. It will be seen from the opinion of Judge Gamble (page 545) that the statute required the certificate to state that "the contents were made known and explained to her." The certificate recited that Mrs. Chauvin was "made acquainted with the contents of the deed." It was held that the statement that she was made acquainted with the contents of the deed was a substantial compliance with the statute. The certificate was further required to state that she "does not wish to retract." The court said:

"She is to be examined as to whether the deed had been executed by her voluntarily, not whether she wished it to be in force as a conveyance. Still, if the acknowledgment, which she is to make, is to include her present wishes in relation to the deed, it must so appear." Page 548

It was held by the whole court that it would have been superfluous to make known and explain the contents of the deed (although the statute required it) to one already acquainted therewith, but it was also held by two of the judges that, as the law still gave Mrs. Chauvin a locus penitentiae, the failure to state that "she did not wish to retract" was fatal, Judge Scott dissenting.

We are asked to declare this deed, executed in the year 1856, and under which possession has ever since been held, void because of the omission of the words "or undue influence" in the certificate of acknowledgment. It is argued that there is a difference between compulsion and undue influence, and that the fact that she executed the deed freely and without compulsion is not a compliance with the law. There may be a shadowy distinction, but the law looks to the substance rather than the shadow.

The motion for rehearing is overruled.  
All concur.

# BYRNE v. BYRNE et al. (No. 22168.)

(Supreme Court of Missouri, Division No. 1.  
July 11, 1921.)

1. Wills  $\S$ 432—Where will set aside, rights of parties the same as if it never existed.

After a will was finally set aside by judgment of the Supreme Court, all rights of the parties under the will ceased, and their rights were to be determined as if testator had died intestate, except as to such prima facie rights as they acquired by the formal probate of the will in the first instance in the probate court.

2. Wills  $\S$ 432—On annulment of will, widow entitled to possession of mansion home and homestead.

Where a will was annulled, the decedent's widow, whose dower had never been assigned to her, was entitled to the possession of the mansion home and the messuages thereto belonging during her life, and to all the rents and profits thereof, as if no will had ever existed.

3. Wills  $\S$ 432—Where will set aside, widow not prevented from having quarantine by finding that will resulted from her undue influence.

Where a will was contested and set aside, a finding in the contest proceeding that the will was the result of the undue influence of the widow and another did not prevent the widow from having quarantine after the will was set aside, on the ground that to allow her quarantine would be to permit her to profit by her own wrong.

4. Judgment  $\S$ 644—Finding in will contest case not binding in another case.

A will contest proceeding is not a proceeding inter partes, but a proceeding in rem, so that a verdict in such proceeding, as that the will was procured by undue influence, is not evidence of wrongdoing as to the will in a later partition suit between parties interested in the will.

5. Limitation of actions  $\S$ 41—Partition  $\S$ 44, 90—Rents offset against improvements by occupying cotenant; limitations inapplicable to rents set off.

In chancery suits in partition a cotenant out of possession, who has received no benefit from the common estate, is entitled to offset or credit the rental value of his interest as against allowance to the occupying cotenant for improvements and taxes; and the statute of limitations bars neither the claim for improvements nor the claim for rent, although the five-year statute of limitations (Rev. St. 1909,  $\S$  2394), is inapplicable to the claim for rents only where such claim is used as an offset to the claim for improvements and taxes; that is, rents barred by the statute can be used only as a shield and not as a sword.

6. Partition  $\S$ 85—Improvements made during will contest by devisees held made in good faith.

Where a will was contested and set aside, improvements made by the devisees under the

will upon the lands devised to them would be allowed in equitable partition among the heirs after the will was set aside, the contention by the successful contestant that improvements made during the will contest were not made in good faith being untenable.

**7. Partition ⚡86—Allowance for rents is based on land without tenant's improvements.**

A cotenant out of possession is entitled to the rental value of his land only as the land would have been without improvements made by the tenant in possession.

**8. Wills ⚡423—Probate binding till set aside.**

The judgment of the probate court admitting a will to probate is valid and binding on all the world until set aside by a suit to contest the will under the statute.

**9. Wills ⚡355—Probate set aside by filing contest.**

The probate of a will is set aside and its efficacy is destroyed upon the filing of suit to contest the will.

**10. Partition ⚡86—Occupying devisees not chargeable with interest on rents prior to filing of contest.**

The occupying devisees under a probated will subsequently set aside on contest were not liable for interest on rents of the occupied property collected and retained by them prior to the institution of the suit to contest the will, as such collection and retention of the rents was under a prima facie right to do so given by the probate, subject to account in case the will was subsequently set aside on contest.

**11. Partition ⚡86—Successful will contestant not objecting to occupying devisees' retention of rents during contest not entitled to interest thereon.**

Where neither at the time her suit to contest a will was filed nor thereafter did the contestant demand of the occupying devisees her share of the rents and profits, nor, upon the filing of her suit to contest, did she apply for a receiver or administrator pendente lite, as authorized by Rev. St. 1909, § 21, but acquiesced in the continued collection by the occupying tenants of the rents and profits subject to the outcome of the contest suit, their receiving and retaining the rents was not wrongful, and hence they were not chargeable with interest thereon.

**12. Descent and distribution ⚡95, 109—Rental value of property received by occupying devisees treated as advancements and brought into hotchpot where will set aside.**

Where a will is contested and set aside, the rental value of the property as received by the occupying devisees will be treated as advancements to be brought into hotchpot.

**13. Descent and distribution ⚡95, 109—Where will set aside personal property distributed by administrator treated as advancements.**

Where will was contested and set aside, personal property of the deceased distributed by the administrator would be brought into hotchpot in partition between the heirs, being

treated as advancements to the various legatees, on which no interest is chargeable, and the final settlement of the administrator, approved by the probate court, would not bar such relief to the contesting heirs, for the final settlement and property division was upon the theory that the will controlled, and subject to be set aside in case of a successful contest.

**14. Wills ⚡744—Contest relates back to probate.**

A will contest proceeding is pending from the date of the probate of the will in the probate court, and the subsequent institution of the contest proceedings in the circuit court is but an appeal from the judgment of probate in the probate court; so that, in case of a conveyance by one of the devisees of land prior to institution or determination of a contest on the expiration of the time for instituting contest, the purchaser takes subject to having his title divested by a successful contest, either pending or subsequently instituted.

Appeal from Circuit Court, Sta. Genevieve County; Peter H. Huck, Judge.

Suits by Alice Byrne against John T. Byrne and others, and by the latter against the former, consolidated and tried as one cause. From the decree Alice Byrne appeals. Reversed and remanded in part and in part affirmed.

John S. Marsalek, and P. H. Cullen, both of St. Louis, and Albert Miller, of Hillsboro, for appellants.

Clyde Williams and Jno. H. Reppy, both of Hillsboro, for respondents.

**SMALL, C. I.** Suit in partition in equity. Appeal from the circuit court of Ste. Genevieve county, to which the case was taken by change of venue from Jefferson, county where the land was located. The land belonged to Patrick Byrne, Sr., at the time of his death. He died on July 5, 1891, leaving a purported will, which was admitted to probate August 8, 1891.

The respondents are the children, and the appellant, Alice Byrne, the granddaughter, the only child of his deceased son, Thomas, and the parties constitute the only heirs of said Patrick Byrne, Sr. The deceased also left a widow, Rose Byrne. The appellant, Alice, was but 18 months old when her grandfather died, and on August 8, 1908, within the statutory period after her majority, brought suit to set aside her grandfather's will, making the respondents and the widow parties defendant in said will contest. There were three trials and three appeals to this court, the case being twice reversed and remanded (first appeal, 250 Mo. 632, 157 S. W. 609; second appeal, 181 S. W. 391); and the third appeal was affirmed on July 5, 1918, 27 years after the death of the testator, and 10 years

after the suit to contest the will was commenced (third appeal, 204 S. W. 730).

On the day of the final affirmance by this court the respondents, as plaintiffs, commenced a suit against the appellant to partition all of the land in question, except one tract, and on August 19, 1918, the appellant, Alice Byrne, as plaintiff, filed a suit against the respondents to partition said one tract. The suits were consolidated and tried as one cause. There is no dispute in the pleadings between any of the parties as to the ownership of each as an heir of said Patrick Byrne, Sr., being an undivided one-eighth interest in all the land sought to be partitioned. There is no contest in the pleadings between the respondents themselves, but they all ask that they each have one-eighth interest in the land or its proceeds upon sale in partition, subject to the claims of John T. James, and Patrick Byrne for improvements and taxes.

But appellant, Alice Byrne, in her pleadings takes issue with any claim of said respondents for improvements and taxes, and asks for rents and profits on her share and interest thereon and waste committed and all relief she seeks in this appeal, including an allowance in this proceeding for her share of the personal estate left by her grandfather, which her cotenants received under the will set aside.

The widow died on the 24th of March, 1914, and her dower was never assigned in any of the land in question.

At the time of the grandfather's death the said lands consisted of the home place, having about 210 or 215 acres in cultivation, 90 acres of which he devised by his will to respondent John T. Byrne. The evidence shows that the 90 acres devised to John T. Byrne, and the balance of the home place, which was devised to the widow for life, were occupied by the widow and her children until her death, in March, 1914.

Besides the home place there was a tract of 160 acres separated therefrom, which by the will of the deceased was devised to Patrick Byrne, respondent.

Also another tract, devised by said will to James Byrne, respondent, on which there was an old mill and millsite at the time of the death of said Patrick Byrne, Sr. This tract contained 139 acres of land.

After his mother's death, respondent John T. Byrne collected the rents from the home place, amounting in all to \$6,735, for the years 1914 to 1918, both inclusive. And during that period he also paid taxes to the amount of \$250, and made improvements of the value of \$500, and which increased the value of the land that sum. The lower court charged him with the total rents received after his mother's death, without interest thereon, and allowed him for the taxes and improvements above mentioned. It charged neither the said John T. Byrne nor any of the respondents with any rents or profits of

the said home place, including said 90 acres willed to said John T. Byrne, during the lifetime of the mother, holding that she was entitled to possession under her right of quarantine, her dower never having been assigned. There was also evidence that in 1910 said John T. Byrne, who seemed to be the manager for some years of the farm for his mother, sold \$1,650 worth of cedar timber off the home place; but the appellant's witness, who purchased it, said that, while it was good timber when he bought it, it soon would have been destroyed by insects, which infested it, had it not been cut down and removed. Furthermore, John T. Byrne testified that he personally got no benefit from the transaction; that he acted for his mother, who received the money. The lower court denied any claim against him on this item.

As to the 160 acres, or respondent, Patrick Byrne, farm. He occupied it himself for 15 years, and rented it to tenants the remainder of the time after his father's death. The evidence tended to show he made improvements and betterments upon the land, increasing its value from \$1,800 to \$3,000 in the year 1895. We think about \$2,250 would be a fair allowance to him for improvements; that its rental value was doubled by these improvements. From the evidence of both parties the rental value of the land, without the improvements, from the date of the father's death until the trial, would not be unfairly estimated as averaging \$100 per annum. The total taxes he paid on the farm during the entire time was \$482.

As to the 139 acres with the mill and mill site, devised to James Byrne: He was in possession from the time of his father's death. At the time the mill was dilapidated and the milldam was out of repair. It was not fit for operation until November, 1894. He gives a detailed statement of the improvements he made with his money and labor, by which he practically rebuilt the mill. He also enlarged the dwelling house and remodeled other buildings on the place; bored a well; put concrete walks and fences around the dwelling house; and cleared off eight acres of land. These improvements increased the value of the land about \$6,000. His testimony was corroborated by apparently disinterested witnesses. During the entire period he paid taxes amounting to \$992. We find from the evidence that the rental value of the 139 acres, independent of the mill and other improvements, was about \$150 per annum on an average for the entire time. He rented the mill at two different times, collecting \$600 from one renter and \$400 from the other. Some of the improvements were made on the mill in the fall or spring after the third verdict against the will, but before the final judgment of affirmance in this court, which was on July 5, 1918.

The lower court refused to charge either of the parties with the rents, except for the five

years preceding the institution of the suit, on the ground that they were barred by the statute of limitations. There were also certain legacies received by five of the cotenants under the will of said Patrick Byrne, Sr., which the lower court refused to require them to account for in this proceeding. We shall refer to this personal property, and such other details, as may be necessary in the opinion. The said Alice Byrne alone appealed to this court.

[1] II. We think there is no doubt that after the will was finally set aside by the judgment of this court, on the 5th day of July, 1918, all rights of the parties under the will ceased, and their rights must be determined as if the testator died intestate, except as to such prima facie rights as they acquired by the formal probate of the will in the first instance in the probate court. *Hines v. Hines*, 243 Mo. 500, 147 S. W. 774; *McIlwrath v. Hollander*, 73 Mo. 105, 39 Am. Rep. 484; *Boothe v. Cheek*, 253 Mo. 132-133, 161 S. W. 791.

[2] Therefore, upon the annulment of the will, the widow's dower never having been assigned to her, she was entitled to the possession of the mansion house and the messuages thereto belonging during her life, and to all the rents and profits thereof, as if no will had ever existed; and it appearing from the facts as found by the lower court and as found by us that the 90 acres of the home place, devised to John T. Byrne by the will, belonged to, and was connected with, the home place or mansion house of the deceased, his widow was entitled to the possession of said 90 acres, as well as the remaining portion of the homestead land. Consequently neither the appellant, Alice Byrne, the granddaughter, nor any of the other children or heirs of the deceased, had any legal claim to the rents and profits of the home place, including said 90 acres, during the lifetime of the widow. That was her quarantine. *Gentry v. Gentry*, 122 Mo. 202, 26 S. W. 1000; *Phillips v. Presson*, 172 Mo. loc. cit. 27, 72 S. W. 501; *Melton v. Fitch*, 125 Mo. loc. cit. 290, 28 S. W. 612; *Givens v. Ott*, 222 Mo. loc. cit. 420, 121 S. W. 23; *Roberts v. Nelson*, 86 Mo. 21; and other authorities cited by respondents. The lower court correctly ruled on this point.

[3] III. We have not overlooked the earnest insistence of appellant's learned counsel that in the contest proceeding the jury found the will was the result of the undue influence of the widow and John T. Byrne, and that, therefore, the widow should not have quarantine after the will was set aside, because the existence of the will prevented the plaintiff from having dower assigned to the widow during her lifetime, and to allow her quarantine would be to permit her to profit by her own wrong. We cannot agree to this contention.

This court twice reversed and remanded

the contest proceeding, and on the third appeal the verdict setting aside the will was affirmed simply on the ground that there was evidence of undue influence. 204 S. W. 730. But "it was an exceedingly close case." 181 S. W. 393, 394.

[4] However, the contest proceeding was not a proceeding inter partes, as in ordinary cases, but a proceeding in rem (*Bradford v. Blossom*, 207 Mo. 228, 105 S. W. 289), and the verdict therein is therefore no evidence in this case as to the will having been procured by the undue influence of the widow. There is, therefore, no evidence of wrongdoing on the part of any one in the making of said will in the record before us. But, admitting the will was procured by the undue influence of the widow, the position of learned counsel is wholly untenable. By the verdict and judgment in the contest proceeding it was conclusively established that the testator died without any will, and all his heirs and his widow were restored to their rights at law. The proponents, as well as the contestants, of the will were restored. While the proponents lost their rights under the will, they gained their rights under the law, as did the contestant, and among the rights regained by the widow was her right to dower and quarantine. The proposition that she lost both her rights under the will and her rights under the law, too, by the setting aside of the will, is wholly untenable. *Hines v. Hines*, 243 Mo. 500, 147 S. W. 774, and other cases cited supra.

[5] IV. But we think the learned court below committed error in not allowing the appellant rents and profits on her share prior to, as well as during, the five-year period next before the commencement of the partition suit, and holding that her claim thereto was barred by the five-year statute of limitations. The right to allow one tenant in common the value of his improvements or betterments is a conditional or reciprocal right. The value of such improvements is not allowable at all at law, but only in equity. It is wholly governed by equitable considerations. The first maxim of equity is that he who seeks equity must do equity. Accordingly, we find it is well settled that the cotenant out of possession, who has received no benefit of the common estate, is entitled to offset or credit the rental value of his interest as against the allowance made the cotenant, who has been in exclusive possession and enjoyment of the estate, for the improvements made and taxes paid thereon; that the statute of limitations bars neither the claim for improvements nor the claim for rent; it does not enter into the equation on either side. Especially is this so in cases like the one at bar, where the tenant in possession, although not in adverse possession, has received and held the rents and profits of the common estate to the exclusion of his cotenant. *Cain v. Cain*, 53 S. C. 350, 31 S. E.

278, 69 Am. St. Rep. 863; *Vaughan v. Langford*, 81 S. C. 282, 62 S. E. 316, 128 Am. St. Rep. 912, 16 Ann. Cas. 91; note to 16 Am. Dec. 443; 7 R. C. L. § 39, p. 843; 20 R. C. L. p. 734; *Coberly v. Coberly*, 189 Mo. 1, 87 S. W. 957; L. R. A. 1915C, 207 note; *Baies v. Hamilton*, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; *Snell v. Harrison*, 131 Mo. 495, 32 S. W. 37, 52 Am. St. Rep. 642; *Holloway v. Holloway*, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339.

V. It is true that in none of the Missouri cases above cited, or which we have been able to find, has the court had under consideration or decided that the rents prior to the five-year period barred by the statute (section 2394, R. S. 1909) from recovery in suits between cotenants, as well as strangers, in ejectment (*Starks v. Kirchgraber*, 434 Mo. App. 218, 113 S. W. 1149), can be allowed in equitable suits in partition, but all our decisions are in harmony with the general principles of equity as to charges and countercharges between cotenants in such equitable proceedings. It is also true that in *Hines v. Hines*, 243 Mo. 500, 147 S. W. 774, a case deciding several of the controverted points in this case, the court disallowed the claim for rents which the lower court had charged against one of the occupying cotenants, and cited said section 2394 as authority therefor (243 Mo. bottom of page 500, 147 S. W. 774). But the real ground of the decision was upon the equitable principle of "reciprocity." The court said (243 Mo. page 500, 147 S. W. 777):

"Owing to the fact that none of the other parties who have received and held property under the will of Matilda A. Higgins [which had been set aside in a suit to contest it] have been charged with rents or interest, we find it would be inequitable to charge defendant Thomas Wesley Hines with rent on the real estate in Missouri which he received and held until the will contest was instituted."

In that case, however, there was no claim for improvements, which distinguishes it from the case at bar. We rule, and only intend to rule, that rents or profits, prior to the statutory period of five years, which are barred by said section 2394 in proceedings in ejectment, can only be used in equitable proceedings in partition as an offset against a claim for improvements and taxes paid, and not that the balance, if any of such rents, over the value of such improvements, could be recovered or charged against the occupying cotenant. In other words, such rents so barred by the statute in ejectment suits can only be used as a shield, and not as a sword, in chancery suits in partition.

[6] VI. Nor do we concur in the contention that improvements made pending the proceedings to contest the will should not be considered as made in good faith, and for that reason no allowance should be made on ac-

count thereof. All the improvements in this case were made after the ex parte or formal probate of the will in the probate court. This vested title *prima facie* in the devisees who afterwards made the improvements which benefited the property to the amount allowed therefor. The law permitted the institution of suits to contest said will during a period of many years after it was probated. In the meantime, however, the devisees were entitled *prima facie* to the possession and use of the property purported to be devised to them by said will. If the property could not be improved in good faith by such devisees, especially when they are also heirs, pending such contests or right to contest a will—which might endure 27 years as in this case—and be allowed compensation therefor, in case the will was set aside, the property might be of little value to any one during such period and be greatly depreciated when the contest was finally determined, and thus work a great injustice and hardship to all the owners thereof. This is inequitable. We rule this point against appellant.

[7] VII. But it has been ruled, and it is the law, that the cotenant out of possession is only entitled to the rental value of his interest in the land as the land would have been without improvements made by the cotenant in possession. *Armor v. Frey*, 253 Mo. loc. cit. 477-478, 161 S. W. 829; 30 Cyc. 234; 7 R. C. L. note 13, § 38, p. 843.

VIII. In view of the foregoing principles we hold, as to the 139 acres, or James Byrne farm, that he is chargeable only with the rental value of the farm independent of the mill and without the other improvements be made on said farm, which under the evidence, we find would average \$150 per annum, or \$4,000 in round numbers, for the 27 years after his father's death up to the time of the trial, and at the same rate per annum since that time. That he should be allowed \$7,000 for all his improvements and taxes paid by him up to the time of the trial, leaving a balance of \$3,000 due him against such tract of 139 acres, on account of such improvements and taxes.

In the same manner Patrick Byrne should account for \$2,700, total rental value, without improvements, of the 160 acres occupied by him for the entire period from his father's death to the trial of this partition suit, and that he should be allowed \$2,700 for his improvements made and taxes paid during that time. So that one charge offsets the other, and his account as to said 160 acres is balanced.

We find correct and affirm the accounting as to John T. Byrne, made and required by the lower court in its decree.

What we have said in this paragraph refers only to the real estate, and not the personal

property, left by the deceased, Patrick Byrne, Sr., which we shall notice presently.

IX. In the foregoing accounting we have allowed no interest on rents and profits, which learned counsel for appellant earnestly claim should be allowed. In this case the occupying cotenants were not trustees *ex malicio*, nor did they wrongfully appropriate to their own use the money of the other cotenants.

It is well settled that, where no wrong is committed in acquiring or detaining the money, a demand is necessary to charge the party with interest, and its computation will begin from such demand. 15 R. C. L. § 25, p. 29, and many cases cited.

[8] The judgment of the probate court admitting a will to probate is valid and binding on all the world until set aside by a suit to contest the will under the statute. *Dilworth v. Rice*, 48 Mo. 131-132; *Banks v. Banks*, 65 Mo. 432; *Stowe v. Stowe*, 140 Mo. 594, 41 S. W. 951.

[9,10] But the probate of the will is set aside and its efficacy is destroyed upon the filing of the suit to contest the will. *Johnson v. Brown*, 277 Mo. 392, 210 S. W. 55; *State ex rel. v. Imel*, 243 Mo. loc. cit. 186, 147 S. W. 989. So that, prior to the institution of the suit to contest the will, the devisees occupied the property and collected and retained the rents under a *prima facie* right to do so, subject to account in case the will was subsequently contested and set aside. This did not render them liable to pay interest thereon during such period.

[11] Neither at the time the suit to contest was filed, nor at any time before or afterwards, did plaintiff demand her share of the rents and profits. Nor upon the filing of her suit to contest did she apply for a receiver or administrator *pendente lite*, as authorized by statute (section 21, R. S. 1909). But she acquiesced in the occupying cotenants continuing to collect the rents and profits, the same as they did before, subject to the outcome of the suit to contest the will. This was not a mere inadvertence on her part. She had able legal advice. The case was "an exceedingly close case," as held by this court. It was well enough to permit her claim for rent to rest and abide the result of the will contest, as was done. Plaintiff having thus consented to the occupying cotenants collecting and retaining the rent during the contest, they neither wrongfully received nor wrongfully retained the same during that time, and are not chargeable with interest thereon.

It is true that in *Bates v. Hamilton*, 144 Mo. 1, 45 S. W. 641, 68 Am. St. Rep. 407, interest on rents collected by one cotenant was allowed to the others; but in that case there was a present right to the rents when collected in each cotenant, and, in effect,

a demand therefor and wrongful refusal to pay over, which is the distinguishing feature between that case, and other cases cited by appellant, and this case.

[12] It seems to us that the demands of equity and good conscience in this case will be satisfied if we treat the rental value of the property as received by the occupying tenants as advancements to be brought into hotchpot, the same as the legacies collected in the *Hines Case*, 243 Mo. *supra*, pending the will contest, and allow no interest thereon, as was ruled in that case.

[13] X. But we agree with the contention of appellant's learned counsel that the personal property of the deceased, Patrick Byrne, Sr., should also be brought into hotchpot in this proceeding. In this regard the case of *Hines v. Hines*, hereinbefore mentioned (243 Mo. 480, 147 S. W. 774), is in our judgment, decisive. In that case the testatrix died in the state of Arkansas leaving a will which was duly probated in that state. She had two farms in Missouri, as well as real estate and personal property in Arkansas. A duly certified copy of her will, and the probate thereof in Arkansas, was filed in the county in Missouri where her Missouri lands were situate. The devisees and legatees in Arkansas, as well as in Missouri, took possession of the respective lands and legacies bequeathed and devised to them by the will. Afterwards the will was set aside in a contest instituted in this state. A partition suit was subsequently brought in this state to partition the lands in Missouri, and the court required the devisees to bring into hotchpot and account for the value of the land and the legacies so received by them in Arkansas before they could participate as heirs in the Missouri property. The court held they should be charged therewith as advancements.

But it may be said that in that case there does not appear to have been a final settlement made and approved by the probate court in the state of Arkansas, and that the final settlement made by the administrator in the case before us, pending the will contest, bars any inquiry into the rights of the cotenants to the personal property which was distributed in such final settlement. But we disallow this contention, for the reason, as we have already seen, the final judgment in the suit to contest the will, declaring that the testator died intestate, restored all the heirs to their rights of inheritance under the law. Said final settlement was made and the property divided thereby on the theory that the will controlled, but it was so made subject to be set aside and annulled in case of a successful contest of the will.

[14] It could have no greater effect than a conveyance by one of the devisees of the land, before the contest was determined, or

the time for instituting it had expired. In all such cases the purchaser takes subject to having his title divested in case of a successful contest of the will, either pending or subsequently instituted. In fact, the contest is pending from the date of the probate of the will in the probate court, and the subsequent institution of the contest proceedings in the circuit court is but an appeal from the judgment of probate in the probate court. *McIlwrath v. Hollander*, 73 Mo. 106, 39 Am. Rep. 484; *Boothe v. Cheek*, 253 Mo. 132-133, 161 S. W. 791; *Hines v. Hines*, 243 Mo. 500, 147 S. W. 774.

The record shows that as devisees under said will of Patrick Byrne, Sr., the personal property was distributed as follows by the administrator in his final settlement on August 18, 1893: To C. E. Byrne, \$500; Mary J. Byrne, \$1,200; Anna Byrne, \$1,200; Ella Byrne, \$1,200; John T. Byrne, \$1,200; Rose Byrne (widow), \$2,500. The five heirs named received in all \$5,103.15, and each was entitled to one-eighth thereof, or \$637.69, and the other heirs to the same amount.

The \$2,500 or share received by the widow cannot be taken into account in this proceeding, because her estate and the interest of the different heirs or legatees therein, cannot be properly considered in this case, and the lower court was right in refusing to do so. And appellant makes no claim in her brief here on account thereof.

Consequently, in adjusting the claims of the parties against each other in this case, they should each be adjudged to receive and be required to account for the personal property aforesaid on the basis that each was entitled to one-eighth thereof, or \$637.69, and no more. But no interest should be charged, because in this accounting the legacies so received are considered as advancements, and interest is not chargeable thereon. *Hines v. Hines*, 243 Mo. 500, 147 S. W. 774.

XI. We disallow the claim for waste against John T. Byrne in cutting and selling the cedar timber off of the homestead land. The evidence shows the mother received the proceeds; that said John T. Byrne acted simply as agent for her in the transaction. He is consequently not accountable therefor.

XII. In addition to charging the respondents John T. Byrne and Patrick Byrne with rents from the time of the trial below up to the time of the sale of the property in partition, at the rate hereinbefore indicated in this opinion, they should be credited with any and all taxes which they have paid or may pay since the time of such trial and up to the time of such sale.

The result is that we reverse and remand the case, with directions to the circuit court to modify and re-enter its decree herein so as to conform to this opinion regarding the

allowance and charges, for and against each and all of the parties in the case, respondent as well as appellant, as herein determined, and to make such alterations and changes in its decree as may be necessary to carry out the order of sale of the property in partition heretofore made. In all other respects the decree of the lower court is affirmed.

BROWN, C., not sitting.

RAGLAND, C., concurs.

PER CURIAM. The foregoing opinion by SMALL, C., is adopted as the opinion of the court.

All the Judges concur.

## ASADORIAN et al. v. SAYMAN. (No. 20766.)

(Supreme Court of Missouri, Division No. 1.  
July 23, 1921.)

### 1. Trover and conversion §53—Peremptory instruction to allow interest erroneous.

Under Rev. St. 1919, § 4222, providing that the jury may, if they shall think fit, give damages, in the nature of interest, over and above the value of the goods at the time of the conversion, the allowance of interest is in the discretion of the jury, and it is error to give a peremptory instruction to allow interest on the value of the property taken.

### 2. Factors §6—Contract for sale of rugs on consignment entire and indivisible.

Contract whereby defendant, sued for the conversion of a stock of rugs, consigned such rugs to plaintiff firm to be sold by them for his account, at cost plus 10 per cent., moneys received from the sale of the rugs to be remitted either in cash or by certified cashier's check to defendant every 30 days, etc., held entire and not divisible, so that defendant had the right to take back the rugs in question for plaintiff firm's breach of contract by failing to pay over moneys, etc.

### 3. Partnership §138—Partner can sell firm property.

Each party to a partnership possesses full power and authority to sell, pledge, or otherwise dispose of the entirety of any particular effects belonging to the partnership, and not merely of his own share thereof, for purposes within the scope of the partnership.

Appeal from St. Louis Circuit Court; Benjamin J. Klene, Judge.

Action by Alexander H. Asadorian and another, copartners doing business as A. H. Asadorian & Co., against T. M. Sayman. From judgment for plaintiffs, defendant appeals. Judgment reversed outright on two counts of the petition, judgment on a third count reversed, and cause remanded for new trial on such count.

Charles E. Morrow, of St. Louis, for appellant.

Alphonso Howe, B. H. Charles, and Seward McKittrick, all of St. Louis, for respondents.

ELDER, J. This is an appeal from a judgment rendered by the circuit court of the city of St. Louis in an action brought by plaintiffs against defendant for breach of contract, for conversion, and for damages for the ruining of the business of plaintiffs, all arising out of a certain written contract relating to the consignment to plaintiffs, for sale, of a lot of Turkish and Persian rugs owned by defendant.

The contract in question, entered into on September 3, 1910, recites that defendant has consigned to plaintiffs a certain lot of "Turkish, Persian and other kinds and grades of Oriental rugs," to be sold by plaintiffs, for the account of defendant, at cost plus 10 per cent., "all moneys so received and accruing from the sale of said rugs to be paid either in cash or by certified cashier's check" to defendant every 30 days; that plaintiffs are to pay "all freight, express and all other transportation charges, rents, cost of repair or cleaning said rugs and the maintenance of the premises known as 386 North Euclid avenue from his portion of the profits which may accrue from the sale of said rugs over and above the 10 per cent. and the actual first cost of said rugs"; that plaintiffs shall see that the said stock is kept "free from injury, damages, moths or other causes which will bring about injury to the same and that they will keep said stock of rugs belonging to T. M. Sayman fully covered by insurance at all times"; that any further rugs purchased or traded in, to be sold for the account of the defendant, are to become the property of defendant and subject to the same sale conditions as in the contract provided; that "all rugs are to be sold for cash upon approval. Positively no credit accounts or notes will be accepted from any purchaser or from A. H. Asadorian & Co. as payment for any rugs on this consignment account"; that from the "share of the profits accruing from the sale of these rugs, thirty per cent. (30 per cent.) dividend" is to be paid defendant, every 30 days, to "balance up a deficiency account" of a certain lot of rugs theretofore consigned to the firm of Asadorian Bros., which account is assumed by plaintiffs; that plaintiffs are to keep a "stock book," a "sales record," a "daybook or book of approval," a "dray ticket or delivery system," a book for "all cleaning and repairing done," and a "cashbook," all of which books are to be the property of defendant; that "all moneys received from all sources of sale are to be deposited in the bank," and "a check is to be made weekly or as may be necessary for the payment of all expenses"; that defendant or his representative is to have "access at all times to all books and accounts for the sale

of any rug or rugs that may be or that have been disposed of or that may be in stock or on hand, likewise to be in full possession of the information contained in the books of the cleaning and repairing account"; that defendant "will replenish the said rug stock from time to time as occasion may warrant to the extent of \$3,000 at a purchase." Further terms of the contract will be adverted to in the course of the opinion.

The third amended petition, upon which the case was tried, is in three counts. The first count is for damages for breach of the contract. After setting forth the terms of the contract, the count alleges that the rugs described in the agreement "were substantially all sold, but that the stock from time to time was replenished, and replaced, and added to, until the termination of the period covered by the said contract, to wit, the 1st day of January, 1912, when there was in said store in the possession of the plaintiffs, a stock of rugs of the aggregate value of \$35,000, the aggregate of the cost price of which was \$22,035.38"; that plaintiffs had "carried out and faithfully performed every obligation imposed upon them," but that defendant did not replenish the stock as occasion warranted; that "although the plaintiffs paid to the defendant the sum of \$500 accrued to the plaintiffs from their portion of the profits of the said business, the defendant did not deposit the said money in any bank to the credit of the plaintiffs on an interest bearing account, as required by said contract; that at the termination of the said contract, to wit, on the 1st day of January, 1912, there was not a sufficient sum of money on hand, nor in the possession of the defendant to the credit of the plaintiffs, to pay for the said stock of rugs, and it became the right of the plaintiffs, as provided in the said contract, to sell a sufficient number of said rugs then in said stock at an auction sale, and from the proceeds thereof to pay to the defendant the purchase or cost price of the said rugs, as in the contract provided; that thereupon the plaintiffs notified the defendant on or about the 1st day of January, 1912, that there was not sufficient money on hand to enable them to pay the defendant for said rugs, as in said contract provided, and that they would proceed to hold an auction and sell enough of said rugs to pay the defendant; and the plaintiffs were preparing to hold said auction sale when the defendant did, in violation of the terms of the said contract, refuse to permit the plaintiffs to hold the said auction sale, did notify plaintiffs not to hold such a sale, did threaten that he would replevin the said stock of goods out of the hands of the plaintiffs if they undertook to hold said sale, did notify the plaintiffs to cease doing any business and not to sell any more of the said rugs on any account whatever, and by force and violence closed the plaintiffs' store, refused to permit the plain-



tiffs thereafter to open the same or to continue their said business of selling Oriental rugs and their said business of repairing and cleaning of Oriental rugs, and kept the said store, by force and violence, closed from the 1st day of January, 1912, until on or about the 14th day of March, 1912; that on or about the said 14th day of March, 1912, the defendant, without warrant or authority of law, and in violation of the terms of the said contract, did secretly and in the nighttime, forcibly enter the said store and remove and take out of the possession of the plaintiffs and out of the said store, without knowledge or consent, all of the said rugs in the amount and value of \$35,000 as aforesaid, and wholly failed and refused to keep or comply with any of the terms or conditions of the said contract; to the damage of the plaintiffs in the sum of \$12,000."

The second count of the petition alleges that on or about the 14th day of March, 1912, plaintiffs were "the owners of personal property consisting of Oriental and other rugs" at 386 North Euclid avenue, which "were being handled and kept with a general stock of Oriental rugs which the plaintiffs had kept and were keeping in the said store, for sale to the general public, referred to in count I"; that "on said 14th day of March, 1912, the defendant forcibly, willfully, wrongfully and without color of right entered the said premises of the plaintiffs and took and carried away the said property of the plaintiffs and has not returned the same, but has unlawfully converted the same to his own use, and disposed of the same to the damage of plaintiffs in the sum of \$2,000 with interest since the 14th day of March, 1912."

The third count alleges that on January 1, 1912, plaintiffs "were the owners, and in the lawful possession" of the rugs referred to in count II and "in the lawful possession" of the rugs referred to in count I, "having an interest therein as in said count I set out"; that "defendant did by force and violence, close the plaintiffs' said store, and refused to permit plaintiffs thereafter to open the same or to continue their business, of buying and selling Oriental rugs and their said business of repairing and cleaning Oriental rugs; and, by force and violence, did keep their said store closed from said 1st day of January, 1912, until on or about the 14th day of March, 1912; that on or about the said 14th day of March, 1912, the defendant, without color of right and without warrant or authority of law, did secretly and forcibly enter the said store of plaintiffs and did, without their knowledge or consent, remove, take and carry away all of said rugs from said store; by reason whereof the business of the plaintiffs was broken up and ruined, their credit greatly injured, their customers driven away, their repairing and cleaning department broken up; and plaintiffs were compelled to start business

anew in another location with an entirely new stock of merchandise, all to their damage in the sum of \$5,000 for which they pray judgment as compensatory damages, and in the further sum of \$5,000 for which they pray judgment as punitive damages, and for their costs."

The answer was a general denial.

The case was tried to a jury. During the progress of the trial, after the plaintiffs had submitted their evidence and rested, and while the defendant was presenting his defense, the court, of its own motion, and over the objection and exception of defendant, withdrew the first count of the petition from the consideration of the jury and ordered the same referred to a referee. The cause proceeded on the second and third counts, and at the conclusion of the trial the jury returned a verdict for plaintiffs for the sum of \$1,500 and interest in the sum of \$195, a total of \$1,695, on the second count, and of \$5,000 compensatory and \$2,500 punitive damages on the third count.

The first count having been referred to Hon. Clarence T. Case as referee, and the evidence thereon having been heard by him, on October 15, 1917, he filed a report recommending a judgment in favor of plaintiffs for the sum of \$1 and costs. Exceptions to the report of the referee were filed by both plaintiffs and defendant. Defendant's exceptions were overruled by the court. Plaintiffs' exceptions were in part overruled and in part sustained. The exceptions sustained related to the measure of damages and the interpretation of the contract between the parties. After a review of the report of the referee, the exceptions thereto, and the testimony heard before the referee, the court handed down a memorandum of findings, ordering the entry of judgment upon the first count, after the disposition of motions for new trial, in favor of plaintiffs for the sum of \$3,409.65 and costs.

In due time motions for a new trial on the first, second, and third counts of the petition were filed; said motions being overruled, the court, on December 24, 1917, rendered and entered judgment for plaintiffs and against defendant upon the verdict of the jury on the second and third counts, for the sum of \$9,195, and upon its own finding on the first count for the sum of \$3,409.65, making a total judgment of \$12,604.65. In due time a motion for a new trial upon the whole case was filed, and, the same being overruled, defendant perfected his appeal to this court.

The record in the case is lengthy, comprising 1,644 pages. Of necessity we can state only the salient features of the mass of evidence adduced, much of which is repetitive and irrelevant.

Plaintiffs offered in evidence the contract in question, which was shown to have been drawn by defendant. The testimony of A.

H. Asadorian tended to show: That the rugs referred to in the contract were in the possession of the plaintiffs under a prior contract at the date the last contract was entered into and were taken over and made subject to the terms of that contract. That the defendant did not replenish the rug stock at all times as occasion required as provided in the contract, but did make several purchases of rugs from time to time. That at the time the contract in question was entered into, there was on hand about \$16,000 worth of rugs, and the plaintiffs went to New York in the spring and fall of the year 1911, and in February, 1912, to buy rugs. That in 1910 the defendant was requested to buy rugs and refused. That plaintiffs paid the freight and insurance on all rugs and paid the rent on the store and made all needed repairs on the rugs from time to time. That from time to time during the contract the plaintiffs sold rugs and paid to the defendant 10 per cent. provided for in the contract, as well as 30 per cent. to apply on the old account, and that in 1910 plaintiffs paid defendant \$500. That after the expiration of the contract and during the month of January, 1912, the plaintiffs requested the defendant to permit them to hold an auction sale of the rugs in question, and the defendant then consented to this. That defendant came to plaintiffs' place of business nearly every morning and on those occasions would stay in the store for a half an hour and sometimes longer and stopped plaintiffs' business, and that this happened sometimes when plaintiffs were waiting on customers. That after January 1, 1912, the defendant refused to let rugs be sent out on approval and refused to permit plaintiffs to make sales of rugs until the matter was settled. That about the 8th or 9th day of March, 1912, defendant sent a clerk to the store of plaintiffs to check over matters and prevent the plaintiffs from selling rugs, and that shortly after January 1, 1912, the defendant refused to permit the plaintiffs to hold an auction sale. That on Sunday, the 10th of March, 1912, the defendant, with Mr. Leahy, his attorney, and some other gentlemen, came to the store and wanted to check up the stock of rugs and make a settlement, but that the plaintiffs informed the defendant that this could not be done on Sunday. That Mr. Leahy insisted that it should be done, and the whole stock of rugs was checked over twice that afternoon. That before that time the defendant had no key to the store and that the plaintiffs had a key of the store lying upon the top of a desk that morning while the defendant was there. That defendant saw the key, but that witness said to the defendant that he (defendant) did not need a key. That defendant said that he would be back from lunch before witness returned and he would take the key and come in and open the door and

pile up the rugs so that they could be checked in the afternoon. That defendant used this key to get in the storeroom that afternoon, and that witness demanded of defendant the return of the key, but the defendant refused to give it back. That two days later plaintiffs bought a padlock and put it on the door. That on Thursday morning, March 14th, when witness came to his store he found that all the rugs had been removed from the store and that everything was gone, including the rugs of some of his customers, which were there to be cleaned and repaired. That the plaintiffs had no knowledge that the defendant was going to take the rugs and did not consent to it. That the screw eyelets in the door on which the padlock was placed had been pulled out and the marks were on the door. That the defendant did not have a key to the padlock. That the desk in the store had been broken into and the books taken out. That plaintiffs had in the store about \$2,000 worth of their own rugs which were taken away.

Subsequently witness testified that—

"The reasonable value of those rugs in St. Louis on the night of March 13 or 14, 1912, was about \$1,200."

The witness further testified that when defendant arrived at the store the next morning, plaintiffs inquired of him about the matter, and defendant stated that he had taken the rugs out of the place and removed them to a storeroom two doors north on the same street; that afterwards defendant brought some of the rugs back to the plaintiffs' store belonging to their customers which were taken by mistake, but that defendant never brought back seven rugs described in the first count of the petition, or any of the rugs described in the second count of the petition; that the rugs were actually taken out of the store about the 14th day of March, 1912. A list of the rugs taken out was produced, which list was made by the plaintiffs and Mr. Lewis, head bookkeeper of defendant, about March 22d. The witness stated that he signed this list and kept a copy; that the list was checked over by witness and Mr. Lewis before signing it; that the aggregate price of all the rugs taken away from the store was \$21,905.37.

The witness was asked how much he made out of the business in the year 1911. (Question objected to as being too speculative and not a proper measure of damages. Objection overruled, and defendant excepted.) In answer to this question witness stated that in 1911 he made about \$3,000 from the repairing and cleaning. Witness also testified that plaintiffs made about \$2,000 a year from the sale of rugs. Witness was asked if he did the same amount of business during the year beginning with the 1st of January, 1912. (Objected to by defendant. Objection overruled, and defendant excepted.) Witness an-

swered that he did not do the same amount of business and that he could not do the same character of business. Witness then testified that defendant was in his place of business frequently in January and February and until he took out of the store all the rugs, and was asked what effect that had upon his business. (Objected to by defendant. Objection overruled, and defendant excepted.) The witness answered that defendant being in his store every morning hurt his business because he used profane language. The witness was then asked if taking out the rugs belonging to customers that were there to be cleaned had any effect on his business and, if so, how. (Objected to because it was too speculative and not a proper measure of damages. Objection overruled, and defendant excepted.) Witness answered that the effect of that was stopping the work on them, and that it was about the 1st of May following before the plaintiffs got in business again, when he moved into another store and started anew, and the trade was new and his customers scattered, and that the first month he made scarcely nothing, and from the 1st of May to the last day of December, 1912, he could hardly pay expenses. That in 1913 he started to build up his business again and did a little better and cleared about \$1,000 in 1913. That in 1914 it was a little better but the business had the same depression. That before March, 1912, there were some few rugs out in the hands of customers on approval; some of them the plaintiffs brought back to their store and turned over to the defendant, but at that time defendant and plaintiffs were negotiating for a settlement.

On cross-examination Mr. Asadorian testified that he never had any substantial stock of rugs until defendant made him consignment contracts; that on September 8, 1910, the contract in question was entered into and the stock under prior consignments was turned in of the value at that time of about \$16,000. That this stock was listed and taken over into the new contract, and plaintiffs proceeded to do business under the new contract, and books of account were kept of the number of rugs sold and profits made. That in 1911 plaintiffs sold about \$7,000 worth of rugs, and that the plaintiffs' profits on these sales were about \$2,000. That the plaintiffs kept a system of dray tickets as provided in the contract. The witness then identified the books which were kept and stated that they showed all moneys received from the sale of all rugs and that all money was deposited in the bank. Witness then produced a receipt dated November 12, 1910, reading, "Received from A. H. Asadorian & Co. \$500.00 on account" signed "T. M. Sayman, per O. Krammer." The witness further testified that he had paid to the defendant during 1910 and 1911, various amounts on account of money received from the sale of rugs, aggregating the sum

of \$10,144.71. That he did not pay the defendant anything in January, February or March, 1912. That plaintiffs paid to defendant monthly 30 per cent. of their profits on all sales. The witness then produced his bank book and testified that all moneys received were deposited in the bank according to the contract; the bank book showed that commencing with September, 1910, and ending February 24, 1912, there was deposited the sum of \$19,206.66. The witness then testified that he was engaged in three different kinds of business at that time, selling rugs, repairing and cleaning rugs, and soap business, but the witness testified that he kept the deposit from his rug business in the Savings Trust Company of St. Louis as shown by the bank book produced by him. He was then asked to read the deposit made from the rug business after this large stock was taken from him. The court restricted this testimony, but permitted the deposit to be shown from March to the end of December, 1912, which amounted to the sum of \$2,526.96. The defendant then sought to show and offered to prove that the plaintiffs had done \$3,706.14 worth of business in the year 1913. (This was excluded by the court, and the testimony was limited to the end of the year 1912.) From a bank book of the Third National Bank, covering installment payments on rugs, the witness read deposits from September 17, 1910, to May 6, 1912, aggregating the sum of \$4,861.04. Witness also testified that there were four rugs marked "M. O. G." which were taken by Dr. Sayman that belonged to the plaintiffs.

The defendant sought to show by the witness that when the contract was entered into between the parties, there was an indebtedness of A. H. Asadorian & Bro., which was assumed by the plaintiffs, amounting to \$1,299. This evidence was excluded by the court. Defendant also sought to show that the \$500 payment which plaintiffs claim was made to the defendant was upon the old account, which was assumed by the plaintiffs in the contract in question. This evidence was excluded. It was admitted by the witness that in January, 1912, he was indebted to the defendant in the sum of \$667.76 for rugs which they had sold, and that this indebtedness has never been paid. It was also admitted by him that all rugs sold were not paid for in full at the time of purchase, and that on March 14, 1912, there were 27 rugs out on approval which were then unaccounted for.

Before the referee, Mr. Asadorian testified that outside of the \$500 paid by him to defendant in 1910 plaintiffs neither reinvested nor turned over to defendant, for application towards the purchase of the stock of rugs any moneys accruing from the sources of income of the business as accumulated, although he admitted that on January 1, 1912, the firm had in bank about \$1,600.

L. S. Alder, buyer and manager of the rug department of Scruggs, testified for plaintiffs that the market value in St. Louis, in March, 1912, of the stock of rugs taken from plaintiffs' store by defendant, as shown by the list thereof, which rugs in New York had cost \$21,905.37, would be about \$35,000, and that the market value in February, 1912, of the rugs claimed to have been owned by plaintiffs and taken by defendant, was \$2,000.

Frank J. Tucker, police officer, testified for plaintiffs that one night in March, 1912 he saw defendant and some of his employees at plaintiffs' store moving rugs a few doors north; that afterwards he noticed "that the padlock of the door had been broken loose, but that the door was locked."

On behalf of defendant, Oscar C. Kramer testified that he had worked for defendant and kept the books involved in the case; that he had gone over the books with Mr. Asadorian and that the list of rugs, which the plaintiffs claimed belonged to them and were taken by the defendant, did not appear anywhere on the books except four of them which Mr. Asadorian stated were taken in exchange and marked "M. O. G." That he went out to the plaintiffs' storehouse and checked up these rugs with the plaintiffs by the stock records which contain a record of the defendant's rugs, and that this record had nothing to do with any property of plaintiffs. That a list of defendant's rugs was made from this record with Mr. Asadorian and checked over by him and Mr. Asadorian, and that he assisted in removing the rugs and checking them out and used this list, and that no rugs were taken which were not contained in this list. The four exchanged rugs were offered in evidence with tags thereon. The witness described them and stated that these tags were put on by him at the direction of Mr. Asadorian showing that they were put in the stock as exchanged rugs in place of other rugs. The witness then took plaintiffs' exhibit, which purported to describe the rugs sued for in the second count of the petition, and stated that none of the rugs contained in that list were removed from the store by the defendant. The witness further testified that on Sunday, March 10, 1912, Dr. Sayman, Mr. Leahy and Mr. Rouse went out to the plaintiffs' store for the purpose of taking possession of the rugs in question, and that at that time the defendant and his attorney claimed that plaintiffs had violated the contract and were not handling the business properly, and stated that they had a right to take the stock, and that Mr. Asadorian said to defendant, "Take your stock, if you want it." (This answer, on motion of plaintiffs, was excluded by the court. An exception was saved.) The defendant then offered to prove by the witness that A. H. Asadorian at that time consented to the defendant taking the rugs and gave defendant the key to the building and

told him to take them out. (Objection sustained and exception saved.) The witness was next asked whether or not Mr. Asadorian at that time gave the defendant a key to the building, and he answered that he did give the defendant a key. The witness then testified that on March 12 he went to the plaintiffs' store about 4 o'clock in the afternoon and met the defendant there, Mr. Asadorian being present, and that the defendant told Mr. Asadorian that he had come to get the stock; that he had come there to make the recheck, that he was going to take the stock.

"Q. What did Mr. Asadorian say and do? A. He said, 'Go ahead.'"

"Mr. Howe: That has been ruled on once before. I move it be stricken out."

"The Court: That will be stricken out."

To this defendant duly excepted. The witness further testified that the three of them proceeded to check the stock, and that Mr. Asadorian stayed as late as he could and finally stated that he had to go home to dinner and that he was sick and begged to be excused from checking the stock. That this was about 6 o'clock in the evening, and the defendant locked up the store by locking the front door with the key Mr. Asadorian had given him on the Sunday previous. That the door had an ordinary Yale lock with an attachment on the side. The witness was then handed a photograph of the door and lock, identified it, and stated that there was no padlock with screw eyes in the door at that time. Witness then stated that after dinner he returned and several employees of defendant were there. That the defendant walked up to the door and took the key and unlocked it, and they proceeded to arrange the rugs in piles according to the merchants they were bought from in New York as the stock was designated in the book so that they would not make mistakes. That they kept an accurate account and checked off the rugs against the stock record as the rugs were carried out of the building. That after the rugs were finally checked off, they were carried in the building two doors north. That two days later the witness went out to the store to which the rugs were removed and saw Mr. Asadorian there and again checked all the rugs there in the place and rechecked them with him. That Mr. Asadorian went and collected rugs that were out on approval and made a list and furnished it to the witness and signed the list and said, "I will collect them." That afterwards he did collect some of them and returned them. The witness then stated that after removing the rugs on the night of March 12th, they closed and locked the door and left all the rugs in the store that were not properly identified as defendant's stock by the tags on them. That there were some 45 pieces left in the cleaning and repairing department in the rear of the

store, and that they left some rugs hanging in the front show window. That they broke no desk and left the place just the same as they found it and did no damage.

The witness further testified that on January 1, 1912, there was an indebtedness for rugs which had been sold and not accounted for by plaintiffs to defendant, amounting to \$1,673.13. That the plaintiffs had failed to account for 64 rugs of the cost price of \$3,575.49. Referring to the books in evidence, the witness testified with respect to a large number of individual rugs which he stated plaintiffs sold and never accounted for, aggregating in cost price \$1,673.13. He then produced a carbon of a letter from the defendant to the plaintiffs demanding \$500 to apply on the old account, which was taken over by the contract, and testified that he delivered this letter to Mr. Asadorian on November 10, 1910, and received a check for the sum of \$500 and delivered it to the defendant, but that by mistake the amount was credited to the general account.

The deposition of Wm. H. Rouse, a witness for defendant, was read in evidence. He testified that about the middle of March he and Mr. Leahy were present when Mr. Asadorian gave the keys of the store to defendant; that in handling the key to defendant he said, "You take the stock of rugs out of the store, and do whatever you want with them," or words to that effect; that at the instruction of defendant the witness rented a store a few doors away from the store of plaintiffs, and that afterwards the rugs were removed to that store; that defendant had a list of the rugs which he owned, and the rugs were checked off from this list by identification tags which were attached to each rug; that certain rugs were out on approval and were returned at different times and delivered to the new location; that Mr. Asadorian made no complaint about the rugs having been wrongfully taken away from him, but that "he did not seem to think he was selling enough rugs to make it worth while him continuing in the rug business"; that all of plaintiffs' rugs and those on hand for cleaning were left in the building; that "after the rugs were removed to the new location and the different rugs that were out on approval had been returned, the stock of rugs was checked up and approved by Mr. Asadorian."

On cross-examination the witness testified that a few months before defendant took possession of the rugs Mr. Asadorian "wanted to go to New York and purchase some additional rugs, some rugs to replenish his stock with, and Dr. Sayman would not consent to his going unless he paid \$500, which was part of a sum of money due Dr. Sayman on some old consignment account." "Q. And what did Asadorian do? A. Asadorian gave Dr. Sayman a check for \$500."

Defendant T. M. Sayman testified that at the time of signing the contract in question there was a balance due him on an old contract of \$1,200. That the value of all the rugs taken over under the contract was "about twenty-one or twenty-four thousand dollars." That he replenished the stock of rugs four or five times, and only refused to replenish the same once when Mr. Asadorian "had about twenty-four or twenty-six thousand dollars worth of goods on hand and wanted to buy more, and I insisted on him paying \$500 on that old account, which he did, and so he got other stock." That on January 1, 1912, plaintiffs were indebted to him for about \$3,500. That after January 1, 1912, he talked over with Mr. Asadorian the feasibility of getting rid of the stock. That Mr. Asadorian was talking about holding an auction sale, but he said he did not have the right kind of stock to conduct an auction and that it was concluded that they would wait until spring and go to New York and buy additional stock and then conduct an auction. That Mr. Asadorian went to New York City and returned, and he said he could not find the pieces he wanted to hold an auction sale and that they concluded that defendant had better take over the stock and sell it. That he went out to the plaintiffs' place of business with Mr. Seropyian, Mr. Bronaugh, and Mr. Kennard, for the purpose of having these gentlemen look over the stock with the view of purchasing it; it was in the evening, and Mr. Asadorian at that time was at his home, and witness asked him if he could not please come down to the store and unlock it and let him show the stock of goods to Kennard, with the view of selling him the stock. That after these parties, with Mr. Asadorian, got to the store, Mr. Asadorian at once commenced pulling rugs out of the shelves and spreading them out on the floor and expounding on the merits of the rugs to the prospective purchasers. That at that time the rugs left for cleaning were in the back of the store and all the rugs for sale were in the front of the store. That afterwards, in the middle of February, Mr. Bronaugh and witness went over to the store, and witness took him through the stock and showed him the rugs again; Mr. Asadorian was present at that time, and witness got his permission to show the stock to Mr. Bronaugh. That on Sunday, March 10, 1912, witness, Mr. Leahy, his counsel, Mr. Rouse and Mr. Kramer met at the plaintiffs' store, and witness made a demand that plaintiffs turn over the stock to him. That Mr. Asadorian said:

"All right, Mr. Leahy, they are Dr. Sayman's rugs; he can take them and do with them what he wishes. I am tired of the business; I want to get out of it. I am doing nothing but losing money ever since I have been in it. If I had stayed with my cleaning and repairing business I would have been better off."

That witness then asked Mr. Asadorian for the key, and he gave it to him in the presence of Mr. Leahy.

"Q. What key was that, have you got it there? A. Yes, sir; right here in my pocket. It is a key to the Sergeant lock which is on the door now."

That on that day witness made arrangements with Mr. Asadorian that he would have somebody there to check the rugs in and out. That he sent a girl employee out to the Asadorian store for the purpose of checking rugs in and checking them out where they were out on approval; she had nothing to do with the opening or locking up of the store; Mr. Asadorian did that and carried his own key to the store. The witness was then asked whether or not Mr. Asadorian agreed to this, and his answer was, "Mr. Asadorian consented and said she could come and help out." (Objected to and ordered stricken out by the court. Defendant excepted.) The witness then stated that—

Mr. Asadorian made the remark in the presence of Mr. Leahy that this girl could come there and remain there until I took possession of the stock and he agreed to it that she could come and check in his stuff, and out; she remained there a few days. "Her name is Miss Lottie Hudson. I have tried to get her as a witness, but she is teaching school somewhere in Minnesota. \* \* \* I rented a store building two doors north. \* \* \* I called up Mr. Asadorian over the 'phone and told him I was coming out that night to check out the rugs for the purpose of removing them, and he said all right, and we went out there. Mr. Kramer and myself went out there in the afternoon about 3:30 or 4 o'clock, and we commenced to check them up. Along in the afternoon Mr. Asadorian complained he had a violent headache, and he said, 'I want to go home,' and he said, 'I want to turn it over to you, Doctor,' and he said he knew everything would be all right and he went out of the store, and the store uses a spring lock, and I says, 'Let me see if my key will fit it.' And he says, 'It is just like my key,' and I unlocked the door in his presence with the key he gave me the Sunday before, and I saw it was all right, and I left, and I went to my home and got my dinner and came back, and we continued to start to check the rugs and get them in detail as per list shown in the book. Mr. Kramer and Mr. Rouse and a young man by the name of Scheu helped me. There may have been three or four of my packers up there, and the man who drove the dray wagon, but I can't recall his name. We came back after we had our dinner, and Mr. Kramer went home to his dinner, and the boys who drove the one-horse dray wagon, and they were there when I came back on the outside, and we went and unlocked the door. I used the key Mr. Asadorian gave me. The lock that I unlocked was a Sergeant lock. We went in and checked over the rugs, and we put them in stacks, and then I went in the other room I had rented and took those rugs as per list as purchased from each jobber and where they were bought. I took these rugs and had

them all placed in there, and I gave specific instructions not to touch anything belonging to Mr. Asadorian. After we got the rugs spread out, we checked them up again that night with the account in the stock records we had right there. The books showed that there were 64 rugs short, but later on it turned out to be a few more."

Defendant further testified that he took away the books used by plaintiffs, which had been bought and paid for by him, but took no rugs belonging to plaintiffs or any one else; that every rug taken "had these tickets on and were my property, according to the records that were kept of them"; that after the rugs were moved Mr. Asadorian "came there and checked every piece in the place" and returned to the stock three or four or five lots which had been out on approval.

"Q. Did you ever give him permission to sell rugs on credit? A. I did not. He was to sell them for money down, cash in hand.

"Q. When did you find out for the first time he was selling rugs on credit, before or after January 1, 1912? A. We have had a tilt with Mr. Asadorian all the time.

"Q. Just give the date. A. It has been right along. I couldn't give the date—from 1910, on down the line.

"Q. You didn't know he was selling on time? A. I thought he was selling for cash, and he would just take the rugs and take it out of the place and have it a few days, and if they didn't buy it he would go and get the rug and put it back in stock."

Defendant also testified that plaintiffs had mistagged some of the rugs, substituting rugs of less value; that he did not break open the desk of Mr. Asadorian, as the same was never in condition to be locked; that the 30 per cent. paid him by plaintiffs was all applied on the balance due under the old contract; that he never prevented plaintiffs from transacting business at their store.

Mr. John S. Leahy, a witness on behalf of defendant, testified with respect to the visit to plaintiffs' store on a Sunday morning in March, 1912, as follows:

"We went in and I was presented to Mr. Asadorian, and the doctor said he had come there to check up the rugs and to take possession of them, perhaps. My recollection is that Mr. Asadorian was quite a fluent talker, gesticulated somewhat, and pointed to the rugs and said. 'There are the rugs, examine the rugs and do as you please about the rugs. I have lost money by this arrangement with Dr. Sayman'—and made various sorts of statements—\* \* \* I took a chair and sat down, and Dr. Sayman began calling off the rugs and called them Barouks and Kermanshaws and various names of that kind, all of which I do not recall, and it seems there was a tag attached to each of these rugs, and the doctor had an inventory of them, and he would examine the tags and call off the number and see if it corresponded with his inventory, and my recollection is that Mr. Kramer, who was, I believe, a bookkeeper for Dr. Sayman, would check these over, and

finally there was some rugs that were missing, and Mr. Asadorian was asked with reference to those rugs, and he said they were out on approval, giving the names of the persons who had the rugs, and various conversations took place between Asadorian and the doctor, the substance of which was Asadorian had lost money by reason of the arrangement he had with Dr. Sayman and they were his rugs and he was glad to get rid of them and so on."

M. C. Seropyian, engaged in the rug business with J. Kennard & Sons Carpet Company, called as a witness by defendant before the referee, testified that in the latter part of April, 1912, he made an examination and inspection of the rugs at the store of plaintiffs, for the benefit of the Kennard Company, which company subsequently purchased 250 or 260 of the rugs on hand, at a discount of 15 per cent. of the then wholesale price in New York; that the rugs purchased, together with a number of rugs taken from Kennard's stock, were auctioned by him, on behalf of the Kennard Company, at Kingshighway and Delmar avenue in May, 1912; that the rental of the store, the lights and newspaper advertisements incident to the auction amounted to over \$1,000; that the gross profit realized on the Sayman rugs which were auctioned amounted to about 25 per cent. over and above the price paid defendant; that by reason of the auction being held by the Kennard Company, the name of that company was a "tremendous factor" in making the auction a success; that the average gross profit of auctions of Oriental rugs held in St. Louis in 1912 was between 25 and 30 per cent., and the average profit on rugs sold at retail was between 60 and 70 per cent. A list of the rugs purchased by the Kennard Company from defendant, offered in evidence, showed a total cost price to defendant of \$16,893.09, the gross price paid by the Kennard Company, to wit, \$14,763.08, and the net purchase price, after deducting 15 per cent. discount, to wit, \$12,548.62.

During the progress of the trial, both before the court and before the referee numerous lists of rugs, scores of book entries, various exhibits, and hundreds of pages of additional testimony were offered, much of which was in no way material to any of the issues involved. The foregoing suffices to outline the case made.

I. Defendant contends that instruction II given for plaintiffs is erroneous, in that it peremptorily instructed the jury to allow interest upon the amount found by them on the second count of the petition. The point made is well taken.

Instruction II told the jury that if they believed and found that plaintiffs were the owners of certain rugs mentioned in the evidence and that defendant, without the consent of plaintiffs, took and carried away the said rugs and had not returned the same to

plaintiffs, then their verdict "must be in favor of plaintiffs and against the defendant on the second count of the said third amended petition; and in that event the amount of your verdict on the second count of the said third amended petition should be such sum as you may believe and find from the evidence to have been the reasonable market value of the said rugs at said time (but not exceeding the sum of \$2,000) with interest thereon from said time to the date of your verdict at the rate of 6 per cent. per annum."

[1] The statute (section 5480, R. S. 1909, now section 4222, R. S. 1919) provides that—

"The jury on the trial of any issue, or any inquiry of damages, may, if they shall think fit, give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure."

Under the decisions, the allowance of interest is in the discretion of the jury, and it is error for the court to give a peremptory instruction to allow interest on the value of the property taken. *State ex rel. Robertson v. Hope*, 121 Mo. 34, 25 S. W. 893; *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855; *Hawkins v. Press Brick Co.*, 63 Mo. App. 64; *Wheeler v. McDonald & Co.*, 77 Mo. App. 213; *Vermillion v. LeClare*, 89 Mo. App. 55.

[2] II. Defendant asserts that the provisions of the contract are not independent, as found by the referee and concurred in as to the last paragraph thereof by the court, but that contract "is entire and indivisible and the clauses mutual and dependent," thereby giving defendant the right to take the rugs in question. This contention calls for a close scrutiny of the terms of the agreement. And in passing upon the question we must bear in mind the rule that the contract is to be construed and its meaning ascertained by an examination of all of its provisions, so as to fully effectuate the intention of the parties unless violative of some inexorable principle of law. By reference to the contract it will be noted that in one of the clauses thereof it is provided:

"That in case the said A. H. Asadorian & Co. default in any payment or payments, that in case they fail to account for any rug or rugs, or in case of failure on their part to comply with any of the provisions or stipulations of this contract as herein set forth that the said T. M. Sayman or his duly authorized representative is hereby authorized to take full possession of the business of the said A. H. Asadorian & Co., and to take full possession, charge and control of the premises and business, and also the account known as the repairing and cleaning department, and that all moneys that may be due the said firm, together with all outstanding accounts of the said A. H. Asadorian & Co., from any source whatever or for any rug cleaning or repairing bills that may be due said A. H. Asadorian & Co., are to become the property of the said T. M. Sayman."

Under this clause it was incumbent on plaintiffs, before they could recover from defendant for taking possession of the rugs, to show performance on their part of the various conditions imposed upon them by the agreement. As admitted by Mr. Asadorian, on January 1, 1912, plaintiffs were indebted to defendant in the sum of \$667.76 for rugs sold, all rugs sold were not paid for in full at the time of sale, and on March 14, 1912, there were a number of rugs out on approval which were not accounted for. Under the terms of the contract these delinquencies amounted to breaches, when viewed in the light of the plain provisions that all moneys "received and accruing from the sale of rugs" was to be paid every 30 days to the defendant, that all rugs were "to be sold for cash upon approval" and "positively no credit accounts or notes" were to be accepted from any purchaser, and that all the rugs received under the contract were to be sold for the account of the defendant and settlement therefor made with him.

The closing paragraph of the contract is as follows:

"The said A. H. Asadorian & Co. hereby and by these presents agree to reinvest their money which may accrue from all sources of income into this business as it accumulates, turning said money over to said T. M. Sayman to be placed to the credit of A. H. Asadorian & Co. at the termination of this contract to apply on the purchase price of said rugs, said money to be placed in a bank on interest for safe-keeping until the first day of January, 1912, and that upon this date the said A. H. Asadorian & Co. agrees to buy and pay cash for all stock on hand, and that in the event there is an insufficient amount of cash on hand to pay for said stock that the said A. H. Asadorian & Co. shall have an auction sale and sell to the highest bidder a sufficient amount of stock to meet said deficiency."

Under this paragraph, which is so predicated upon the preceding provisions of the agreement as to be inseparable therefrom, the obligation was imposed upon plaintiffs to turn over to defendant, for deposit to their credit in a bank on interest, all moneys accruing from the income of the business, such moneys to be applied, at the termination of the contract, towards the purchase of the rugs then on hand. Here again Mr. Asadorian admitted that he had not, with the exception of a \$500 payment, the purpose of which was questioned by defendant, turned over to defendant for application towards the purchase of the stock of rugs, any moneys accruing from the income derived from the business, but that on the contrary the firm had in the bank, on January 1, 1912, about \$1,600 which had not been paid over.

According to the doctrine announced by this court en banc in *Browning v. Railway Co.*, 188 S. W. loc. cit. 149:

"The undertakings of parties to a contract are mutual and dependent, and before either can recover for breach he must do more than show default of the other—he must show either a performance or an offer to perform on his part—and, in order to show the latter he must show his readiness and ability to perform at the appointed time and place. These are conditions precedent to the right of either party to maintain an action for the default of the other."

Under what was said in *Turner v. Mellier*, 59 Mo. loc. cit. 535, where a contract contains various stipulations, some on the part of one, and some on the part of the other, of the contracting parties, "neither can recover for a breach of a covenant in his favor, without alleging and proving the performance of all acts on his part, which by the contract are conditions precedent to the obligation of the defendant, upon which suit is brought, and his readiness to perform those, if any, which were to be performed concurrently with the act to be performed by the defendant."

As enunciated in *Meyer v. Christopher*, 176 Mo. loc. cit. 594, 75 S. W. 754:

"The law is plain that courts cannot make contracts for litigants and that a party must show performance, on his part, of a contract before he can recover upon it or compel the other party to perform it."

And as expressed in 13 *Corpus Juris*, § 525, p. 561, as a general rule a contract may be said to be entire "when by its terms, nature and purpose it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent."

Applying these principles to the instant case, we rule that the contract under review is entire and not divisible and that its various constituent parts are mutual and dependent. And plaintiffs having failed to prove performance of the contract by them, but on the contrary breaches of the conditions imposed upon them having been shown, they should not be allowed to recover on the contract.

[3] III. Defendant insists that the court erred in giving plaintiffs' instruction IV; and in refusing defendant's instructions VII, XII, and XV. Said instructions are as follows:

Plaintiffs' instruction IV:

"The court instructs the jury that if you believe and find from the evidence that at the times mentioned in the third amended petition the plaintiffs constituted a partnership under the firm name of A. H. Asadorian & Co. and engaged in the general business of selling Oriental rugs and of cleaning and repairing them, and if you further find and believe from the evidence that the removal of the entire stock of rugs resulted in the breaking up of the plaintiffs' business, then the consent of Mr. A. H. Asadorian alone to the removal of the rugs was not the consent of the partnership and was not binding



on it and forms no defense to the causes of action set forth in the petition."

#### Defendant's instruction VII:

"The court instructs the jury that if you believe from the evidence that the rugs mentioned in the evidence, and belonging to the defendant, and covered by the contract mentioned in the evidence, were taken by the defendant with the consent of A. H. Asadorian, or that the plaintiffs had made default in any payment or payments, or that they had failed to account for any rug or rugs covered by said contract, mentioned in the evidence, and that the defendant took peaceable possession of the same by unlocking the door of the store with a key delivered to him by A. H. Asadorian, then the plaintiffs are not entitled to recover any damages for having been deprived of the possession of said rugs."

#### Defendant's instruction XII:

"The court instructs the jury that the plaintiffs charge in the second count of their third amended petition that the defendant forcibly, willfully, wrongfully and without color of right entered the premises and store of plaintiffs and took and carried away the property mentioned in the evidence and unlawfully converted the same to his own use; if, therefore, the jury believe from the evidence that the said rugs and property mentioned in the evidence were voluntarily turned over by the said A. H. Asadorian to the defendant, then the plaintiffs cannot recover upon the second count of their third amended petition and your verdict should be for the defendant on that count."

#### Defendant's instruction XV:

"The court instructs the jury that if you believe from the evidence that A. H. Asadorian consented and agreed with the defendant to turn over to him the stock of rugs, mentioned in the evidence, that he thereby bound his wife, Marguerite G. Asadorian, as his partner, and that his act was the act of the partnership."

The evidence shows that Mr. Asadorian was in active charge of the business of plaintiffs, bought and sold rugs, and in general transacted the major portion of the business of the firm. His wife, to all intents and purposes, was but an assistant. When asked, "What were your duties there and what did you do?" she testified:

"I answered the telephone, and I would check rugs when they would come in, and sometimes I would show rugs to customers."

There can be no question but that Asadorian was the dominant partner.

As early as the case of *Clark v. Rives et al.*, 33 Mo. 579, loc. cit. 582, the doctrine was asserted that—

"It is well settled that in virtue of the community of rights and interest in the partnership property, *each party possesses full power and authority to sell, pledge, or otherwise dispose of the entirety of any particular effects belonging to the partnership*, and not merely of his

own share thereof, for any purpose within the scope of the partnership." (Italics ours.)

This doctrine was reaffirmed in *Keck v. Fisher, Admr.*, 58 Mo. 532. In *Anable v. Land Co.*, 144 Mo. App. loc. cit. 312, 128 S. W. 41, the principle was enunciated that—

"Each partner is a representative of the firm, and the release and satisfaction by one partner of the partnership claims binds the firm in the same manner as though all the partners were acting together."

Chancellor Kent (3 Kent, Com. 44) expresses the rule as well established that each partner, "In ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi*, of the whole partnership interests, and is considered to be the authorized agent of the firm."

Mr. Justice Story (*Story on Partnership*, [7th Ed.] § 94) holds that—

"Each partner possesses full power and authority to sell, pledge, or otherwise to dispose of the entirety of any particular goods, wares, merchandise or other personal effects belonging to the partnership, and not merely of his own share thereof, for purposes within the scope of the partnership."

Although Mr. Asadorian denied, as did his wife also, that he had consented to the removal of the stock of rugs by defendant, the record nevertheless discloses considerable testimony on behalf of defendant that he did so consent. And, such consent being in complete accord with the paragraph of the contract giving to defendant, in case of plaintiffs' failure to comply with any of the provisions of the contract, the right to take full charge and possession of the business and premises of plaintiffs, it could only be said to have been given for purposes within the scope of the partnership. Under the authorities above quoted, the consent of Mr. Asadorian, if given, therefore became binding upon his wife, the remaining partner. Plaintiffs' instruction IV, which told the jury that "the consent of Mr. Asadorian alone to the removal of the rugs was not the consent of the partnership and was not binding on it," was accordingly erroneous and should not have been given. And, the conflicting evidence on the question of consent, coupled with the evidence upon the noncompliance by plaintiffs with the conditions imposed upon them by the contract and upon the manner by which defendant had obtained possession of the rugs, having raised questions for the jury, defendant's instructions VII, XII and XV became proper and should have been given.

IV. Many additional assignments of error are urged by defendant and are ably discussed in the briefs by counsel on both sides. While some thereof seem to have merit, nevertheless, from what has thus far been ruled upon, it becomes unnecessary for us to re-

view the further questions presented. The error committed in giving plaintiffs' instruction IV and refusing defendant's instructions VII, XII, and XV would necessitate our remanding the case for a new trial. However, as we hold to the view that the contract presented herein is entire and indivisible and its several clauses mutual and dependent, remanding the case for a new trial upon the first and third counts of the petition would be unavailing for the reason that under the evidence adduced defendant, by the express terms of the contract, had a right to take full possession, charge and control of the business and premises of plaintiffs, which right would preclude a recovery by plaintiffs on those counts.

While the error complained of as to plaintiffs' instruction II, relating to count 2 of the petition, could possibly be cured by a remittitur, nevertheless the error committed in refusing defendant's instruction XII, which relates to the same count, necessitates our remanding the case for a new trial upon that count. Furthermore, as the evidence bearing upon count 2 was so interwoven with the voluminous evidence adduced upon counts 1 and 3 as to render it difficult to differentiate between the three, the jury may have been confused, and the merits of the alleged conversion should be submitted anew and apart from any other issue.

Our order therefore is that the judgment of the circuit court upon counts 1 and 3 of the petition be reversed outright; that the judgment upon count 2 be reversed and the cause be remanded for a new trial upon that count alone, irrespective of counts 1 and 3, in accordance with the views expressed herein.

All concur.

**SLOVENSKY et al. v. O'REILLY et al.**  
(No. 22144.)

(Supreme Court of Missouri, Division No. 1  
July 23, 1921.)

**1. Action ¶25(3)—Action in ejectment and to quiet title properly tried as one at law.**

Issues in an action on a petition containing a count in ejectment and one to quiet title held issues at law, and case was properly tried as one at law.

**2. Appeal and error ¶1010(1) — Findings of court conclusive on appeal.**

In a case properly tried as one at law before the court without a jury, findings of fact by the court had the force and effect of a verdict by a jury, and were final upon appeal if supported by substantial evidence.

**3. Appeal and error ¶585(2)—Unchallenged additional abstract binding as to fact.**

An additional abstract, filed by respondents and standing unchallenged, in so far as it

states facts contrary to those stated in appellants' abstract, is binding on appeal.

**4. Navigable waters ¶36(7)—Finding that purchaser did not get land formed by change of bed in river sustained.**

In an action in ejectment and to quiet title, a finding that a purchaser of land got nothing beyond the old bed of a river, which had become a mere slough, held supported by substantial evidence.

**5. Boundaries ¶3(8) — Field notes held to control in ascertaining locations.**

Field notes and a plat of government surveys of record will control in ascertaining locations, even though the monuments established are gone.

**6. Navigable waters ¶45 — Government did not lose land by reason of change in channel of stream.**

Where government retained title to 18 acres of land adjoining a river, having given a patent to land on the other bank of the river, the mere fact that two channels were formed in the river and the principal channel of the two divided the 18-acre tract did not change the ownership in the government.

**7. Navigable waters ¶1(1)—Must be navigable in fact.**

Navigable waters are waters capable of being navigated, that is, navigable in fact, the test being whether or not they are navigable in their ordinary condition as highways for commerce over which trade and travel may be conducted in the customary modes of trade or travel on water.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Navigable.]

**8. Evidence ¶10(5)—Judicial notice taken that Meramec river is not navigable.**

It will not be judicially noticed that the Meramec river is navigable in Crawford county near the head water of the stream, notwithstanding Laws 1839, p. 83, making it a highway below the mouth of Crooked creek, but rather judicial knowledge as to history of state will preclude the state from saying the stream is a navigable one.

**9. Navigable waters ¶45—Landowners owned to middle thread of stream.**

Owners along nonnavigable stream owned to the middle thread of the stream, and where the stream changed its course and cut a new channel, owners on both sides of the stream had an interest in the old bed.

**10. Appeal and error ¶882(17) — Error of court in finding held invited.**

Where plaintiffs sued to recover bed of an old stream and a parcel of land between the old and new bed, the court did not err so as to require a reversal in finding that neither plaintiffs nor defendants owned the bed of the stream, where neither parties introduced any evidence as to where the thread of the stream was when it was flowing in the old bed, and a petition of plaintiffs was "dismissed" as far as the old bed of the stream was concerned, since the

technical error of the court was invited by the plaintiff, who is appealing; judgment having gone for defendant as to other parcel of land.

Appeal from Crawford County Circuit Court; L. B. Woodside, Judge.

Action by John H. Slovensky and others against John F. O'Reilly and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. H. Harrison, of Steelville, for appellants.  
Harry Clymer, of Steelville, for respondents.

GRAVES, J. The petition in this case is in two counts. The first count is an ordinary petition in ejectment for two small tracts of land, being parts of the southeast quarter of section 5, township 38 north, range 3 west, in Crawford county. One tract is said to contain 6.50 acres, and the other 4.50 acres, and both are described by metes and bounds, not necessary to further mention at this point. The second count in the petition is in the usual form of an action to quiet title. The answers are diverse in lines of defense. John F. and Mary E. O'Reilly in answer to the first count (the count in ejectment) admit that they are in possession of the 6.50-acre tract and deny all other allegations of said count. As to the second count (the action to quiet title) these defendants aver that they are the owner of the 6.50-acre tract, and claim the title thereto, and further aver that the plaintiffs have no interest therein. In a second paragraph of the answer the following is stated:

"And for further answer to both the first and second counts in plaintiff's petition these defendants aver that they are the owners in fee and in possession of all that part of the southeast fractional quarter of the southwest fractional quarter of section 5, township 38 north, range 3 west, lying north of the original bed of the Meramec river, according to the original survey made by the United States, and which includes the first tract or parcel of land described in plaintiffs' petition and containing 6.50 acres, more or less, and that plaintiffs have no right, title, or interest in or to said tract; that the second tract of land described in both the first and second counts in said petition is the original bed of the Meramec river, and so designated as such by the original survey made by the United States government at the time said section 5 was surveyed, and when patents were issued to the lands in said section 5, the river as then located was designated as the boundary lines of the tracts or parcels of land lying along said river, and that all of the interest either the plaintiffs or defendants have in or to said last-described tract or parcel of land is such right, title, or interest as they may have under the law by virtue of owning the lands on opposite sides of the river bed; that all the claim these defendants assert to said second described tract or parcel of land is such right, title, and interest as they may have

thereto under the law by virtue of being the owners of the land lying north of said river bed and being adjacent thereto."

The defendants pray that their title to the 6.50 acres be adjudged and confirmed in them, and that the court determine the respective interests of the parties to the 4.50-acre tract. Defendant Thomas Woods by answer to first count averred that he was in the possession of the 6.50-acre tract as tenant for the defendants O'Reillys, and denied all other allegations of said count, as well as each and every allegation of the second count. The answer of Posey Woods was a general denial to each count. Reply placed in issue all new matter in the respective answers. A jury was waived, and the trial was had before the court. The court found against plaintiffs upon both counts, and decreed title in defendants as to the 6.50-acre tract. As to the 4.50 acres the court found that neither had title or interest therein. Costs were adjudged against plaintiffs in favor of all the defendants. From such judgment the plaintiffs have appealed.

[1, 2] I. The issues made by the pleadings are issues at law, and not in equity. The case was properly tried as one at law. Although tried before the court, the findings of fact made by the judge have the force and effect of a verdict by a jury. If these findings are supported by substantial evidence, they are binding in this court. The findings incorporated in the judgment are general ones, to the effect: (1) The issues on both counts are found for defendants; (2) that defendants John F. and Mary E. O'Reilly are the owners in fee of the 6.50-acre tract, and that plaintiffs have no interest therein; and (3) that the 4.50-acre tract is a part of the old bed of the Meramec river, and neither parties, plaintiffs or defendants, have any interest therein. As said, these findings, if supported by substantial evidence, are final upon an appeal in this, a law case.

II. The material facts, under the rules of law, *supra*, are therefore the deciding factors in the case. Sections 5 and 8 were surveyed by the government in 1821. The plat and field notes of this survey are in the record. This shows that the Meramec river ran across the southwest quarter of section 5, township 38, range 3. It entered shortly south of the northwest corner of said quarter section, and passed out at the southeast corner. This plat shows 50.61 acres in the southwest quarter of said section south of the then river. This tract was patented to one Reeves in May, 1878, and the patent describes it as 50.61 acres south of the Meramec river, in the southwest fractional quarter of said section 5, township 38, range 3 west. The next patent in evidence is one for 18 acres from the government to Clarence E. McKinley, in January, 1908, which 18

acres is described as the southeast fractional quarter of the southwest fractional quarter of said section 5, north of the Meramec river. In November, 1885, Benj. F. Reeves and wife conveyed to Sarah E. McKinley all the north half of the northwest quarter of section 8, and the south half of the southwest fractional quarter of section 5, south of the Meramec river, containing in all 129.73 acres. The acreage granted is the exact acreage shown by the government plat, mentioned, supra, because the north half of the northwest quarter of section 8 is shown to contain 79.12 acres, which added to the 50.61 acres in section 5, makes the 129.73. From plaintiffs' showing of the record title the conveyances ran through divers persons with the same description, until finally in November, 1898, it is conveyed back to Sarah E. McKinley, with the same description as above set out. In 1906 Sarah E. McKinley and husband conveyed by the identical description this 129.73 acres of land to Clarence E. McKinley. Up to this point we have two separate tracts of land in the name of Clarence E. McKinley, i. e., the 18 acres conveyed to him by United States patent in 1908, and the 129.73 acres deeded to him by Sarah E. McKinley in 1906, as stated, supra.

In 1898 during heavy floods the channel of the Meramec shifted to the north, and the 6.50-acre tract was left in the south of the new channel. This was a part of the 18-acre tract according to the survey of 1821. Clarence E. McKinley's patent said:

"Eighteen acres according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by Clarence E. McKinley."

This patent was received by Clarence E. McKinley 10 years after the change of channel in 1898, and 2 years after he acquired the original Reeves farm of 129.73 acres in 1906. Up to this point all parties appear to have been recognizing and acting upon the government survey. When Clarence E. McKinley received this patent to 18 acres, formerly north of the Meramec river, 6.50 acres of it was between the old and new channels of that stream, and had so been since 1898. The trouble in the case comes in at this point. Clarence E. McKinley contracted to sell certain lands to James Thomas Kitchen on November 5, 1908. This contract (not recorded) describes the land as:

"The north half of the northwest quarter of section 8, and the south fractional half of the southwest quarter (south of Meramec river) of section 5."

The number of acres was not given. But a year later Clarence E. McKinley and wife by general warranty deed conveyed to J. T. Kitchen as follows:

"All of the south half of the southwest fractional quarter (south of Meramec river) of Sec.

5, and the northwest quarter of the northwest quarter and the northeast fractional quarter of the northwest quarter of Sec. 8, Twp. 38, R. 3 W., containing 129.73 acres, more or less."

This is the first time the term "more or less" appears in the conveyances of the old Reeves farm. Theretofore it had been designated as 129.73 acres.

In 1913 Kitchen and wife deeded to H. H. & Charles F. Daugherty by the following description:

"All of the southwest fractional quarter south of the Meramec river of Sec. 5, and the north half of northwest quarter of Sec. 8, all in Twp. 38, R. 3 W."

The Daughertys on January 23, 1915, conveyed to plaintiffs by the same description. This (excluding a suit to quiet title in 1910, and which we may have occasion to revert to later) is the record evidence upon which plaintiffs base their claims of title to the 6.50-acre tract, and the 4.50-acre tract.

In 1915 the respondents O'Reillys purchased of Clarence E. McKinley the 18-acre tract which was patented to him by the government in 1908, under the same description employed and used in the patent. Their claim is based on those two instruments, and the possession they had of such 6.50-acre tract. The oral evidence we take next.

[3] III. Respondents have challenged the accuracy and sufficiency of the appellants' abstract of record, and have filed herein an additional abstract of record. This additional abstract stands unchallenged, and, in so far as it states facts contrary to those stated in appellants' abstract, we are bound by the additional abstract.

By the oral evidence it is shown that Sarah E. McKinley (who was the mother of Clarence E. McKinley) was the first purchaser of what is known as the Reeves farm of 129.73 acres. This she sold to the son in 1906. The plaintiffs showed by J. T. Kitchen that when he (Kitchen) bought of Clarence E. McKinley, he was shown the land up to the present river channel as being a part of the farm. On the other hand, it is shown by some three witnesses that the old river channel, in which water was standing at the time, was shown to Kitchen as the boundary line of the farm. This fact the trial court found against plaintiff, and could not well have done otherwise.

Reeves testified that when he located on the place the land now in dispute was an island, there being two channels to the Meramec river, but he thought the one to the north carried a little more water. It is further shown by the evidence that up to within 12 years of the trial (1919) water flowed in this south channel, and especially during high water. It was shown also by the surveyor of the county, who made a survey from the old government field notes, that this south channel, now a slough with standing water therein, was the Meramec

river of 1821 when the government survey was made, and that the meanderings of that survey so showed. Clarence E. McKinley testified that after he sold the old Reeves farm to Kitchen, he had the 18-acre tract surveyed with Kitchen's knowledge and without objection. He further testified that Kitchen offered to buy the 18-acre tract, of which the 6.50 acres was a part, but at that time his mother did not want him to sell it, and he refused. This testimony was denied by Kitchen, who maintains that he was told that the line was up to the north or new channel of the river, and that there was nearly 150 acres in the tract. He accepted, however, a deed calling for "129.73 acres, more or less," and in one place admits that he understood that he was only buying the old Reeves farm. This 18-acre tract was never a part of that farm. The evidence further tends to show that the purchaser from Kitchen was informed by Kitchen that the new channel was the line, as were the present appellants by their grantors, the Daughertys, who were the vendees of Kitchen. The respondents say that they had no knowledge of any adverse claims when they took the deed to the 18 acres from Clarence E. McKinley in 1915, and that they went into possession in May, 1916, and have been in possession ever since. Prior, and during the occupancy of the Reeves farm by the Daughertys, it appears that there was a fence placed around this 6.50-acre tract, and timber cut therefrom, but this fence was partially, if not totally, washed away. The government plat tends to show that the surveys on each side of the Meramec river ran up to the respective banks, and followed the meanderings of those banks.

The foregoing are the outstanding facts from the oral testimony.

[4] IV. From the foregoing evidence, oral and written, we cannot say that the trial court's finding to the effect that Kitchen only bought the old Reeves farm, and got nothing to the north of the old river channel, is not supported by substantial evidence. In fact when Kitchen got his deed, he got with it an abstract of title, the first page of which reads:

"Abstract of title to the following described lands situate in Crawford county, Missouri: S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  fr., south of river (50.61 acres), Sec. 5, Twp. 38, Rng. 3. N. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  (40 acres), Sec. 8, Twp. 38, Rng. 3. N. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  (39.12 acres), Sec. 8, Twp. 38, Rng. 3. Note Sec. 5-38-3 is S.  $\frac{1}{2}$  of S. W. frl.  $\frac{1}{4}$ , containing 50.61 acres."

These figures aggregate the 129.73 acres mentioned in his deed. They are the very figures found upon the government plat of the land, which plat was in the chain of title, and of which the law will impute to him knowledge. This plat and the field notes therewith gave to him the metes and bounds

of the land in the southwest fractional quarter of section 5. But aside from this the court could well find that Kitchen knew that he was getting no part of the 18-acre tract. The court did so find, and we cannot disturb that finding, because it is supported by substantial evidence.

[5] But passing to the record status of the land purchased by Kitchen, it should be added that the government surveys were made before the state acquired any interest in those lands. Field notes and a plat of these surveys were matters of record. These field notes will control in ascertaining locations, even though the monuments established are gone. *Bradshaw v. Edelen*, 194 Mo. loc. cit. 661, 92 S. W. 691; *Lumber Co. v. Ripley County*, 270 Mo. loc. cit. 135, 192 S. W. 996. From these field notes the surveyor had no trouble locating the 50.61 acres, described as the south part of the southwest quarter of section 5, and as so found it included neither of the two tracts involved in this case.

[6] The United States government retained title to the 18 acres until 1908. The mere fact that since the survey in 1821 two channels had been formed in the river, and the principal channel of the two divided this 18-acre tract, did not change the ownership in the government.

"A man may own land bordering upon the river, and if the latter cuts and divides it into two tracts, he does not lose either tract or any portion thereof, except that which has been washed away by the stream." *Grady v. Royar*, 181 S. W. loc. cit. 432.

So that, even if it were true, that there had been an absolute change in the river channel, the United States government held title to all of the 18-acre tract, including the 6.50-acre tract in dispute, until it parted with title in 1908 to McKinley. The evidence tended to show a clear record title in respondents, and the finding of the trial court was therefore correct. It may be the absolute title to a part of the 4.50-acre tract follows this title, but of this later.

[7, 8] V. The interest, if any, of the respective parties to the 4.50-acre tract is dependent upon the character of the Meramec river as to its navigability. In 27 R. C. L. p. 1302, it is said:

"By the great weight of authority in this country, navigable waters are now defined as waters capable of being navigated; that is, navigable in fact. This definition is in accord with the civil law on the subject. In the words of the Digests, a navigable river is *statio iturve navigio*. The rule by which to determine whether waters are navigable is variously stated, but clearly enough defined. The test of navigability of a river, as stated by the Supreme Court of the United States, is that those rivers are navigable in law when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over

which trade and travel are or may be conducted in the customary modes of trade and travel on water. Another test is whether, in its ordinary state, a stream or body of water has capacity and suitability for the usual purpose of navigation, ascending or descending, by vessels such as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether steam or sail vessels."

There are cases which call rafting logs commerce upon the stream, and broaden the view of the foregoing rule as to navigable streams. In Missouri, however, we have held to the more rigid rule, and with some aggressiveness. *State ex rel. v. Taylor*, 224 Mo. loc. cit. 484 et seq., 123 S. W. 892; *Lumber Co. v. Ripley County*, 270 Mo. loc. cit. 130 et seq., 192 S. W. 996. The first of those cases deals with Chariton river, and the latter with Current river. Each were declared nonnavigable, notwithstanding we had early statutes declaring them to be public highways. Such statutes, however, did not declare the streams to be navigable streams. In 1839, we find an act (Laws of 1838-39, p. 83) which declares:

"All that part of the Merrimac river, in the state of Missouri, lying below the mouth of Crooked creek, is hereby declared a public highway."

We take it that this refers to the stream involved in this case, although the spelling differs. We know of no other stream to which this act of 1839 could apply. In the first place this act does not declare the stream to be a navigable stream, and if it did so declare it would be against the real facts. *State ex rel. v. Taylor*, supra. We have never heard that the white sails of commerce floated upon the waters of the Meramec when it was at its ordinary stages. We don't know historically or otherwise of any special commerce which it has carried. Its treachery, as a stream for bathing and canoeing, near St. Louis, is well known, but its navigability up in Crawford county (near the head waters of the stream) will not be judicially noticed. On the contrary, we would rather take notice that such stream is not a navigable stream within the most soundly reasoned rules upon the subject. The record in the case is silent as to the use or size of the stream, where it flows through Crawford county, and the judicial knowledge that we have of state history would preclude us from saying that the stream is a navigable one, but we would have to judicially know the contrary.

[9] In view of the fact that the Meramec is a nonnavigable stream, was the trial court right in its ruling as to the 4.50-acre tract? Such court was right in refusing to hold that the plaintiffs acquired any title by adverse possession, but not further in our judgment. This 4.50-acre tract was the old channel of the Meramec. The owner of

the Reeves farm (this being a nonnavigable stream) owned to the middle thread of the stream when it was in fact a stream. On the other hand, the owners of the 18-acre tract, to the north likewise owned to the middle thread of the stream. *Lumber Co. v. Ripley County*, 270 Mo. loc. cit. 128 et seq., 192 S. W. 996.

[10] So that both plaintiffs and defendants have some interest in the 4.50-acre tract. But can the parties complain as to this error in the judgment? The respondents cannot complain, because they failed to appeal, and acquiesced in the judgment. Can the appellants complain? They had no such theory below, and furnished the court no evidence from which the court could determine the middle thread of the old stream. Strictly speaking, appellants are not in much position to complain about having an interest, less than the whole, in this 4.50-acre tract. They did not urge such below, and did not, as the law required of them, furnish the facts to determine an interest less than the whole interest. *Benne v. Miller*, 149 Mo. loc. cit. 245, 50 S. W. 824; *Brumwell v. Harris*, 148 Mo. loc. cit. 446, 50 S. W. 98. Under these cases had the trial court attempted to adjudge plaintiffs' portion of the 4.50-acre tract, we would not let it stand, because plaintiffs failed to put in the proof. While the trial court found in its findings that neither party had any interest in the 4.50-acre tract, we note that when the decree or judgment proper is reached it is said:

"It is further considered, ordered, and adjudged by the court that plaintiffs' petition as to the following tract of land, to wit: [Here follows the metes and bounds of the 4.50-acre tract] be and the same is hereby dismissed."

From this it will be noted that the actual judgment is not quite so broad as the facts found. This is a law case, and defendants in their answer had in view just what we have found, but neither side put in any evidence as to the thread of the old stream. Under all the facts we do not feel like respondents should suffer by a reversal of the present judgment, and a remanding of the cause for the entry of a new judgment. We prefer to rule that the plaintiffs have placed themselves in position of not being able to complain here. The trial court was not given an opportunity to divide this 4.50-acre tract by evidence as to the thread of the stream, and, while the court technically erred in the matter, the error was invited by the conduct of plaintiffs throughout the case.

We shall therefore affirm the judgment. It may be that the parties can agree upon a modification of the judgment to be entered here, a matter which we can consider later. Respondents are so clearly right as to the 6.50-acre tract (and in addition they suggested in the answer the proper theory of the 4.50-acre tract) that we do not feel like

making them bear the costs of this appeal, which would follow a judgment of reversal in a law case. If it were in equity we might have a different matter.

Let the judgment be affirmed for the reasons stated.

All concur.

**STATE ex rel. CALHOUN, Circuit Judge, et al.  
v. REYNOLDS et al., Judges of St. Louis  
Court of Appeals. (No. 22646.)**

(Supreme Court of Missouri, in Banc. July 8, 1921. Motion for Rehearing Denied July 22, 1921.)

**1. Certiorari  $\S$  64(1) — Province of Supreme Court on certiorari to Court of Appeals.**

On certiorari it is not the province of the Supreme Court to determine whether the Court of Appeals erred in its application of rules of law to the facts stated in its opinion, but only whether upon those facts it announced some conclusion of law contrary to the last previous ruling of Supreme Court on the same or a similar state of facts.

**2. Certiorari  $\S$  64(1) — Holding of Court of Appeals in prohibition that petition did not show jurisdictional facts error of opinion, not to be quashed by Supreme Court on certiorari.**

Error of Court of Appeals in a prohibition proceeding, in holding that a petition in the trial court did not show jurisdictional facts sufficient to warrant the appointment of a receiver by the trial court, was error as a matter of opinion, and the Supreme Court on certiorari has no authority to quash its judgment.

**3. Certiorari  $\S$  64(1) — Misapplication by Court of Appeals of rules announced in Supreme Court decisions held not to constitute error cognizable on certiorari.**

Misapplication by Court of Appeals of rules announced in Supreme Court decisions does not constitute error cognizable on certiorari in the Supreme Court, where the facts are in no way analogous to the facts in Supreme Court cases.

**4. Courts  $\S$  231(4) — Decision of Court of Appeals held not in conflict with decision of Supreme Court.**

In certiorari proceeding in Supreme Court, held, that opinion and judgment of Court of Appeals in prohibition proceeding, which interfered with action of circuit court after that court had determined and assumed jurisdiction on the facts before it, was not in conflict with decisions of Supreme Court.

**5. Courts  $\S$  231(4) — Decision of Court of Appeals held not in conflict with Supreme Court's decisions.**

In certiorari proceeding in Supreme Court, held, that a judgment of a Court of Appeals concerning jurisdiction to appoint a receiver for a corporation which has no officers or directors, and whose property is threatened with sale,

waste, or dissipation, was not in conflict with a decision of the Supreme Court.

Certiorari by the State of Missouri, on the relation of John W. Calhoun, Judge of the Circuit Court of the City of St. Louis, and others, to quash a judgment entered by the St. Louis Court of Appeals in prohibition, brought at the relation of George T. Priest against the named relator (226 S. W. 329), which judgment restrains and enjoins the respondent judge from proceeding further in the suit of J. H. Conrades and others against the Blue Bird Appliance Company; Hon. George D. Reynolds and others, Judges of the St. Louis Court of Appeals, being respondents. Death of the named respondent having been suggested, the cause has been revived against the Hon. Charles H. Daues, Successor Judge. Writ quashed.

Smith & Percy, of St. Louis, for relators.  
G. T. Priest, of St. Louis, for respondents.

ELDER, J. Relators seek by writ of certiorari to quash a judgment entered by the St. Louis Court of Appeals in an original proceeding in prohibition brought at the relation of George T. Priest against John W. Calhoun, Judge, 226 S. W. 329, which judgment restrains and enjoins the respondent judge from proceeding further in the suit of J. H. Conrades et al. v. Blue Bird Appliance Company, pending in the circuit court of the city of St. Louis, in which suit the said judge had theretofore appointed a receiver for the said Blue Bird Appliance Company. The death of respondent herein, the Honorable George D. Reynolds, having been suggested, this cause has been revived against the Honorable Charles H. Daues, successor judge of the St. Louis Court of Appeals.

The facts in the proceeding in prohibition, which are most relevant to this review, are thus stated in the opinion of the Court of Appeals:

"It appears that on May 25, 1920, John H. Conrades, Thomas Mellow and Ben G. Brinkman were by the circuit court of the city of St. Louis appointed receivers of a certain corporation known as the Blue Bird Manufacturing Company, and that said receivers took charge of all of the assets of the said company under their powers as receivers of said company, and that amongst said assets were 51 per cent. of all of the capital stock of a corporation known as the Blue Bird Appliance Company, a Missouri corporation.

"On June 19, 1920, said John H. Conrades, Thomas Mellow, and Ben G. Brinkman, as receivers of the said Blue Bird Manufacturing Company, and as such owners of 51 per cent. of the capital stock of the Blue Bird Appliance Company, filed a suit in the circuit court of the city of St. Louis, wherein said receivers asked for the appointment of a receiver for the

said Blue Bird Appliance Company, and upon the same day a temporary receiver was duly appointed and qualified. Thereafter the court, on August 20, 1920, appointed a permanent receiver, upon the giving of a bond in the sum of \$25,000, which bond was on the same day filed, presented, and approved by the court, since which time the judge of the circuit court, respondent here, has retained jurisdiction of the said case continuously, and the receiver, since the date of his appointment as permanent receiver, and up to the time of the filing of the application for a writ of prohibition herein, has continued in charge of and in control of the property of the said Blue Bird Appliance Company.

"The main allegations set out in the petition of the said Conrades et al., receivers of the Blue Bird Manufacturing Company, and as such holders of 51 per cent. of the capital stock of the Blue Bird Appliance Company, in which petition the appointment of a receiver for the said Blue Bird Appliance Company is sought (as appears from the respondent's return herein) are:

"A. The plaintiffs in said cause were stockholders owning \$5,100, par value, of the capital stock of the defendant corporation, whose total capital was \$10,000, and were also creditors to the extent of approximately \$450,000.

"B. That the assets of the defendant corporation located in various states were being subjected to attachment suits, levies and other forms of waste, and that all of said assets were in danger of being utterly destroyed and dissipated.

"C. That all of the directors, officers, managers and executives of the defendant company had on the 17th day of June, 1920, resigned and abandoned the property and assets of the defendant corporation, and defendant corporation was without any officers, directors, managers or executives.

"D. That unless a receiver were appointed by the court the value of plaintiffs' stock in the defendant corporation would be utterly destroyed, and the value of plaintiffs' claim would be utterly destroyed.

"E. The prayer was for the appointment of a temporary receiver, an inquiry by the court into all the facts alleged, the appointment of a permanent receiver and for all general and equitable relief that to the court under the circumstances might seem meet and proper."

"On October 19, 1920, a petition in bankruptcy was filed in the United States District Court for the Eastern District of Missouri by certain creditors against the Blue Bird Appliance Company. One of the grounds of alleged bankruptcy of the said Appliance Company set forth in the bankruptcy petition is the appointment of a receiver for the said Blue Bird Appliance Company in the cause of Conrades et al. v. Blue Bird Appliance Company, above mentioned."

The opinion further recites that the application for the writ of prohibition contains averments that the relator Priest is a creditor of the Blue Bird Appliance Company in the sum of \$7,500 and had attempted to perfect a lien therefor by attachment proceedings but that the aforesaid bankruptcy

proceeding was designed to defeat the said lien; that although interested in defeating the proceedings in bankruptcy, he (the relator Priest) could not therein attack the appointment of the receiver for the said Blue Bird Appliance Company, as such attack would be collateral, but that the only course open to him was to raise the question of jurisdiction by a direct proceeding; that the circuit court was without jurisdiction to appoint a receiver in the suit of Conrades et al. v. Blue Bird Appliance Company, such lack of jurisdiction appearing upon the face of the petition filed in said cause.

Proceeding, the opinion recites that respondent's return to the preliminary rule issued shows that the relator Priest had been an officer and director of the Blue Bird Appliance Company up to the 18th day of June, 1920, on which day he, with the other officers and directors of the company, had resigned as such officers and directors; that immediately after resigning as officers and directors of the Blue Bird Appliance Company all of the stockholders of that company except relator Priest (who owned one share) and the aforesaid Conrades, Mellow and Brinkman, receivers of the Blue Bird Manufacturing Company, left the city of St. Louis.

Further matters pertinent to a determination of the contentions of relators herein, as to why the judgment of the Court of Appeals should be quashed, will be adverted to in the course of the opinion.

[1] I. At the threshold of a consideration of the questions presented by relators, let us reaffirm the doctrine which we have firmly enunciated in our most recent pronouncements, to wit, that in certiorari it is not our province to determine whether the Court of Appeals erred in its application of rules of law to the facts stated in its opinion, but only whether upon those facts it announced some conclusion of law contrary to the last previous ruling of this court upon the same or a similar state of facts. *State ex rel. American Packing Co. v. Reynolds et al.*, 230 S. W. 642, decided en banc on April 30, 1921, our number 22290, not yet [officially] reported; *State ex rel. Peters v. Reynolds et al.*, 214 S. W. loc. cit. 122; *State ex rel. Mechanics Amer. Nat. Bank v. Sturgis et al.*, 276 Mo. 559, 208 S. W. loc. cit. 462; *Majestic Mfg. Co. v. Reynolds et al.*, 186 S. W. 1072.

Relators in their brief assign nine grounds of error, wherein it is alleged that the Court of Appeals failed to follow the last controlling decision of this court. All but two thereof are entirely foreign to the purview of certiorari, when measured by the rule above quoted. These two we shall discuss in order.

[2, 3] II. Relators urge that the opinion of the Court of Appeals is in conflict with *State ex rel. v. Shields*, 237 Mo. 329, 141 S.



W. 585, and *State ex rel. v. Mills*, 231 Mo. 493, 500, 133 S. W. 22, which hold, as relators say, that "where the jurisdiction of a court to hear and determine a case rests upon facts [the supervisory] court will not, by its writ of prohibition, preclude such court from determining its jurisdiction from the facts, and after it has determined its jurisdiction from the facts will not interfere, for the reason that such matter then becomes mere error and can be reached by appeal." Both of the foregoing cases were proceedings in prohibition and while we fully agree with the rule of law there announced, that rule has no relevancy to the case before us for review for the reasons following:

That portion of the opinion of the Court of Appeals, which is apposite to the contention urged, is as follows:

"Having in mind the general rule that the appointment of a receiver is not the end and object of litigation, but merely a provisional remedy resorted to for the purpose of preserving property involved in litigation, so that the relief awarded by the court, if any, may be effectual (*State ex rel. Merriam v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; *Miller v. Perkins*, 154 Mo. 629, 55 S. W. 874), does the petition filed below by the receivers of the Blue Bird Manufacturing Company, as holders of 51 per cent. of the stock of the Blue Bird Appliance Company contain allegations of fact sufficient to confer jurisdiction upon a court of equity solely for the appointment of a receiver, and not ancillary to other relief sought therein, for a going corporation? In other words, do the facts alleged in the petition bring the case within the exception to the foregoing general rule, namely, that courts of equity have jurisdiction to appoint receivers for corporations even in the absence of express statutory authority, in cases of extreme necessity, for which there is no other adequate remedy? \* \* \*

"Neither the elementary text-writers, when the full context on the subject is read, nor the adjudicated cases sustain the view that a court of equity has jurisdiction to appoint a receiver for a going corporation upon allegations alone showing that the corporation is temporarily without officers and directors, unless it appears that the circumstances are such that the condition thus alleged to exist is one amounting to a condition of extreme necessity for which the complainants have no other adequate remedy. A fortiori would this be true where the petition, though averring that the corporation is without officers and directors, upon its face shows that the complainants are in control of a majority of the stock of the corporation and hence in a position to remedy the matter without invoking the extraordinary power of a court of equity. \* \* \*

"Do then the circumstances outlined in the petition below make out a case of such extreme necessity, for which there is no other adequate relief, that equity alone can grant adequate relief? We think not. It affirmatively appears that the petitioners below, three in number, were the receivers of the Blue Bird Manufacturing Company, and as such receivers held

51 per cent. of the total capital stock of the Blue Bird Appliance Company. The relator herein, George T. Priest, was the owner and holder of one share of the capital stock of the said Appliance Company on the day when the officers and directors of that company resigned, and also on the following day thereafter, when the receivers for the Manufacturing Company filed their receivership petition, and was present in St. Louis at that time. No action whatsoever was taken by the said receivers of the Blue Bird Manufacturing Company, though they were the owners and holders of 51 per cent. of the stock of the Blue Bird Appliance Company, toward calling a special meeting of the stockholders for the election of a new board of directors, though such action is specifically provided for by our statutes. Sections 2964-2966, Revised Statutes of Missouri 1900. The petition thus clearly fails to exhibit a state of facts from which a court of equity could conclude that the petitioners had exhausted all reasonable efforts to induce corporate action, but, on the contrary, conclusively shows that no action whatsoever was taken on the part of those same receivers holding 51 per cent. of stock, toward calling a special stockholders' meeting, or otherwise, but contented themselves, on the very next day succeeding that on which the officers and directors of the company had resigned, with seeking the aid of a court of equity to appoint a receiver, though the statutes specifically provide a method of procedure under such circumstances. And it will be noticed that whatever proper amendments could be made to the petition below, these salient and determinative facts in the case could not be affected thereby."

If the Court of Appeals has erred in holding that the petition did not show jurisdictional facts sufficient to warrant the appointment of a receiver, it erred as a matter of opinion, and on certiorari we have no authority to quash its judgment on that ground. *State ex rel. American Packing Co. v. Reynolds et al.*, supra; *State ex rel. Wahl v. Reynolds et al.*, 272 Mo. 588, 199 S. W. 978. Moreover, even though the Court of Appeals may have misapplied the rule announced in the *Shields* and *Mills* Cases, supra, to the facts before it, such misapplication does not constitute error cognizable in this proceeding, as the facts here are in no way analogous to the facts in the *Shields* and *Mills* Cases, and no conflict can therefore be engendered. *State ex rel. Commonwealth Trust Co. v. Reynolds et al.*, 278 Mo. 695, 213 S. W. 804. Furthermore, although the Court of Appeals, by its judgment, may have interfered with the action of the Circuit Court, after that court had determined and assumed jurisdiction upon the facts before it, nevertheless, by reason of the dissimilarity of facts in the cases cited, it cannot be said that there is a contrariety of opinion as insisted.

The point made must accordingly be ruled against relators.

[4, 5] III. Relators also contend that the

opinion of the Court of Appeals is in conflict with *Price v. Trust Co.*, 178 S. W. 745, 749, which case relators claim holds:

"That a court of equity has jurisdiction to appoint a receiver for a corporation which has no officers or directors and whose property is threatened with sale, waste or dissipation."

To sustain this claim relators cite the following passage from the *Price Case*, opinion by Faris, J., 178 S. W. loc. cit. 749:

"If there were an allegation that the Arcadia Country Club had no officers or directors to conserve its interests and protect its property, we can see readily why a court of equity would interpose in the event of a threatened sale of the property of the club by a mortgagee under an invalid or doubtful incumbrance. But there is a full complement of officers and directors of the Arcadia Country Club existing, and acting for aught that is said or appears. Nor does it appear that the Bankers' Trust Company is in possession of the property or any of it, which it is threatening to sell under its deeds of trust which are alleged to be without consideration, or void for that they are based on notes the making of which were acts *ultra vires*. On the contrary, the club, or the vendees of the 118 lots not reserved, but included in the deed of trust, seem to be, and for aught which appears to the contrary are, in possession thereof."

From a perusal of the entire case above mentioned, it will be apparent that the paragraph cited is obiter dictum; and a reading of the paragraph itself shows that the opening statement is made *arguendo*. Moreover, a further examination of the opinion will reveal this language:

"It is fundamental that there is neither in law nor in equity any such thing as a plain receivership action; i. e., an action in which a receiver is the only desideratum. In short, the appointment of a receiver by a court of equity, except in rare cases arising out of lunacy or infancy, is ancillary wholly to some other action having some definite relief in view. *State ex rel. v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534. The receiver is 'the hand of the court' used to protect the property and to prevent waste, or to hold the property in statu quo pending the decreeing of the relief which is the crux of the case brought; so it necessarily follows that, absent a cause of action stated in the main case, there is no ground for the appointment of a receiver. *Cantwell v. Lead Co.*, 199 Mo. 1, 97 S. W. 167; *Pullis v. Pullis*, 157 Mo. 565, 57 S. W. 1095."

And a reference to the petition in the instant case, which is epitomized in the opinion of the Court of Appeals, discloses that a receiver was the only desideratum contemplated thereby. Hence the judgment of the Court of Appeals, instead of being contrary to the *Price Case*, is consonant therewith. Furthermore, the Court of Appeals in its opinion quotes at length, as authority for its ruling, passages from the *Price Case* which

are declaratory of the doctrine that where there is any other adequate and complete remedy a receivership is precluded. And finally, even though the opinion of the Court of Appeals may be inconsistent with anything said in the *Price Case* (which is contrary to our belief), there is no conflict therewith for the reason that the facts involved therein are not similar to the facts here.

IV. As said hereinbefore, other reasons are assigned by relators in behalf of the relief sought. Were the case here on appeal or writ of error they might have some relevancy, but in an application for certiorari they have none. In a proceeding of this character the scope of our inquiry has been well determined, and unless the judgment of the Court of Appeals contravenes some prior ruling of this court, we will not interfere.

After a careful review, we find no merit in the errors urged by relators. It follows, therefore, that the writ herein was improvidently granted and should be quashed. It is so ordered.

All concur.

STATE ex rel. KOEHLER v. BULGER et al.,  
Judges. (No. 22959.)

(Supreme Court of Missouri, in Banc. July 8, 1921. Rehearing Denied July 22, 1921.)

1. *Mandamus* §107 — *Mandamus* is proper remedy to enforce payment of salary fixed by law.

Where the amount of salary of a public official is fixed by law, and no discretion is left in disbursing officers as to the amount paid, *mandamus* is the proper remedy to enforce payment of the salary.

2. Counties §74(5) — Statutes construed as to salary of surveyor and highway engineer.

Under Rev. St. 1909, § 10737, enacted in 1907, setting the salary of the surveyor of Jackson county at \$3,000 per year, and section 10556, providing that in a county containing a city of more than 100,000 inhabitants the county surveyor should be *ex officio* county highway engineer, and that his salary as surveyor, and *ex officio* county highway engineer should be not less than \$2,000 and not more than \$3,000, since the office of surveyor was a very old office and the salary was fixed by law before enactment of the statute making him *ex officio* highway engineer, it was the intention in section 10556 to provide for a salary for the *ex officio* office in addition to the salary as surveyor.

3. Counties §74(5) — Statutory salary of *ex officio* highway engineer held in addition to salary as county surveyor.

Under Rev. St. 1919, § 10787, amending section 10556, Rev. St. 1909, and allowing county

court to set the salary of the surveyor and ex officio highway engineer at from \$3,000 to \$5,000, and in view of the fact that the salary of the county surveyor of counties containing cities of 100,000 inhabitants or more was already set at \$3,000 per year by Rev. St. 1919, § 11041, the intention of the Legislature evidently was to provide a salary of from \$3,000 to \$5,000 per year for the ex officio office of county highway engineer in addition to the salary of \$3,000 per year for the office of county surveyor, and \$3,000, being the minimum fixed by law, must be paid in addition to the salary as county surveyor.

Original petition for writ of mandamus by the State, on relation of Leo E. Koehler, County Surveyor of Jackson County, against Miles Bulger, Presiding Judge, and James E. Gilday and another, Associate Judges, of the County Court of Jackson County, Mo., to compel payment of salary of \$250 per month as ex officio county highway engineer. Alternative writ of mandamus made permanent.

Clinton A. Welsh, of Kansas City, for relator.

A. L. Cooper, County Counselor, and Wallace Sutherland, Asst. County Counselor, both of Kansas City, for respondents.

GRAVES, J. This is a proceeding in mandamus. To relator's petition the respondents, who constitute the county court of Jackson county, entered their appearance, waived the issuance of our alternative writ, and filed their demurrer to such petition as if it were the alternative writ. The questions are purely questions of law. Relator was elected county surveyor of Jackson county in November, 1920, and took possession of his office January 1, 1921. The contest is over the amount of salaries to which he is entitled. By virtue of his election to the office of county surveyor he avers that he became ex officio county highway engineer of said county. He avers that he is entitled to \$250 per month as county surveyor and bridge commissioner, which he says the respondents have regularly paid him. He also avers that he is entitled to \$250 per month as ex officio county highway engineer, which salary for the month of January the respondents duly paid to him, but that since said month of January the respondents have claimed that he was only entitled to the sum of \$2,000 per year as ex officio county highway engineer, instead of \$3,000, thus making his aggregate salaries for the two offices \$5,000 per annum, instead of \$8,000 per annum. He avers that since January the respondents have tendered to him each month a warrant for his salary as ex officio county highway engineer in the sum of \$166.66%, which is the monthly salary if he is only entitled to \$2,000 per annum, instead of \$3,000 per annum. These warrants the relator declined to accept, but had throughout demanded \$250 per month. The

several sections of the statutes under which relator bases his claims are cited and set out in his petition, but these we leave for the opinion. As the demurrer admits all well-pleaded facts, we have the simple issue as to whether or not the relator, under the law, is entitled to \$250 or only \$166.66% per month as ex officio county highway engineer. He asks that this court compel the respondents, as judges of the county court of Jackson county, to issue him warrants for the month of February, March, April, and May in the sum of \$250 each, or in the aggregate sum of \$1,000 for the four months. Such is the case for determination.

[1] I. It may be conceded, as suggested by the respondents, that it devolves upon relator to show a clear right to the remedy herein sought. If, however, the amount of a salary is fixed by law, and for that reason no discretion is left as to the amount, then mandamus is an appropriate remedy to enforce the payment of a salary to a public official against the officer or officers whose duty it is to pay such official. In such cases the salary is a fixed amount, if it exists at all, and the sole question is the legal one as to whether or not there is a liability. In the insistence above respondents do not mean to question the remedy used in this case, but what they mean is that it must be plain that the salary claimed is one allowed by law. This clearly appears from the whole brief.

[2] II. Relator contends that he holds two offices, one by election and the other ex officio. These offices, he contends, are created and governed by separate laws, and the duties thereof fixed by such separate laws, and further that the salaries are likewise fixed by these separate statutes. The county surveyor and his duties and fees are fixed by chapter 117, R. S. 1919. It is an ancient office coming to us from territorial days. Highway engineer is much more modern (Laws of 1907, p. 401), and the provisions of law governing this office are found in article 6 of chapter 98, R. S. 1919. By the act of 1907, supra, the office was first created. In 1909 this act of 1907 was repealed and a new law enacted in lieu thereof, which became article 5 of chapter 102, R. S. 1909. This act of 1909 in its general provisions is substantially the same as the present law, article 6 of chapter 98, R. S. 1919. There were, however, some changes made in 1919, which are material here. It would perhaps be best to start with the act of 1907. Laws of 1907, p. 401. By this act there was created in the several counties of the state "the office of county highway engineer." Such officer was to be appointed by the county court for a term of two years, the salary of which office should not be less than \$300 nor more than \$2,000, as might be fixed by an order of the county court. The office was separate and distinct from that of county surveyor. The

county surveyor was not mentioned in the act. By the act of 1909, which became article 5 of chapter 102, R. S. 1909, the first section (section 10551, R. S. 1909) created the office of county highway engineer, such office to be appointed by the county court for term of one year, and until his successor was appointed and qualified. This section 10551 applied to the "several counties" of the state. The fee provision of this act of 1909 (which became section 10553, R. S. 1909) reads:

"The county highway engineer shall receive such compensation as may be fixed by order of the county court of his respective county: Provided, his salary shall not be less than three hundred dollars nor more than two thousand dollars per annum: Provided further, that in all counties in this state which contain or may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds, or may hereafter exceed, the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than one hundred thousand inhabitants by the last decennial census, the county surveyor and ex officio highway engineer shall receive a salary of not less than two thousand dollars nor more than three thousand dollars, as may be fixed by the county court."

By section 10556, R. S. 1909, the county court was authorized to appoint the county surveyor as county highway engineer, if he were competent, in which event such county highway engineer should "receive the compensation fixed by the county court, as provided in section 10553, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor." Up to this date no fees had been established for a county highway engineer, nor is it a fee office now. It was a salary as fixed by the county court. There were fees then allowed to the county surveyor. Section 10714, R. S. 1909. See, also, R. S. 1909, § 11327, as to counties having 50,000 or more inhabitants and which adjoin a city of more than 300,000 inhabitants. In this section 10556, R. S. 1909, it was further provided:

"Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, or which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex officio county highway engineer, and his salary as surveyor and ex officio county highway engineer shall be not less than two thousand dollars and not more than three thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund."

This covered Jackson county, but in 1907 the county surveyor of said county had been placed on a salary basis, and his salary fixed at \$3,000 per year, payable monthly. R. S. 1909, § 10737; Laws of 1907, p. 420.

Bearing in mind that both sections 10556 and 10737 applied to Jackson county, the question is: How is the expression "as surveyor and ex officio county highway engineer," as used above to be understood? We start with this act of 1909, because we can best get the bearings at this date. Shall we, in the face of the fact that the county surveyor of Jackson county was a salaried office, and the salary fixed by law at \$3,000 per annum, reasonably say that section 10556 in this proviso meant to combine both offices and make the salary of both dependent upon the order of the county court, with a maximum for both services of \$3,000, or shall we say that the expression "salary as surveyor and ex officio county highway engineer" as used here has reference to the ex officio duties and the ex officio salaries? We are inclined to the latter view, when the history of the laws is considered. The surveyor has always been an elective officer, and this elective office had been and was upon a salary basis in Jackson county, and counties of its class, when the office of county highway engineer was created. We had no county highway engineer prior to 1907, and by the act of 1907 they were appointed by the county court and their salary fixed by order of the county court. Not until 1909 were duties of this office made ex officio the duties of the surveyor in such counties as Jackson. It is hardly reasonable to hold that the lawmakers intended to have the county court fix the salary for the duties of the surveyor and for the county highway engineer, and be empowered to fix the salary of both at less than the statutory salary of the surveyor. We are inclined to the view that the term "as surveyor and county highway engineer" had reference to the office of engineer, and not that of surveyor. If he were signing instruments in the capacity of engineer, he would properly sign "County Surveyor and Ex officio County Highway Engineer." In fact, to sign otherwise would be wrong. *Callahan v. Davis*, 125 Mo. 27, 28 S. W. 162.

We conclude that under the act of 1909 (R. S. 1909, § 10551 et seq.) the reference in section 10556 as to salary had reference solely to the duties as engineer. What we have said as to section 10556 applies with equal force to section 10553, both of which we have quoted supra. The amendments to the act of 1909 we take next.

[3] III. Going now to more recent amendments, we shall try to find the present status of this office in Jackson county. It must be borne in mind that we are discussing the statutes applicable to that county and counties of its class, and not other counties or

classes of counties. In 1919 section 10551, R. S. 1909, was amended. Laws 1919, p. 636. By this amendment (which is now section 10,782, R. S. 1919) the county court appoints the county highway engineer for no fixed term, but for such time as that body finds advisable, and at a compensation to be fixed by the court. This therefore left all county highway engineers to be appointed by the county courts, except the excepted classes found in the statutes. Jackson county belonged to an excepted class under the act of 1909, and so continues to-day. Section 10787, R. S. 1919. In 1919 Laws of 1919, p. 634 (section 10556, R. S. 1909), was amended, and the substantial amendment was to change the old law, where it gave the county court the right to allow from \$2,000 to \$3,000, so that the county court could allow from \$3,000 to \$5,000. This amended section is the present section 10787, R. S. 1919.

What we said as to old section 10556 applies with equal force to this new section in so far as the office to which it refers is concerned. As said, the salary of the county surveyor was fixed by law. He is and was an elective officer. It must be kept in mind that the office of county highway engineer and county surveyor are separate offices, with separate and distinct duties. In this age of road building (the thing which called for a highway engineer) the duties of the office of highway engineer are extremely onerous, and it is not reasonable to conclude that the lawmakers intended to abolish the salary of the surveyor (which was \$3,000) and give the county court the power to say that the duties of both officers must be performed for \$3,000 per year. Yet, if respondents are right in their contentions, then the county court of Jackson county could make an order that relator should be allowed only \$3,000 for both offices. Their contention amounts to saying that the act of 1909, as well as the act of 1919, in effect, repealed section 10737, R. S. 1909, now section 11041, R. S. 1919, which fixed the salary of county surveyor at \$3,000 per annum.

We do not believe that the lawmakers so intended. If it was intended to so combine the two offices by the act of 1909 (section 10556, R. S. 1909), that only one salary was to be paid, the intention would have been more specifically made, and some mention would have been made of the fixed salary of \$3,000 to the surveyor alone. With the view urged by respondents, the real purpose of the act of 1909 was to empower the county court, by order, to reduce the salary of surveyor (fixed by the existing law) from \$3,000 to \$2,000, and allow such officer nothing for the duties of "county surveyor and ex officio county highway engineer." Such would be the effect of the contention made by respondents

as to the act of 1909. So, too, as to the present law.

If it be true that the present section 10787 was an allowance for both offices, then by order of the county court the salary for both offices could be fixed at \$3,000, whilst the existing law allows \$3,000 to the surveyor's office alone, and the act of 1909 must have repealed the section which fixed the surveyor's salary at \$3,000, which section is now section 11041, R. S. 1919; this for the reason that such section fixed a salary by law, and section 10737 (as respondents would have us construe it) vests the power of fixing the surveyor's salary in the county court. The act of 1909 (Laws of 1909, p. 755), which is the basic law involved, shows no legislative intent to make such a repeal. It specifically mentions the things repealed, but no part of the surveyor's act or the act concerning his salary is mentioned. So we repeat what we said as to the act of 1909, that the words "as county surveyor and ex officio city highway engineer" as used through all these acts has reference to the office and to the duties of the highway engineer, and the pay there mentioned is to cover those duties, and not to cover the duties of county surveyor, as such. For services as county surveyor the salary is fixed at \$3,000 per annum. For "county surveyor and ex officio county highway engineer" the salary is not less than \$3,000 nor more than \$5,000. More than the minimum of \$3,000 cannot be claimed, unless the county court has so ordered. The \$3,000 is fixed by law, and must be paid. We conclude that relator is entitled to two salaries of \$3,000 each, one as county surveyor, under section 11041, R. S. 1919, and one under section 10784, R. S. 1919. It therefore follows that our alternative writ should be made permanent, and it is so ordered.

All concur.

#### SCHOONOVER v. ST. LOUIS & S. F. RY. CO. (No. 2844.)

(Springfield Court of Appeals, Missouri. June 18, 1921. Rehearing Denied Aug. 9, 1921.)

#### 1. Railroads ~~411~~(14) — Fence required at private switch.

A railroad has the right to leave open whatever track is necessary to permit it to transact business with the public and insure the safety of its employees, but it must not leave open any more track than is reasonably necessary to enable it to properly discharge its duty to the public, and it must locate its switches with a view to leaving no more open track than is reasonably necessary, and cannot be released from its duty to fence on account of having a switch or spur for the sole accommodation of a private enterprise.

**2. Railroads  $\Leftrightarrow$ 411(16) — Fence required at place of animal's entry on track near flag station.**

A railroad is not excused from fencing its line to prevent animals from going on the track at a place between 100 and 150 feet from a station platform in an unincorporated village of four or five families, where there is no platted town and no depot or station agent, and only the platform, at which no trains stop, except when flagged or when they have passengers or freight to discharge.

**3. Appeal and error  $\Leftrightarrow$ 179(2)—No complaint of amount of damages, in absence of controverting evidence.**

Where plaintiff testified that value of cow wrongfully killed for shipping purposes was \$50, but that its value at the time and place of its death was \$75, defendant cannot complain on appeal against the manner in which the statement for plaintiff that the value was \$75 was elicited, not seeking to controvert it.

**On Motion for Rehearing.**

**4. Railroads  $\Leftrightarrow$ 447(4) — Instruction, linking together definition of station and use of switch, held erroneous.**

In an action for double damages for death of a cow on track, an instruction, linking together a definition of a station and the use of a switch in connection with a station, and standing alone in a case where the question of a station or no station and the use of a switch in connection therewith was at issue, was erroneous.

**5. Appeal and error  $\Leftrightarrow$ 1064(1)—Erroneous instruction held not prejudicial.**

In an action for damages for death of cow on railroad track, an erroneous instruction, which told the jury that if they should find that the switch at or near which the animal was killed was maintained for the exclusive accommodation of one industry, then such switch was not a station within the meaning of the law so as to relieve the defendant of the duty to fence its track, even though they should further find that trains sometimes stopped there to receive and discharge passengers and freight, held not prejudicial.

**6. Railroads  $\Leftrightarrow$ 441(6)—Necessity for leaving track unfenced defense to be proved.**

In an action under the Double Damage Act for death of an animal on railroad track, plaintiff makes out a prima facie case by showing that the animal entered on the track and was killed where the track passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands, and not at a crossing of any public road or other road, and not within the limits of any incorporated town, city, or village, and if the nearness of a public station or a public switch made it necessary to leave the track unfenced at the point where the animal entered on the track, that is a matter of defense, and the burden is on defendant to establish it.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by T. V. Schoonover against the St. Louis & San Francisco Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans, of St. Louis, and Ward & Reeves, of Caruthersville, for appellant. Corbett & Stiles, of Caruthersville, for respondent.

COX, P. J. Action for double damages for killing a cow at a point on defendant's road where it is alleged it was required to, but did not, fence. Verdict for plaintiff for \$75, which was doubled by the court, and judgment rendered for plaintiff for \$150, and defendant has appealed.

The cow was killed near what is called Ogden. Appellant contends that Ogden was a station on its line of road, and that the cow was struck at a point within the switch limits at that public station, and for that reason it is not liable under the Double Damage Act. The evidence shows that there is no depot at Ogden and no station agent, but only a platform composed of sand and silica. No trains stop there, except when flagged or when they have passengers or freight to discharge. There are four or five families living there, but no platted town. The railroad runs east and west at that point. From 100 to 150 feet west of the west end of the platform a switch or spur leaves the main track and runs out a short distance to accommodate the Edwards Pole & Piling Company, who use this switch or spur for loading lumber and piling. The use of the switch is not open to the public, but is maintained there for the sole accommodation of the aforesaid company, and no other person can use it without first securing the permission of this company. At or near the switch stand where the switch leaves the main track a dirt road crosses the railroad track, but whether or not this is a public road is not clear. Some 50 or more feet west of the switch stand is a trestle. The cow came on the track somewhere between the switch stand and the trestle, and was struck and killed at the trestle. The evidence tends to show that it is necessary for the protection of the trainmen in using the switch to keep the track open and free from cattle guards some distance from the switch stand. The witnesses vary in their estimate, placing it at from 40 or 50 feet to 150 feet.

It is conceded that the track was not fenced at the point where the cow entered on the track, or where she was killed, and if the presence of the switch relieved the defendant of the duty to fence, then there is no liability, but if it did not, then liability is clearly established. There is some contention between counsel as to whether or not Ogden is a station on the railroad within the meaning of the law, so that the defend-

ant would be justified in leaving any of its track unfenced on that account. If we concede that Ogden is a station, we do not regard that as a controlling factor in this case. The place where the cow entered upon the railroad track is something more than 100 feet from the end of the platform, and there is no evidence that it was necessary to leave the track at that point unfenced to permit the public to secure access to the platform, where they would be required to go in order to transact business with the railroad. Neither does the evidence show that the switch or spur was placed or maintained there for use in connection with the company's business at the station, so we find no evidence to justify the conclusion that the location of the station, if it be a station, had anything to do with defendant's duty to fence. We think this question is to be determined by solving the question whether or not the presence of the switch or spur without any reference to the station relieved defendant from the duty to fence at the point where the cow entered upon the railroad track.

[1] A railroad has the right to leave open whatever track is necessary to permit it to transact business with the public and insure the safety of its employees in switching while engaged in the transaction of business with the public. *Hay v. St. L. & S. F. Ry. Co.*, 161 Mo. App. 1, 142 S. W. 468.

While this is true, it is also true that it must not leave open any more track than is reasonably necessary to enable it to properly discharge its duty to the public, and it must locate its switches with a view to leaving no more open track than is reasonably necessary. In this case, it is conceded that the switch mentioned is a spur which only connects with the main line at one end, and this spur is not for the use of the public, but is maintained solely for the accommodation of one firm, to enable it to load lumber and piling. No one else is permitted to use this spur except by the permission of this firm. That being true, there was no need of this spur at all to enable the railroad company to transact its business with the public. This switch was not maintained for the use of the public, and the railroad cannot be released from its duty to fence on account of having put in and maintained a switch or spur for the sole accommodation of a private enterprise or business. For that reason, the presence of the spur should be eliminated in determining whether or not it was the duty of defendant to fence its track at the point where the cow entered thereon. *Duncan v. St. L., I. M. & S. R. Co.*, 111 Mo. App. 193, 85 S. W. 661; *Foster v. K. C. S. R. Co.*, 112 Mo. App. 67, 87 S. W. 57; *Bridges v. M., K. & T. R. Co.*, 132 Mo. App. 576, 112 S. W. 37; *Green v. K. O. S. R. Co.*, 142 Mo. App. 67, 125 S. W. 805; *Hay v. St. L. & S. F. R. Co.*, 161 Mo. App. 1, 142 S. W. 468.

[2] With consideration of the presence of the switch eliminated, it is clear that it was the duty of defendant to fence at the point where the cow entered on the track, and defendant's liability becomes clearly established.

[3] It is next contended that the verdict of \$75, assessed as the value of the cow, is excessive. No one testified as to the value of the cow except the plaintiff. Defendant placed several witnesses on the stand, but they were not questioned on that point. The contention that the verdict is excessive is based on plaintiff's testimony alone. He testified that the value of the cow for shipping purposes was \$50, but its value there at the time and place of her death was \$75. Some criticism is directed against the manner in which the statement from plaintiff that the value was \$75, was elicited, but since defendant did not seek to controvert it, we do not think it is now in a position to complain. Plaintiff's testimony furnished some substantial evidence that the cow was worth \$75 at the place where she was killed, and we are not prepared to say that the jury were not authorized to adopt that as the true value.

The judgment will be affirmed.

FARRINGTON and BRADLEY, JJ., concur.

#### On Motion for Rehearing.

PER CURIAM. On motion for rehearing appellant's counsel make a vigorous attack on instruction No. 3, given for plaintiff. This instruction told the jury that if they should find that the switch, at or near where the animal was killed, was maintained for the exclusive accommodation of one industry, then such switch was not a station within the meaning of the law so as to relieve the defendant of the duty to fence its track, even though they should further find that trains sometimes stopped there to receive and discharge passengers and freight.

[4-6] This instruction links together the definition of a station and the use of a switch in connection with a station, and, standing alone in a case where the question of a station or no station and the use of a switch in connection therewith was at issue, would be erroneous. It could not, however, have misled the jury in this case. The other instructions placed the burden on plaintiff to show that the animal entered on the track and was killed at a place where the defendant was required to fence; that is, where the track passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands, and not at a crossing of any public road or other road, and not within the limits of any incorporated town, city, or village. When the plaintiff proved these facts he made a prima facie case. If the nearness of a public station or a public switch made it neces-

sary to leave the track unfenced at the point where the animal entered on the track, that was matter of defense, and the burden on the defendant to establish it. *Cox v. A. T. & S. F. Ry. Co.*, 128 Mo. 362, 31 S. W. 3.

We find no evidence in this case to warrant the submission of these defenses to the jury; hence defendant could not have been injured by instruction No. 3.

The motion for rehearing will be overruled.

### SCOTT v. AMERICAN EXPRESS CO. (No. 2903.)

(Springfield Court of Appeals. Missouri. June 18, 1921. Rehearing Denied Aug. 9, 1921.)

#### 1. Abatement and revival §69 — Validity of judgment not affected by death of party pending appeal.

In civil actions, the judgment of the trial court remains in force as a valid judgment, though its enforcement may be suspended by giving bond, and the death of a party pending an appeal does not ordinarily abate or destroy the cause of action.

#### 2. Criminal law §1070—Death of defendant pending appeal from conviction abates prosecution.

In criminal cases, the death of the defendant pending an appeal from a judgment of conviction abates the prosecution or cause of action entirely.

#### 3. Rewards §8 — Reward for information leading to "conviction" not due on the defendant's death pending appeal from conviction.

Under a contract to give a reward for information leading to the "conviction" of persons who had committed a particular robbery, there was no liability, where the defendant, who had been convicted, of the crime died pending his appeal from the judgment of conviction, since the contract, in view of the purpose of the reward offered, contemplated a final conviction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Convicted—Conviction.]

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Elwood Scott against the American Express Company. Judgment for plaintiff, and defendant appeals. Reversed.

N. O. Hawkins, of Caruthersville, for appellant.

Ward & Reeves, of Caruthersville, for respondent.

COX, P. J. Action to recover \$1,000 as a reward alleged to have been offered by appellant for "first information leading to the ar-

rest and conviction" of each of two men who robbed an express messenger on a train between Dyersburg, Tenn., and Hickman, Ky., on October 18, 1917. Verdict for plaintiff, and defendant has appealed.

An agreed statement of facts covering a part of the facts in the case was filed, from which it appears: That the robbery of the express messenger was committed by two men, then unknown. A reward of \$1,000 for first information leading to the arrest and conviction of each of these men, or \$2,000 for both, was offered jointly by the Memphis & Gulf Railroad Company and the American Express Company. That the American Express Company which joined in this offer of reward was a joint-stock company. Afterward the parties interested in this joint-stock company formed the defendant corporation by the same name, and took over all the assets and continued the business of the joint-stock company. One Will Buntyn was tried in the circuit court in Dyer county, Tenn., on a charge of being one of the parties who robbed the express messenger, and was convicted. After his conviction, he took an appeal to the Supreme Court of Tennessee, and was liberated on bond pending that appeal. Before his case was reached on the Supreme Court docket, he died. This suit to recover the reward for his arrest and conviction was filed after his death. The plaintiff offered evidence tending to show that he had performed services which would entitle him to the reward, if the defendant were liable therefor when he filed his suit.

The appellant contends that a demurrer to the evidence should have been sustained for several reasons, among which is the following: That Buntyn having died pending his appeal, his death abated the proceedings against him, and there was therefore no final conviction.

[1, 2] If the appeal of Buntyn and his death pending that appeal to the Supreme Court abated the proceedings in such a sense as to take away from the verdict of the jury and the sentence of the trial court thereon their character as a conviction of Buntyn under the terms of the offer of reward, then plaintiff's cause of action never accrued, and the judgment should have gone for defendant in this case. In civil actions, the judgment of the trial court remains in force as a valid judgment, though its enforcement may be suspended by giving bond, and the death of a party pending an appeal does not ordinarily abate or destroy the cause of action. In criminal cases, however, the death of the defendant pending an appeal from a judgment of conviction abates the prosecution or cause of action entirely. *Town of Carrolltown v. Rhomberg*, 78 Mo. 547; *State v. Perrine*, 56 Mo. 602.

[3] Buntyn's death pending his appeal



from a judgment of conviction against him abated the prosecution and cause of action against him for the alleged crime of which he had been convicted in the trial court, and for that reason, plaintiff's cause of action never finally accrued. The offer of the reward and plaintiff's services in procuring the arrest and conviction of Buntyn constituted a contract which is to be construed by the same rules as any other contract. *Hoguard v. Dickerson*, 180 Mo. App. 70, 165 S. W. 1133.

The contract must be given a reasonable construction, keeping in mind the purpose of the party offering the reward. The terms of the offer must be substantially complied with, and the conditions, if any, attached to the offer must be met before liability ensues. The offer of the reward in this case was for "first information" that would lead to the arrest and conviction of the guilty party. The purpose of the party offering the reward was to secure the punishment under the law of the person or persons who had committed the robbery. To him a conviction meant such a final judgment of a court of competent jurisdiction as would make the punishment of the offender certain. The verdict of guilty by a jury or the passing of sentence by the trial court meant nothing to him, unless the judgment of the court was of such a character as to carry with it the punishment imposed by the law. The operation of the judgment entered on the verdict of guilty returned by the jury in the case against Buntyn was suspended by his appeal. The punishment imposed by the law was suspended pending the determination of the Supreme Court as to whether or not the conviction was legal, and whether or not any punishment would ever be imposed upon the party convicted could not be finally determined until the case should be decided by the Supreme Court.

The Supreme Court of Kentucky held in *Stone v. Wickliffe*, 106 Ky. 252, 50 S. W. 44, that liability on an offer of reward for arrest and conviction did not attach until after the affirmance of the judgment by the Supreme Court. The party claiming the reward in that case brought suit while the appeal in the criminal case was pending, and the court held he could not recover, for the reason that there had been no final conviction such as to make the party offering the reward liable therefor. In the case of *Baker v. M. W. A.*, 140 Mo. App. 619, 121 S. W. 794, an insurance policy had been issued on the life of Baker, who was a member of the fraternal order, and this policy, as well as the by-laws of the order, provided that any member and policy holder who should be convicted for felony should be automatically expelled, and his policy become null and void. Baker, who was a member and policy holder, was convicted

of a felony, and appealed to the Supreme Court of this state, and pending that appeal he died. The widow, who was the beneficiary in the policy, brought suit, and the defense was made that Baker had been convicted of a felony, and for that reason, his policy had been annulled. The St. Louis Court of Appeals, held, however, that the conviction was not final, and that the policy must be paid. These cases uphold appellant's contention in this case, and we think rightly so.

We have been cited by respondent to a number of cases which hold that a judgment of a circuit court in a civil case remains a valid judgment pending appeal; also cases which hold that a party convicted of a felony is not relieved from the personal disqualification to testify as a witness or serve on a jury pending appeal. We have carefully examined these cases, but do not think they reach the point involved here. The question involved here is the proper construction to be given to the term "conviction," used in the offer of reward. We think it means a final judgment, which settles the question of the guilt of the party. As long as that question remained in litigation in any way, there was no conviction as meant by the offer of reward. The death of the defendant before the final determination of the litigation prevented the judgment ever becoming final in the sense that, as a result, the punishment for the offense must follow.

From what we have said, it follows that plaintiff has no cause of action, and it will be unnecessary to discuss the other questions in the case.

Judgment reversed.

FARRINGTON and BRADLEY, JJ., concur.

#### MORROW v. HINES, Director General of Railroads. (No. 2799.)

(Springfield Court of Appeals. Missouri. June 18, 1921. Rehearing Denied Aug. 9, 1921.)

1. New trial  $\S$  41(3)—No new trial for error in instructions where movant not entitled to recover.

Court could not grant plaintiff a new trial after verdict for defendant by reason of error in instructions, where it appeared that under the evidence plaintiff could not recover.

2. Railroads  $\S$  346(6) — Burden of proving contributory negligence on railroad.

Ordinarily in a suit for damages or for an injury at a railroad crossing based on a failure to give the statutory signals, the plaintiff makes a prima facie case by proving the injury and failure to give the signals, and burden is then on defendant to prove contributory negligence.

**3. Railroads ⇨327(4)—Traveler must look and listen.**

A railroad track is itself a signal of danger, and it is the duty of a person approaching a railroad crossing to both look and listen before going upon the track, if to look or listen will enable him to discover the approach of a train, and failure to do so is negligence as a matter of law.

**4. Railroads ⇨346(6)—On proof of contributory negligence, traveler must show excuse.**

Failure to look or listen when approaching a railroad crossing makes a prima facie case of contributory negligence, and if the failure to look or listen can be excused at all, the burden is on the plaintiff to furnish the testimony to justify such failure.

**5. Railroads ⇨328(8) — Automobile driver, crossing at night, held negligent in failing to look.**

An automobile driver, who did not look or listen at night before crossing a switch track on which he was struck by a backing train without lights, held guilty of contributory negligence as matter of law.

**6. Railroads ⇨327(13)—One crossing switch track must look and listen.**

The duty to look and listen extends to one crossing a switch track.

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by D. C. Morrow against Walker D. Hines, Director General of Railroads, in charge of the St. Louis & San Francisco Railway Company. Verdict for plaintiff. From an order granting a motion for a new trial, defendant appeals. Reversed and remanded, with directions.

W. F. Evans, of St. Louis, and Ward & Keesee, of Caruthersville for appellant.

Smith & Seed, of Kennett, for respondent.

COX, P. J. Plaintiff brought suit for damages to an automobile, which was struck at a public crossing on a switch track of the Frisco Railroad at Campbell, Mo. Verdict for defendant; motion for new trial filed by plaintiff and sustained on the ground that the court had committed error in giving instructions 6 and 7 on the part of defendant, and defendant has appealed.

[1] We have examined these instructions in the light of the evidence in the case, and think they were erroneous, and the action of the trial court in sustaining the motion for new trial on that ground was correct, unless it further appears that under the evidence plaintiff could not recover, and hence he was not injured by the error.

Appellant insists that the plaintiff's own evidence shows that his agent, who was driving the automobile at the time of the collision, was guilty of contributory negligence as a matter of law, and a verdict for defendant should have been directed.

The negligence alleged is that defendant backed a train over a public crossing before daylight without ringing a bell or sounding a whistle, or without any light or signal of any kind on the rear of the cars, and without any one upon the rear of the cars to give a signal of the approaching train. The answer was a general denial and plea of contributory negligence.

Plaintiff testified that he was the owner of the automobile; that it was practically destroyed by a collision with the train of defendant, and was of the value of \$562.50; that at the time of the accident, the car was driven by W. N. Pinkley, who was in his employ.

W. N. Pinkley, who was driving the car, testified that he had started in the car to go from Campbell to Holcomb, where he worked, and that he had been making the same trip three or four times a week for three or four months, and was familiar with the streets and the railroad tracks that he had to cross and the crossing where the accident occurred. He knew that the train which struck the car stood on that switch all night each night, then backed over this crossing in the morning in order to get into proper position to start upon its regular daily run. This accident occurred at about 6 o'clock a. m. on December 9th, and it was dark and raining at the time. The lights of his car were on, and the side curtains were closed, but had isinglass in them so he could see through them. His eyesight and hearing were both good. That he was not thinking about the train, and did not look and listen as he approached the crossing, but went right along. He could not see very far, and did not see the train until it was within 2 or 3 feet of him, and then he could not do much, and the train struck the automobile and dragged it along for some distance, and entirely demolished it. He escaped by crawling out at the rear, and ran to the engine of the train and signaled the engineer to stop the train. The train had no light on the rear, and, had it had one there, he could have seen it. There was no one on the rear of the train to give warning. He was going very slowly, and heard no whistle or bell. He did not notice any lights in the coaches when he started toward the engine on the train, but did see that the coaches were lighted as he returned. The train was going slow, about four or five miles an hour.

Witnesses for defendant testified that the coaches were lighted, and some of them saw the bulk of the train and heard it when 150 feet away; that there was nothing to obstruct the view of the driver of the automobile for at least 150 feet from the crossing; that the whistle was sounded, and the bell was ringing as the train backed.

If on plaintiff's own testimony he could not

recover, then his motion for new trial should not have been sustained, because he was not injured by the erroneous instructions.

[2] Ordinarily in a suit for damages for an injury at a railroad crossing based on a failure to give the statutory signals, the plaintiff makes a prima facie case by proving the injury and failure to give the signals, and the burden is then on defendant to prove contributory negligence, but if plaintiff's evidence shows that he was guilty of contributory negligence as a matter of law, then there is nothing for defendant to prove, and the jury should be peremptorily instructed to find for defendant. *Green v. Railroad*, 192 Mo. 131, 90 S. W. 805; *Burge v. Railroad*, 244 Mo. 76, 94, 148 S. W. 925; *Farris v. Railroad*, 167 Mo. App. 392, 151 S. W. 979; *Osborn v. Railroad*, 179 Mo. App. 245, 256-260, 166 S. W. 1118.

[3] Was plaintiff's servant who was driving the automobile guilty of contributory negligence as a matter of law as shown by his own testimony? He says he was familiar with the situation. He knew the train stood on the switch all night, then backed over the crossing where the accident occurred in the morning. It was raining and dark, and he could not see very far, but how far is not stated. His eyesight and hearing were both good. He did not think about the train, and did not either look or listen as he approached the crossing; but just went along, and the train was within two or three feet of him when he saw it. The train was moving slowly, and so was he. On this testimony, can it be said that he was exercising ordinary care for his own safety, or was he so negligent that the law will hold him as having contributed to his own injury? A railroad track is itself a signal of danger, and the rule is well settled that it is the duty of a person approaching a railroad crossing to both look and listen before going upon the track, if to look or listen will enable him to discover the approach of a train, and failure to do so is negligence as a matter of law. *Burge v. Wabash Railroad*, 244 Mo. 76, 94, 148 S. W. 925; *Jackson v. S. W. Ry. Co.*, 171 Mo. App. 430, 439, 156 S. W. 1005.

[4, 5] We think the failure to look or listen when approaching a railroad crossing makes a prima facie case of contributory negligence, and if the failure to look or listen can be excused at all, the burden is on the plaintiff to furnish the testimony to justify such failure. In this case, the driver of the automobile was alone in the car, driving leisurely along, with nothing to engage his attention, and there can be no excuse for his failure to look and listen. He says that it was dark, and he could not see very far, but that was no excuse for his not looking, for it is uniformly held that, where there are obstructions to the hearing or seeing, these obstructions, instead

of excusing a party from the effort to hear or to see, should only increase his vigilance, and it is apparent in this case that the train backing as slowly as it was, and his automobile moving as slowly as he says it was, if he had been attentive, and, instead of overlooking the fact that he was approaching a crossing, he had looked and listened, he would undoubtedly have discovered the presence of the train, and could have avoided the injury. By reason of his failure to look and listen, he must be held to have been guilty of contributory negligence as a matter of law.

[6] Suggestion has been made by counsel that this crossing was over a switch track, and not on the main track, where trains are likely to pass at any time, and that the duty to look and listen should be different in this case for that reason. We do not think the evidence in this case would warrant making any distinction. Switch tracks are generally used to run trains over, and the fact that a train may be moving on a switch instead of a main track could not lessen the danger of collision, or take away the duty of one approaching the crossing to look and listen.

The judgment will be reversed, and the cause remanded, with direction to reinstate the verdict of the jury and enter judgment thereon for the defendant.

FARRINGTON and BRADLEY, JJ., concur.

#### HAMRA v. ORTEN. (No. 2642.)

(Springfield Court of Appeals, Missouri, June 18, 1921. Rehearing Denied Aug. 9, 1921.)

1. Witnesses  $\S$  126—Statute making testimony as to transaction with a deceased incompetent does not render incompetent testimony competent at common law.

Rev. St. 1919,  $\S$  5410, making testimony as to a transaction with a deceased incompetent, is an enabling and not a disabling statute, and does not render incompetent testimony that would have been competent at common law.

2. Witnesses  $\S$  164(2)—Contents of alleged lost instrument to be established before proof of loss thereof by party to transaction with deceased.

In view of Rev. St. 1919,  $\S$  5410, making testimony as to a transaction with a deceased incompetent, in an action between one party to a transaction and the administrator of the other party, the contents of an alleged lost instrument must be first established by other witnesses before the party to the suit is competent to establish the loss, notwithstanding usual procedure of establishing loss of an instrument before proving contents thereof.

**3. Appeal and error ¶882(7)—Improper order of proof not available on appeal, where invited by appellant's objection.**

In an action by an administratrix on an account, which it was claimed the defendant owed plaintiff's intestate, the admission of defendant's testimony as to the loss of receipts received from intestate, before he had testified as to the contents thereof, was not ground for reversal, where plaintiff had invited court's ruling permitting testimony as to loss of receipts before testimony as to contents by her objection that parol testimony as to contents was inadmissible as not the best evidence.

**4. Trial ¶75—A party who introduces a letter waives question of incompetency.**

A party by introducing a letter waives the question of its incompetency.

**5. Evidence ¶263(1)—Defendant can prove that his statement against interest was made by mistake.**

In action on an account, defended on the ground of payment, in which the plaintiff introduced in evidence defendant's letter stating that he had a receipt for \$25, the defendant could prove that his daughter had written letter for him, and had by mistake written \$25, instead of \$225, as dictated by him.

**6. Appeal and error ¶230—Objection to evidence must be raised at trial.**

Objection, made for first time in motion for new trial, that parol evidence was inadmissible, in that it tended to explain or contradict an unambiguous writing, is insufficient to raise objection on appeal.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Mary Hamra, administratrix of the estate of R. S. Hamra, deceased, against John Orten. Judgment for defendant on appeal from a justice court, and plaintiff appeals. Affirmed.

Corbett & Stiles, of Caruthersville, for appellant.

C. G. Sheppard, of Caruthersville, for respondent.

BRADLEY, J. As the administratrix of the estate of R. S. Hamra, deceased, plaintiff commenced this cause in a justice of the peace court to recover on an account for merchandise alleged to be due plaintiff's intestate. The cause was appealed to the circuit court, where upon trial before the court and a jury verdict and judgment went for defendant. Plaintiff, failing to get a new trial, appealed.

The statement filed in the justice court is in the usual form in a suit on account, and filed therewith was an itemized statement of the account, showing charges and credits, leaving an alleged balance due of \$225.92. No written answer was filed, but the defense was payment.

Error is assigned in the admission of evidence and in the giving of an instruction. Because of the nature of the evidence, the admission of which is challenged, it will be necessary to set out the facts somewhat in detail. Deceased operated a store in Caruthersville at which defendant traded, and the account had run for several years. Plaintiff's intestate died February 2, 1920. Plaintiff introduced in evidence the account, showing charges and credits, and balance due. The last credit appears under date of November 21, 1919, and is for \$25 as shown on the books. Plaintiff also introduced in evidence a letter written by defendant to plaintiff under date of April 12, 1920, and a receipt given defendant for the payment of \$25 on November 21st. This letter is as follows:

"Caruthersville, Mo., April 12, 1920.

"Mrs. R. S. Hamra—Dear Madam: In reply to yours of the 10th instant, I must say you are very much mistaken about me owing you \$255.83, for I did owe \$25, but I paid it to your husband about two months before his death, and have a receipt for it; if you have orders that I have sent you, why I'll be willing to pay it, for I always sent orders when my family bought goods. There is no use putting it in court, unless you want more expense, for I have all my receipts. I settled with R. S., but didn't know how he fixed the books; you must be looking at some old accounts, for I have traded with R. S. for years.

"Yours,

John Orten."

The receipt is as follows, the signature not appearing in the record here:

"The Boston Store, R. S. Hamra, Prop.

"November 21, 1919.

"Received of John Orten on account \$25.00."

Alfred Martin, testifying as a witness for defendant, stated that between November 20 and 30, 1919, he saw defendant pay plaintiff's intestate some over \$200, and that the day before this payment was made defendant paid \$25 and got a receipt. While Martin was on the stand, defendant sought to show by him the contents of the receipt for the "200 and some odd dollar" payment. Plaintiff interposed the objection that the receipt itself would be the best evidence, and was sustained. Defendant then was called to account for the receipt, and the following occurred:

"Q. I will ask you if you have looked for the receipt that you got from Mr. Hamra for this payment of \$225 and something?

"Mr. Corbett: I object to any testimony from this witness about the receipt, or anything that occurred between him and Mr. Hamra, for the reason that he is one of the parties to the transaction in dispute, and Mr. Hamra is dead.

"By the Court: I will let him show the receipt is lost.

"Mr. Corbett: Exception.

"A. Yes, sir; I got it misplaced somewheres; couldn't find it; made a search about my place

for it. No, sir; I can't read or write. Yes; I got a statement from Mrs. Hamra in regard to this claim after R. S. Hamra's death. Yes, I had my girl to write a letter to her for me.

"Q. You may state what you told her to write in that letter.

"Mr. Corbett: I object to that; that wouldn't be binding on the plaintiff in this case; whatever his agent did would bind him, and not the plaintiff.

"By the Court: I believe I will sustain that objection.

"Q. This letter says, 'In reply to yours of the 10th inst., I must say you are very much mistaken about me owing you \$255.83, for I did owe you \$25, but I paid it.' Now, you may state whether or not you told your girl to say you did owe \$25, or what you did tell her?

"Mr. Corbett: I object; same reason; wouldn't be binding on plaintiff what he told the girl outside of the presence of— (Interrupted.)

"Mr. Sheppard: I know, but they are holding this as his agent and he has a right to explain, and it's for the jury to say— (Interrupted.)

"By the Court: Read the question again; let me hear it. (Question read over by the stenographer.)

"Mr. Corbett: I object; that would be a self-serving declaration, and would not be binding on the plaintiff, because she wasn't present.

"By the Court: The letter speaks for itself, and of course Orten made his daughter his agent to write for him; but I will let him make what explanation he desires of that.

"Mr. Corbett: Note exception.

"Q. State to the jury, so they will understand, what you told your girl to write. A. I told her to write that I owed them \$225, in place of \$25, and she never read the letter to me— I can't read or write anyhow, but I thought I had all my receipts with me, and commenced looking for them, and couldn't find the others, but this one. Q. Had you paid him the \$225? A. Yes, sir.

"Mr. Corbett: I object to that, because Hamra is dead.

"By the Court: Sustained."

By section 5410, R. S. 1919, it is provided, among other provisions, that where one of the original parties to the contract or cause of action is dead the other party to such contract or cause of action shall not be admitted to testify in his own favor or in favor of any party claiming under him, and where an executor or administrator is a party the other party shall not be admitted to testify in his own favor unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator.

[1, 2] This statute has been under consideration a great many times. It is generally agreed that the statute is an enabling one. Its purpose in the main was to remove the disability under the rule at common law that a party to an action was not a competent witness, and one, although not a party,

if interested in the result of the action, was likewise incompetent under the common-law rule. 40 Cyc. 2244; 28 R. O. L. p. 492. In *Jenkins v. Emmons*, 117 Mo. App. 1, 94 S. W. 812, plaintiff was seeking to recover on a claim against the estate of one Enoch. The foundation of the claim was a promissory note, which was lost. Plaintiff was offered as a witness to prove the note was lost. Objection was made that plaintiff was not a competent witness, since Enoch, the maker, was dead. The court held that plaintiff was a competent witness to establish the loss of the note. Quite a number of cases are cited and reviewed in the *Jenkins* Case, and it is there pointed out that under the common-law rule an exception existed whereby a party to a suit was competent to establish the loss of a material written instrument. If at common law defendant in the instant case would have been competent to establish the loss of the receipt, he would be competent under the statute for the same purpose, because the statute is an enabling statute, and not a disabling one.

It would seem, however, that our rule is that the contents of the alleged lost instrument must first be established by other witnesses before the party to the suit would be competent to establish the loss. This is contrary to the usual procedure, but the reason is apparent. If the party to the suit was first permitted to prove the loss of a written instrument, before its existence or contents has been proved by other witnesses, it would be most difficult to avoid infringement upon the statute. In order to prove the loss by a party to the suit, the existence of the instrument would necessarily have to be shown in order to prove its loss. If the loss is not satisfactorily shown, the previous evidence of contents would fall, because the evidence of the contents would only be competent upon the assumption that the instrument was lost.

[3] In the case at bar the defendant was proceeding properly to establish the contents of the alleged lost receipt, but was met with plaintiff's objection that the receipt would be the best evidence, and under the ruling of the court on that objection defendant was compelled to proceed out of order; but of this plaintiff cannot complain, because she invited the court's ruling by her objection. Defendant's evidence should, however, have been confined to the loss of the receipt, when testifying concerning that subject. It appears that she went too far afield. "Q. Had you paid him the \$225? A. Yes, sir." Objection was made and sustained to this last-mentioned evidence, but the answer was given before the objection was made, and plaintiff did not move to strike the answer.

The next question is the competency of the evidence as to what he directed his daughter to write in the letter of April 12th

to plaintiff. The evidence offered by plaintiff is to the effect that on November 21, 1919, he paid \$25 and got the receipt offered in evidence, and that the next day he paid the balance of his account and got the lost receipt. Plaintiff's contention is that defendant made the \$25 payment on November 21st, but that he did not make any payment on the next day, or any other, on the balance. To support the claimed competency of defendant's explanation of what he meant to say in the letter, defendant cites *Stamper v. Hammond Packing Co.*, 180 S. W. 1074, *Huff v. Railway et al.*, 213 Mo. 495, 111 S. W. 1145, and *Downs v. Racine-Sattley Co. et al.*, 175 Mo. App. 382, 162 S. W. 331.

The *Stamper Case* was for personal injury. Plaintiff's evidence was somewhat at variance to a written statement he had made to a claim agent. It was urged that the statement was made against interest, and should be accepted as conclusive. The court, citing *Downs v. Racine-Sattley Co. et al.*, supra, ruled that, where a party through ignorance, oversight, or mistake makes statements against his interest which are not true, the jury is not bound to give conclusive effect to such statements. In passing upon the question there presented the court said:

"In our consideration of the demurrer to the evidence, which defendant earnestly argues should have been given, we are asked to give conclusive effect to the written statement of plaintiff, and to treat as an established fact the assertion therein that the slipping of the hook was caused by water which had accumulated in the cylinder, and not by the worn and defective condition of the hook, block, and spring. To do this would require the rejection, not only of the testimony, which on its face carries no indication of improbability or unreasonableness, that the only cause of the slipping was the worn, defective, and dangerous condition of the machine, but also the testimony tending to show that the statement did not recite the true cause, and was signed \* \* \* under a misunderstanding of the real cause of the injury. In the recent case of *Downs v. Racine-Sattley Co.*, 175 Mo. App. loc. cit. 386, 162 S. W. 331, we came to the conclusion from a careful review of the pertinent cases in this state that, where a party, through ignorance, oversight, or mistake, makes statements against his interest which are not true, the jury are not bound to give conclusive effect to such statements. This rule, which is expressly approved by the Supreme Court in the later case of *Steele v. Railway (Sup.)* 175 S. W. 177, applies to written statements against interest made before the trial, as well as to the erroneous testimony of the party at the trial. The right to correct evidentiary mistakes innocently made continues until the close of the evidence, since its exercise clearly is in the interest of truth and justice. The testimony of plaintiff at the trial raised issues of fact with the recitals of the written statement, the solution of which fell within the province of the triers of fact."

In the *Downs Case* plaintiff had made statements while a witness which tended to establish a fact against his interest. Counsel for defendant in that case sought to invoke the rule:

"That a plaintiff in a civil case is conclusively bound by every declaration and admission against his interest made while testifying before the court and jury."

The court, after discussing the authorities, held that the rule was not so strict.

"It may be conceded, as claimed by defendant, that plaintiff in his testimony stated facts which are inconsistent with his evidence that Lowrie's first visit to Kansas City was in July; but, as we have shown, such statements did not conclusively bind plaintiff. The jury were entitled to infer that they were made mistakenly or in ignorance of the true facts, and to accept as true the contradictory evidence. The law does not demand infallibility of any witness, or unduly punish a party for honest mistakes or inconsistencies in his testimony."

In *Huff v. Railway*, supra, plaintiff while on the stand had made some statement against her interest. At defendant's request the court instructed:

"You are instructed that all statements made by the plaintiff while upon the stand testifying which are against her own interest, if any, must be accepted by you as absolutely true, while all statements made by her in her own favor while upon the stand testifying, if any, should be given just such weight and credence as you deem them fairly entitled to under all the other facts and circumstances in evidence."

Of this instruction the court said:

"Clearly this instruction is erroneous for two reasons: First, because it singles out plaintiff and comments upon her testimony; and, second, because it erroneously declares the law. Under this instruction, if the plaintiff through ignorance or mistake made a statement against her interest, the jury was bound under their oaths to take it as absolutely true, whether it was in point of fact true or not. We know of no means by which a party litigant can be made to understand things any better while testifying upon the witness stand than he does while acting off the witness stand, nor by which he can be prevented from making mistakes under oath the same as he does when he is not under oath. We have many times condemned that form of instruction, and it should never be given. *Ephland v. Railroad*, 137 Mo. loc. cit. 198; *Zander v. Railroad*, 206 Mo. loc. cit. 460, 461, and cases cited. If the plaintiff made statements against her interest while testifying (and we must presume she did so, else the instruction would not have been given), which were untrue, and made through mistake, oversight, or ignorance, and she should at the time have discovered her error and had attempted to correct it, the jury under that instruction would necessarily have been compelled to have disregarded her explanation and find that the statement was true, even though the mistake was ever so apparent, for the rea-

son that the instruction told them that they must take such statements as absolutely true. Such a proposition is monstrous, and it has no foundation upon which to stand, either in law or morals."

[4-6] Plaintiff in the case here introduced the letter, and therefore waived the question of its competency. Defendant made no objection to the evidence of defendant's explanation except that such evidence was self-serving and that the direction to say \$225, instead of \$25, was not made in plaintiff's presence and was not binding on her. No objection was made that the explanation was an attempt to vary the plain language of an unambiguous paper, as plaintiff urges in her brief, or that such evidence, together with the letter, was to the effect that defendant had paid the account. In her motion for new trial plaintiff challenges the competency of the evidence in explanation of the letter, on the ground that it violated the rule that a written instrument, plain and unambiguous on its face, cannot be explained by parol evidence, and the further rule that a written instrument cannot be contradicted by parol evidence. We know of no authority to support the contention that a party may make his objections to evidence in the motion for new trial, and thereby save the point for review. We are not holding that, had plaintiff made the objections that we have mentioned that might have been made, such objections should have been sustained. We are merely holding that, in view of the record before us, no error was made in admitting the evidence complained of.

There is no error in the instruction challenged. The judgment below should be affirmed; and it is so ordered.

COX, P. J., and FARRINGTON, J., concur.

#### FOSTER v. METROPOLITAN LIFE INS. CO. (No. 16704.)

(St. Louis Court of Appeals. Missouri. July 6, 1921. Rehearing Denied July 18, 1921.)

1. Trial  $\Leftrightarrow$  141 — Affirmative defense held a question for jury, though evidence uncontradicted.

In suit on life insurance policy, a defense on the ground of failure to pay premium was an affirmative defense, and although defendant's evidence of failure to pay the premium was uncontested, the question of truth of defendant's evidence was still a question for the jury, and a refusal of the trial court to give a peremptory charge for defendant is not error.

2. Trial  $\Leftrightarrow$  136(1) — Card record of payment of premiums not a sufficient "writing" or "record" to counteract prima facie case and keep case from jury.

Where defendant's only written evidence of the nonpayment of the premium on the policy

sued on was a card on which was kept a record of the policy, and its admissibility in evidence depended on identification and oral testimony of defendant's witnesses, it is not a "writing" or "record" standing undisputed and overcoming and destroying plaintiff's prima facie case, so a peremptory instruction for defendant would have been erroneous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Record; Write—Writing.]

3. Appeal and error  $\Leftrightarrow$  1003 — Whether verdict is against the weight of the evidence is a question for the trial court.

The question whether there is any substantial evidence is for the appellate court, but the question whether the verdict is against the weight of the evidence is for the trial court alone.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

"Not to be officially published."

Action by Lavinia Foster against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fordyce, Holliday & White, of St. Louis, for appellant.

Henderson & Henderson, of St. Louis, for respondent.

NIPPER, C. This is an action to recover on a life insurance policy. The policy was issued on the 15th of February, 1916, upon the life of John H. Foster, whereby the defendant promised to pay plaintiff, wife of the insured, upon proof of death, the sum of \$1,000. The policy contained the 81 days of grace clause. John H. Foster died on June 2, 1917.

Defendant in its answer admitted the issuance of the policy, which provided for the payment of quarterly premiums of \$14.33 each, upon the 15th day of February, May, August, and November of each year, and sets up the affirmative defense that the premium due upon said policy on the 15th day of February, 1917, was not paid, and that thereupon said policy became lapsed and void and of no effect whatever.

Plaintiff recovered judgment against defendant for \$1,000, with interest amounting to \$110.83. Plaintiff introduced the policy, and made proof of death, and then introduced the following letter from the defendant, written to her, dated New York City, June 12, 1917:

"Dear Madam: In answer to your postal card of June 4th, our records show that the above-numbered policy is out of benefit, owing to the nonpayment of the February 15, 1917, quarterly premium.

"Yours truly, L. J. Cahen, Manager."

Plaintiff thereupon rested her case in chief. Defendant then requested a peremptory in-

struction, directing a verdict in its favor, which the court refused to give.

David Lerch, witness for defendant, testified that he was deputy superintendent of the defendant company, and had been since 1916; that he solicited the insurance, and wrote the policy in suit; that he called on deceased to collect the premium, but the deceased did not pay this premium at any time; and that he called on plaintiff after the death of the insured, and she stated she did not know whether or not this premium had ever been paid.

Philip H. Bearkan testified that he was an agent of defendant, and had been such since August, 1916; that it was his duty to collect premiums and solicit business in the territory in which the insured lived; that he called on insured to collect the premium due February 15, 1917, on the policy in suit, but that insured did not pay him. He also stated that he called on the insured every Wednesday and every Saturday, and three or four times with respect to the payment of this premium, but that he never received payment. He further stated that when he collected a premium or failed to collect he made a record of it, and turned this record in to the home office.

A. J. Emendorf testified that he was chief clerk of the defendant company, and had been since August, 1910, except for one month in 1911; that he called on insured to collect the premium which fell due on February 15, 1917, but that insured did not pay the premium; that at that time he was deputy superintendent, and it was his duty to make an investigation, where an agent reported a policy for cancellation, to see whether or not this business had received the proper attention; that he was sent out about the middle of March to investigate this matter, and immediately after the 31 days of grace had expired. He identified the record of policies in force in the district where insured lived, and kept as a record in the office of the defendant. This record shows that the policy of insured was canceled in March, 1917, for the nonpayment of the February premium. He also stated that, so far as he knew, insured never made any attempt to revive the policy.

The deposition of Leon Bendel was then read in evidence. He testified that he was superintendent of the Delmar district of the defendant company since 1914. He was shown Exhibit 1, and identified same as a card record of the defendant, which is sent from New York with every policy; that upon receipt of this policy by the district office from the home office in New York it is placed in a filing cabinet, and when a policy is canceled it is marked on this card and filed in a lapsed cabinet; that if the policy is reinstated the date of the reinstatement is placed on the card, and the card is then taken from the lapsed file and replaced in the original file.

This Exhibit 1 is what we have heretofore referred to as the record kept by the defendant on the policy in suit.

Clara J. Stamm testified that she was a stenographer for defendant company, and in February and March, 1917, she had charge of entering the ordinary and indemnity collections, and attending to policies that were lapsed, and marking the cards. She identified the record heretofore referred to as a record kept in the Delmar office of the defendant pertaining to this policy. She identified the notation of the payment of the first premium as having been made by Mr. Thomas, and the remaining three as having been made by her. She stated that she stamped the notation on the card that the policy was lapsed March 19, 1917, and that if any further premiums had been paid she would have stamped same on the card. She also stated that the only recollection she had of the particular transaction was what the record showed.

Plaintiff, in rebuttal, offered in evidence an envelope and a notice from the defendant company, addressed to the insured, and postmarked "New York, April 11, 1917." This notice stated the amount of the premium, and gave the due date as May 15, 1917, "if said policy be then in force." There was no date on the card.

After verdict and judgment as aforesaid, the court overruled defendant's motion for new trial, and hence this appeal.

[1] Defendant contends here that, since all the uncontroverted written evidence in the case established the fact that the policy had lapsed, the court should have directed a verdict in its favor. Plaintiff contends that the introduction of the policy, and the proof of death, made a prima facie case, and therefore the question of whether or not the premiums had been paid was a question for the jury. Upon a determination of this question hinges the result of this case.

In *Lafferty v. Kansas City Casualty Co.*, 229 S. W. 750, our Supreme Court adopted as a part of its opinion the opinion of this court in the same case (209 S. W. 942), where the following language appears:

"Learned counsel for appellant argues with great force that it appears affirmatively that Lafferty did not pay anything on this policy by way of premium or otherwise, and that the testimony of defendant shows affirmatively that the policy was never accepted nor delivered as a policy. That may be, but these were for the determination of the jury [citing cases]. The possession of the policy raised the presumption that it had been delivered and paid for."

The affirmative defense set up in defendant's answer is the failure to pay the premium due on said policy on the 15th day of February, 1917, and even though defendant's evidence was uncontradicted, it was still a question for the jury, which jury had the



right to believe or disbelieve defendant's evidence. And under the law as announced by our Supreme Court in *Lafferty v. Kansas City Casualty Co.*, supra, there was no error in the trial court's refusal to give a peremptory instruction to find for defendant.

[2] The only written evidence upon which defendant relied was the card on which was kept a record of the policy in question. But the admissibility of this in evidence depended upon the identification and oral testimony of defendant's witnesses, and is not such a writing or record as is referred to in *Darlington Lumber Co. v. Missouri Pacific Railway Co.*, 243 Mo. 224, 147 S. W. 1052.

[3] The failure of trial courts to set aside verdicts and grant new trials in cases where the verdict is against the overwhelming weight of the evidence has frequently been condemned by our appellate courts. An examination of this record indicates that the verdict in the present case is one where the trial court should have functioned aright and granted a new trial, on the ground that the verdict was against the weight of the evidence. The question of whether or not there is any substantial evidence is for the appellate court, but the question of whether or not the verdict is against the weight of the evidence is for the trial court alone, because the law has imposed upon trial courts such duty. *Keller v. St. Louis Butchers' Supply Co.* (Sup.) 229 S. W. 173.

Therefore the Commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

ALLEN, P. J., and DAUES, J., concur.  
BECKER, J., absent.

### YOUNG v. HOOVER. (No. 2913.)

(Springfield Court of Appeals. Missouri.  
June 18, 1921. Rehearing Denied  
Aug. 9, 1921.)

1. Landlord and tenant §169(7) — Evidence held to justify inference that ground floor tenant's goods were injured by water from faucet left open by second floor tenant.

In an action for damages to the goods of a tenant on the ground floor, alleged to have resulted from the negligence of a tenant on the second floor, where it was shown that a faucet under the control of the defendant was found running and flooding, no other inference could be drawn but that it was this water which damaged plaintiff's goods.

2. Appeal and error §1050(1)—In a close case, admission of incompetent testimony held reversible error.

Where it appears that a finding for either party would have been supported by substantial testimony, and it is a close question of fact concerning defendant's liability, if incompetent testimony was admitted, and the appellate court cannot say that it did not affect the result, the admission of such testimony will be held reversible error.

3. Appeal and error §1050(1)—Landlord and tenant §169(5) — Evidence in tenant's action for damages caused by another tenant leaving faucet open held inadmissible and prejudicial.

In an action for damages to the goods of a ground floor tenant alleged to have been caused by the negligence of a second floor tenant in leaving a faucet open, a copy of defendant's lease providing that the landlord, and not defendant, should be liable for defective plumbing, held inadmissible and prejudicial.

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Action by Minnie Young against Mattie Hoover. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Phil. M. Donnelly and A. W. Curry, both of Lebanon, for appellant.

I. W. Mayfield & Son, of Lebanon, for respondent.

FARRINGTON, J. Plaintiff (appellant here) brought suit against the defendant for damages, alleging that she (plaintiff) occupied the ground floor of a building as a tenant, therein running a millinery and merchandise establishment; that the defendant occupied the second and third floors of such building as a tenant, running a hotel therein and that such hotel was equipped with water mains, faucets, bathtubs, basins, and sinks and carried water for the supply of said hotel. The petition alleges that defendant carelessly and negligently allowed the faucets to remain open, the bathtubs, basins, and sinks to fill, overflow, and run down and fall upon plaintiff's stock of merchandise and damage and destroy the same.

[1] The evidence of plaintiff is that early one morning when she went to her store she found that a large volume of water had come from above, and had destroyed and injured her merchandise, and that on former occasions she had spoken to the defendant about trouble of this character. It is further shown by witnesses for the plaintiff that a faucet, which was in the hall or in a room on one of the upper floors of the building, and under the control of the defendant, was found running and flooding; that the water was running down on the floor and along the hall, from which no other inference could be

drawn but that it was this water flooding out of this faucet which damaged plaintiff's goods.

Defendant testified that she had examined this faucet a short time before it was found to be running, and that it was properly shut off.

After a trial to a jury, under the instructions given by the court, a judgment was returned in favor of the defendant, and error is assigned here on the refusal of certain instructions asked by plaintiff and on the admission of incompetent testimony.

[2] Under the evidence which was introduced in this case a finding for either party would have been supported by substantial testimony. As the case was tried, it was a close question of fact concerning defendant's liability. Under these circumstances, if there was admitted in evidence incompetent testimony, concerning which we are unable to say that it did not affect the result of the verdict and judgment rendered, the admission of such testimony, must be held to be reversible error.

This court in deciding the case of *Hatch v. Bayless*, 104 Mo. App. loc. cit. 224, 146 S. W. 842, quoted from the case of *Levels v. Railroad*, 196 Mo. loc. cit. 617, 94 S. W. 275, which held as follows:

"But when the case turns on a question of fact and the evidence is so conflicting that a verdict for either can be said to have substantial evidence to support it, then the introduction of illegal evidence is a matter of more consequence than it would be in a case where the evidence in support of the verdict was substantially all one way."

[3] In the case at bar, the defendant, over the objection and exception of the plaintiff, was permitted to introduce in evidence a copy of the lease made between herself and her landlord, in which lease it was provided that the defendant was not liable for the upkeep and care of defective plumbing in said hotel, but the same was to be kept and repaired by her landlord, Jones, and that, in case damage was caused by defective plumbing in said hotel, the defendant was not responsible, but the liability was to be borne by the landlord, Jones.

On what theory this lease could have been admissible, we are unable to perceive, and respondent has not enlightened us in this regard in the brief filed here. There was no testimony whatever concerning any defective plumbing having any effect whatever on this cause of action. The evidence clearly shows that it was not defective plumbing, but the fact that a faucet was left open, and the water was running out of it which caused the alleged injury. Such evidence admitted might, and in all probability would, give the jury the idea that the landlord in some way might be held liable for this damage, and

as the contest was between two women, both of whom were proprietresses of business carried on in the same building, and there was evidence to support the contention of either, we are unable to say that the introduction of this incompetent evidence did not have its effect upon the verdict rendered. See *Sandige v. Hill*, 70 Mo. App. 71.

The other assignment of error briefed in this case goes to the question of whether the petition in this case charged general or specific negligence, thereby determining whether plaintiff's refused instructions should have been given. As the case must be retried, it is unnecessary to go into this question, as in all probability the pleadings will be so remodeled at another trial that the questions raised here on this appeal in that regard will be disposed of.

The obligations of tenants occupying the same building to respect the rights of each other, and the right of a tenant to recover from a cotenant for a condition brought about through the negligence of such cotenant, or through the commission of a nuisance by a cotenant, involve much declared law. It would, therefore, be out of place to lay down any of the rules governing the relations of these parties until such relations are brought here in definite propositions, and only decided after the consideration of the briefs filed by the attorneys for the parties.

For the erroneous admission of the lease between defendant and her landlord, the judgment will be reversed, and the cause remanded.

COX, P. J., and BRADLEY, J., concur.

#### FULLER v. PRESNELL. (No. 2855.)

(Springfield Court of Appeals. Missouri.  
June 18, 1921. Rehearing Denied  
Aug. 9, 1921.)

1. Contracts  $\S$  143 — That is certain which can be made certain.

In construing contracts, that which can be made certain is certain.

2. Sales  $\S$  1(4) — Contract for sale of lumber held not void for uncertainty as to quantity and kind.

Contract for sale of from 100,000 to 150,000 feet of lumber at \$30 per thousand for 8-foot, and \$35 per thousand for standard lengths, held not void for uncertainty as to the quantity and kinds of lumber contracted for; the seller having the right to select the amount of each kind of the different lengths he desires to furnish.

3. Sales  $\S$  89 — Modification of contract a matter of defense, with burden of proof on defendant.

In buyer's action for breach of contract to deliver lumber, the seller, claiming that the

contract had been modified, has the burden of proving the modification of the contract; it being a matter of defense.

**4. Sales ⚡89—Modification of contract not established.**

In buyer's action for breach of contract for sale of lumber, seller's testimony that he had told buyer that he would not have enough lumber to fill the contract, and that buyer had stated that he would take what the seller had, and "that would settle it," though undisputed, held not sufficient to establish a modification of the contract as a matter of law, the question being for the jury.

**5. Contracts ⚡238(2)—Modification of written contract must be in writing.**

A contract that is required to be in writing can only be changed or modified in writing.

**6. Frauds, statute of ⚡131(1) — Contract within statute can be modified only by compliance with statute.**

A contract to which the statute of frauds applies can only be modified in some one of the ways in which the statute required the contract attempted to be modified to be executed in the first instance.

**7. Frauds, statute of ⚡131(1) — How sales contract within statute can be modified.**

An executory contract for the sale of personal property of greater value than \$30, which was in writing, as required by the statute of frauds, could not be modified by parol agreement, unless the new agreement was supported by a new consideration, with part payment, or a receipt and acceptance of some part of the property by the purchaser.

**8. Sales ⚡85(3)—Buyer held not required to inspect lumber until delivery of the minimum amount to be delivered under the contract.**

Contract for sale of lumber to be delivered by specified date and at a certain place, and "to be inspected at" such place, did not require buyer to inspect the lumber on delivery of a part prior to the delivery of the whole amount, but only on being informed that the minimum amount to be furnished under the contract was ready for inspection, in the absence of a custom of the trade to the contrary.

**9. Appeal and error ⚡1067—Refusal of instruction held harmless in view of issues.**

In buyer's action for breach of contract to sell lumber, in which fraud was pleaded, not as a defense in the case, but only by way of inducement to show what led up to and caused the alleged modification of the contract, refusal of instruction defining fraud, if error, was harmless, where the alleged modification of the contract was not binding.

**10. Sales ⚡421—Refusal of instruction that buyer must have been able, ready, and willing to perform contract by date of delivery held proper.**

In buyer's action for breach of contract for sale of lumber, in which both parties recognized that the contract had remained in force until a certain date, when the seller had sold to another party, the refusal of an instruction

that buyer must have been able, ready, and willing to perform his part of the contract before a prior date specified in the contract as the date of delivery held proper.

**11. Sales ⚡418(2) — Buyer's damages for breach of contract stated.**

Where both parties to sales contract recognized the contract as in force after the date specified for delivery and up to subsequent date when seller sold goods to third person, the measure of damages was the difference between the contract price and the market value on such subsequent date.

**12. Sales ⚡418(2)—Market value within reasonable time after breach not considered in ascertaining damages for failure to deliver.**

The market value of goods within a reasonable time after the time of the breach cannot be considered in ascertaining the buyer's damages for failure to deliver, the measure of damages being the difference between the contract price and the market value at the time of breach of contract.

Appeal from Circuit Court, Bollinger County; Peter H. Huck, Judge.

Action by Oscar Fuller against Charles E. Presnell. Judgment for plaintiff, and defendant appeals. Affirmed on conditions.

Chas. Revelle, of St. Louis, Rush Limbaugh, of Cape Girardeau, and Wm. M. Morgan, of Marble Hill, for appellant.

Homer F. Williams, of Marble Hill, and Davis & Davis, of Fredericktown, for respondent.

COX, P. J. Action for damages for breach of contract for sale of lumber. Judgment for plaintiff for \$1,710, and defendant appealed.

The contract is evidenced by the following writing signed by the defendant:

"9/14/19.

"Received of Oscar Fuller two hundred fifty dollars (\$250.00) being part payment from one hundred to one hundred fifty thousand feet of oak lumber to be delivered at Laffin, Mo., by January 1, 1920, at \$30.00 per thousand for 8 foot and \$35.00 per thousand for standard lengths. Same to grade No. 2 common and better and to be inspected at Laffin.

"Chas. E. Presnell."

The answer admitted defendant signed the receipt above; then pleaded fraud by plaintiff's agent in this, that defendant was ignorant of the meaning of the words "same to grade No. 2 common and better," and plaintiff's agent represented to him that these meant the same as "mill run," or the entire output of defendant's mill; that when defendant delivered a certain part of the lumber, he then learned for the first time that these words meant a certain grade of lumber, and therefore he could not deliver under this contract the entire output of his mill; that

on learning of that fact he complained to plaintiff's agent, and that they then modified the contract by mutual consent so that defendant could only be required to deliver such quantity of oak lumber grading No. 2 common and better as he might be reasonably able to cut and deliver; and that he complied with the contract as modified, but plaintiff refused to inspect and accept the lumber.

The evidence shows: That the lumber was not cut at the time the contract was signed. Later defendant sawed and had ready for delivery at Laffin a part of the lumber. Plaintiff's agent inspected and accepted one carload at that time, but culled out more than defendant thought he should, and defendant testified that he complained of the culling, and stated that, if it was to be culled that way, he would not have enough lumber to fill his contract. That plaintiff's agent then stated "that he would just take what I had, and that would settle it." It was on this conversation that defendant based his claim of a modification of the contract.

Defendant testified that plaintiff received 19,000 feet, and that he had 22,000 or 23,000 feet more ready, but could not get plaintiff's agent to inspect and receive it, though he made frequent requests for him to do so, and finally, on February 7, 1920, he sold this lumber to another party, and gave notice to plaintiff's agent on February 9th that he would not furnish any more to plaintiff. Defendant also testified that he at no time had 100,000 feet of lumber, including what he had delivered, on hand. The evidence shows that both parties recognized the contract as still in force after January 1, 1920, and up to February 7th, when defendant sold to another party.

At the close of plaintiff's testimony, and again at the close of all the testimony, defendant filed a demurrer to the evidence, which was overruled. Defendant contends that a demurrer to plaintiff's testimony should have been sustained, because the contract was void for uncertainty as to the quantity and kinds of lumber contracted for, and because there was no proof of any damage to plaintiff. Also that the demurrer at the close of all the testimony should have been sustained for the same reasons, and for the further reason that defendant's testimony as to a modification of the contract was not denied.

[1] It is a familiar rule of construction of contracts that that is certain which can be made certain. Applying this rule, it has been held that when the exact amount of each kind of goods to be furnished under a contract is not specifically set out, yet if the kind or character of goods to be furnished is described with certainty and the minimum or total amount to be furnished is specified, then in that case the seller may make his own selection as to the amount of each kind he will furnish, and under those circumstan-

ces he cannot be heard to say that the contract is void for uncertainty. *American Hardwood Lbr. Co. v. Dent*, 151 Mo. App. 614, 132 S. W. 320; *American Hardwood Lbr. Co. v. Dent*, 164 Mo. App. 442, 144 S. W. 1198.

[2] In this case the minimum amount to be furnished was 100,000 feet and the maximum 150,000 feet. The kind was oak lumber to grade No. 2 common and better, and \$30 per 1,000 feet to be paid for 8-foot lengths, and \$35 per 1,000 for standard lengths. It was to be delivered at Laffin, Mo., by January 1, 1920. The only thing not definitely provided in this contract was the amount of 8-foot lengths and the amount of standard lengths that were to be furnished. We hold, as we did in the case cited above, that this gave the defendant the right to select the amount of each kind of the different lengths he would furnish, and with that right resting in him he had it in his power to comply with the terms of this contract as far as that provision is concerned, and the contract was a valid and binding contract.

[3, 4] It is next contended that defendant's testimony that the contract was modified was not denied, and for that reason the demurrer at the close of all the testimony should have been sustained. We do not agree with this contention. If there were a modification of the contract, that was a matter of defense, and put the burden on defendant to prove it, and even if what testimony he offered on that question was not denied, yet that testimony, being oral and not coming from plaintiff, it was still for the jury to say whether or not the testimony established the modification claimed. In this case, that issue was submitted to the jury on instructions asked by defendant, and the jury found against him, and the trial court permitted the verdict to stand, and that is binding on us, even if it be conceded that the defense of a modification of the contract was available to defendant in this case.

Objection is made to instruction No. 1 for plaintiff on the ground that it construed the contract to mean that defendant was required to furnish at least 100,000 feet of oak lumber of standard lengths, while the contract permitted him to furnish lumber of 8-foot length. The instruction is somewhat ambiguous, and if there were any conflict in the testimony as to the lengths furnished, it would be misleading and erroneous, but there is no conflict on that question. The parties never had any disagreement about the length of the lumber, and we do not think it possible that the jury in this case even thought of the question of whether the lumber delivered, or offered to be delivered, by defendant was of any particular length. That question did not enter into the issues under the evidence in the case at all, and the jury could not have been misled by the language used in this instruction.

A further objection to this instruction is

that it ignores the defense of the modification of the contract, and authorizes a finding for plaintiff without considering that defense. We think it open to that objection, provided the defense of a modification of the contract was available to defendant in this case.

[5] It will be observed that this contract was for the purchase of personal property of greater value than \$30, and was therefore within the statute of frauds, and, to make it binding, must have been in writing, or part of the purchase price paid, or part of the property received and accepted by the purchaser. It was in writing, and the statute thereby complied with. The rule is well settled in this state that a contract that is required to be in writing can only be changed or modified in writing. *Rucker v. Harrington*, 52 Mo. App. 481; *Arky v. Commission Co.*, 185 Mo. App. 241, 170 S. W. 353; *Last Chance Mining Co. v. Tuckahoe Mining Co.*, 202 S. W. 287; *Eastern States Refrigerating Co. v. J. W. Teasdale & Co.*, 211 S. W. 693. *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644.

[6, 7] It is likewise true that a contract to which the statute of frauds applies can only be modified in some one of the ways in which the statute required the contract attempted to be modified to be executed in the first instance. In this case, the supposed modification was not in writing, and, being executory in character, it could not be made binding unless it was supported by a new consideration with part payment, or a receipt and acceptance of some part of the property by the purchaser under the contract as modified. There is no evidence that either of these things was done, and hence the defense of a modification of the contract failed for want of proof. That being true, it was not necessary to refer to it in the instructions.

Defendant contends that plaintiff was negligent and unreasonably delayed inspection and acceptance of the lumber which he had sawed and had ready for inspection, and that justified his refusal to furnish the remainder of the lumber. The trial court took the view that it was the duty of plaintiff to inspect as often as defendant had on hand quantities that were reasonable for the purpose for which it was contracted, and submitted the question of plaintiff's duty in that respect to the jury on that theory in an instruction asked by defendant. The jury having found for plaintiff, they have found against defendant on his claim of unreasonable delay of plaintiff in making inspection so he is in no position to complain.

[8] Further, the contract has no provision governing that question. Some effort was made to prove a custom of the trade that required prompt inspection after delivery in certain amounts, and before delivery of the entire amount provided for by the contract, but the witnesses did not know the custom, if

there was one, and that effort failed. The defendant then attempted to show, by men familiar with the lumber business, what would be a reasonable time in which to make inspection after a delivery at the agreed place of delivery. This offer was refused, and is now assigned as error. We think the objection to this testimony was properly sustained. The contract contained no provision requiring inspection on receipt of any part of the lumber prior to the delivery of the whole amount, and unless a custom of the trade which would require an inspection of a less amount than the whole could be shown, we do not think plaintiff could be required to make any inspection until informed that the minimum amount to be furnished under the contract was ready for inspection.

[9] Complaint is made that plaintiff's instruction No. 5, which defined fraud, was erroneous. There was no occasion for giving this instruction. Fraud was not pleaded as a defense in this case, but was pleaded only by way of inducement to show what led up to and caused the alleged modification of the contract. Since we hold that the alleged modification of the contract was not binding, the element of fraud as pleaded in this case is also eliminated, and, that being true, this instruction, whether erroneous or not, was harmless.

[10] Defendant asked an instruction to the effect that plaintiff must have been able, ready, and willing to perform his part of the contract by January 1, 1920. This was refused. In view of the fact that both parties recognized the contract as in force up to February 7th, when defendant sold to another party, we think this instruction was properly refused.

Instruction No. 2 for plaintiff is as follows:

"You are further instructed that if you shall find and believe from the evidence that the plaintiff substantially performed his part of said contract, and that defendant did not perform his part thereof, then you will find for the plaintiff, and you will assess his damages at the difference in the price of \$30 per thousand for such number of feet of oak lumber as you may find and believe from the evidence, if any, that defendant failed to deliver, and the fair market value of the same on the 9th of February, 1920, or within a reasonable time thereafter."

[11, 12] Complaint is made of this instruction that under it, if the jury found for plaintiff, then, in ascertaining the damages, they could consider the market value of such lumber on February 9, 1920, or within a reasonable time thereafter, while the contract fixed January 1, 1920, as the time for performance and contention is made that the jury should have been instructed to find the value at that time. It is true that the contract provided that the lumber should be delivered by January 1, 1920, but both parties recognized it as in force after that date and up to February 7th, when defendant sold what lumber

he had to another party. Plaintiff received notice on February 9th that defendant would furnish him no more lumber under the contract. This justified the court in placing the time of breach and the date at which to ascertain the market value of the lumber as on or about February 9, 1920. The words "or within a reasonable time thereafter" should have been omitted. Plaintiff testified that he was a lumber dealer, and had sold the lumber he had bought from defendant, and, when defendant failed to furnish it, he had to buy other lumber on the market to replace it, and that the amount he was required to pay was the reasonable market value at the time. This purchase for the purpose of replacement was made about March 1st, so the only evidence on the part of plaintiff of a specific amount of increase in value is the increase on March 1st. The evidence also shows that there was a large increase in the value of lumber in February and March. There is no evidence from which it can reasonably be found what the amount of increase by February 9th was, except the testimony of defendant that on February 7th he sold the lumber he had been holding for plaintiff at an increase over his contract with plaintiff of \$15 per thousand on 8-foot lumber and \$20 per thousand on standard lengths. Defendant admits that he at no time had 100,000 feet of lumber which he could have furnished to plaintiff. It is also conceded by the testimony that 19,000 feet was furnished to plaintiff. This left a balance of 81,000 feet under the minimum amount of 100,000 feet called for by the contract. The jury having found for plaintiff, it was their duty to assess his damages at the difference between the contract price and the market value on or about February 9, 1920, on 81,000 feet. Defendant testified that he sold at an increase of \$15 per thousand on 8-foot lumber and \$20 on the other lengths. On this basis, the least the jury could have found would have been \$15 per thousand on 81,000 feet. This would amount to \$1,215.

If plaintiff will, within 10 days, remit all of the judgment in excess of \$1,215, the judgment will be affirmed for that amount; otherwise the judgment will be reversed, and the cause remanded.

FARRINGTON, and BRADLEY, JJ., concur.

# MILLIGAN v. G. D. MILLIGAN GROCER CO. (No. 2800.)

(Springfield Court of Appeals. Missouri. June 18, 1921. Rehearing Denied Aug. 9, 1921.)

## 1. Corporations — Estopped to question validity of dividend.

Where directors of a corporation, individually and as a board, conducted the business of

the corporation on the assumption that a certain dividend declared by only a part of the directors was valid, and executrix of a stockholder knew of such conduct and relied on it when selling the stock of deceased, the corporation was estopped from questioning the validity of the dividend in action by executrix to recover the same, having permitted the dividend to be transferred to another on the books of the company without an assignment from the executrix.

## 2. Witnesses — 142 — Surviving director of corporation held not disqualified as witness.

Corporate directors present at a special meeting were not disqualified as witnesses, by the death of another director, to testify that an absent director had no notice of the meeting, in an action by executrix of the deceased director to recover a dividend declared at such meeting, under Rev. St. 1919, § 5410; the directors not standing in the relation to each other as parties to a contract or a cause of action within the meaning of the statute.

## 3. Corporations — 426(2) — Action of stockholders must be unanimous to ratify order of directors.

Action or want of action by stockholders, based on actual knowledge, must be unanimous in order to constitute a ratification of an order of a portion of the board of directors.

## 4. Corporations — 152 — Stockholder cannot declare dividend nor ratify void declaration thereof.

Under Rev. St. 1919, § 10153, stockholders of a corporation cannot, even in the most formal way, at a legal stockholders' meeting and by unanimous vote, declare a dividend and enforce its payment without the consent of the board of directors, nor can they by the same formal action ratify a void order of the board of directors declaring a dividend without the consent of the board of directors.

## 5. Corporations — 426(4) — Ratification of void order declaring dividend must be by board of directors.

Ratification of an order declaring a dividend, void because made by only a part of the board of directors, must come about by some action or want of action by board of directors acting as such, as the corporation cannot be bound by individual action or silence of the members of the board acting separately, under Rev. St. 1919, § 10153.

## 6. Corporations — 426(4) — Void order declaring dividend held ratified.

An order declaring a dividend, void because made by only a part of the board of directors, held ratified by the board by the crediting of the amount of the dividend to the stockholders and transferring such credits upon the books from the account of sellers of stock to that of purchasers.

## 7. Corporations — 426(4) — Void order declaring dividend ratified by informal action.

Ratification of an order declaring a dividend, void because made by only a portion of the board of directors, may be shown without showing any formal action of the board of

directors or proving it by a record of the proceedings of the board at a regular meeting; anything from which may be clearly found as a fact that the board as a board had agreed that the void action should be binding being sufficient.

8. Appeal and error  $\S$ 1071(2)—Erroneous declarations of law in case tried before court not ground for reversal of correct judgment.

The only office filled by declarations of law in a case tried before the court without a jury is to show the theory on which the trial court decided the case, and when a finding of facts is filed and it appears from the facts found that the final conclusion of the court is correct, his judgment should be affirmed, notwithstanding erroneous declarations of law and error in refusing declarations of law.

Appeal from Circuit Court, Greene County; Orin Patterson, Judge.

Action by Nelle C. Milligan, executrix of the last will and testament of Alva D. Milligan, deceased, against the G. D. Milligan Grocer Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Barbour & McDavid, of Springfield, for appellant.

E. P. Mann and W. D. Tatlow, both of Springfield, for respondent.

COX, P. J. Action by Nelle C. Milligan, executrix of the last will and testament of Alva D. Milligan, deceased, against G. D. Milligan Grocer Company, a corporation, to recover \$5,950 and interest as dividend on 238 shares of capital stock in the corporation. The petition alleges that deceased, Alva D. Milligan, was the owner of 238 shares of stock of the defendant at the time of his death on or about January 4, 1919; that on or about April 20, 1918, the board of directors of defendant declared a dividend of \$25 on each share of stock, which amounted to \$5,950 on the 238 shares held by Alva D. Milligan at his death; and that it has not been paid. The petition further alleges that after said dividend was declared, to wit, on or about April 22, 1918, the said dividend was credited to the several stockholders on the books of the corporation, and so remained credited on said books at the time of the death of the deceased and at the time the stock of deceased was sold by order of the probate court, and that a part of said dividend was afterward paid to some of the stockholders; that the declaration of said dividend was known to and acquiesced in by all the directors and stockholders and recognized by them as a debt and obligation of the corporation to the respective stockholders; and that the defendant corporation as well as its directors and stockholders are estopped from denying or questioning the validity of said declaration of dividend.

The answer denies that a dividend was de-

clared by the board of directors or that it was credited to the stockholders on the books of the corporation or that such alleged action was known and acquiesced in by all the directors and stockholders or that they or the corporation are estopped to resist the payment of said alleged dividend. It further alleges that on April 20, 1918, the board of directors of the corporation consisted of three members, Alva D. Milligan, F. A. Leard, and Madge E. Milligan; that on that date two of said directors met in special meeting and made the order declaring the dividend, but without notice to Madge E. Milligan, the other member, and therefore their action at that time was void.

The trial was had before the court without a jury. Judgment for plaintiff, and defendant has appealed.

A finding of facts was filed by the trial judge, from which we note the following: The court found that defendant is a corporation with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each. In 1918, Madge E. Milligan was president, F. A. Leard, her brother, vice president, and Alva D. Milligan was secretary and general manager and he had active charge of the business. Its directors were Madge E. Milligan, Alva D. Milligan, and F. A. Leard. The records of the corporation show that a special meeting of its directors was held on April 20, 1918, at which a dividend of \$25 on each share for the year ending December 31, 1917, was declared. At this meeting only F. A. Leard and Alva D. Milligan were present and the other member of the board, Madge E. Milligan, had no notice of the meeting and was not present. Alva D. Milligan died in January, 1919. Plaintiff is executrix of his will. Alva D. Milligan was the owner of 238 shares of stock, and his part of the dividend has not been paid. All of the stockholders resided in Springfield, Mo., except Norvell W. Milligan, who lived in California. The stock was held as follows: Madge E. Milligan, 262 shares; Madge E. Milligan, trustee for Hester Milligan, 262 shares; Alva D. Milligan, 238 shares; Mary Milligan Clement, 118½ shares; Norvell W. Milligan, 118½ shares; F. A. Leard, 1 share. On April 22, 1918, the purported dividend was extended on the books of the corporation as credits in favor of the respective stockholders according to their interests. At or about that time every stockholder was notified of the declaration of the dividend by a document called a "trial balance." These documents showing the dividend, with other information, were sent to the stockholders a number of times. No stockholder or director ever objected to the said dividend nor prior to this suit challenged its validity, but they all acquiesced in it. After Norvell W. Milligan was notified of the dividend, he asked that it be paid, but was

informed by Alva D. Milligan that the corporation was not ready to pay. In June, 1918, Norvell drew a draft for \$500 on the corporation, which was paid and charged against his share of the dividend, which amounted to \$2,962.50. In June, 1919, Madge E. Milligan, acting for herself and certain employees of the corporation, purchased the stock of Norvell W. Milligan for \$50,000, less certain deductions, among which was the \$500 received on the said draft, and this \$500 was paid by her to the company. This left the original credit of \$2,962.50 credited to him on account of the supposed dividend intact and was then credited to the "employees" account for whom Madge E. Milligan had bought the stock.

In June, 1919, the plaintiff, under order of the probate court, sold as executrix the 238 shares of stock owned by Alva D. Milligan to Madge E. Milligan. This stock was appraised at its book value, omitting the dividend. In the negotiations for this sale, both plaintiff and Madge E. Milligan acted in recognition of the validity of the dividend of April 20, 1918, and straightway after the sale the dividend of \$5,950 that had been credited to Alva D. Milligan was transferred on the books of the company to Madge E. Milligan without an assignment thereof from plaintiff. All the stockholders knew about the dividend and all the directors knew all of the particulars about this dividend. The by-laws of the company enabled either of the three directors to call a special meeting of the board. The by-laws also provided for two regular meetings each year of the board, and at least one of these had been held. There had been no disavowal of the dividend nor a cancellation of the credits entered because of the dividend.

[1] Because the directors of the corporation individually and when acting as a board conducted the business of the corporation on the assumption that the dividend of April 20, 1918, was valid, and because plaintiff knew of that conduct and relied on it, and because the corporation cannot restore the status quo ante, the corporation is estopped from questioning the validity of the dividend. The corporation accepted or affirmed the validity of the dividend by failing to challenge it in any of its meetings and by permitting the dividend to be carried on its books as credits to stockholders for more than a year and by permitting plaintiff's interest therein, amounting to \$5,950, to be transferred to another on the books of the company without an assignment from plaintiff.

The trial court held that the purported action of the board of directors on April 20, 1918, was illegal because one director was not notified of the meeting, but held that the corporation became bound by it on the theory of estoppel and by ratification, and found for plaintiff for \$5,950 and interest at 6 per cent. from August 21, 1919.

The finding of the court that Madge E. Milligan, one of the directors, was not notified of the meeting of the board on April 20, 1918, was based on the testimony of F. A. Leard and Madge E. Milligan, who were directors at that time. Respondent contends that by the death of Alva D. Milligan, one of the directors who participated in the meeting on April 20, 1918, the other directors, F. A. Leard and Madge E. Milligan, are by statute rendered incompetent to testify that no notice of that meeting was given to Madge E. Milligan, the other director, and, with their testimony eliminated, there is no evidence that such notice was not given, and in that situation the law will presume that the meeting was regularly called, and the record, being regular on its face, must stand as valid and binding.

Respondent also contends that even if these witnesses are held competent and the finding that no notice of that meeting was given is warranted, yet the action of the two members of the board has since been ratified by the corporation through its directors and stockholders, and also that it is now estopped to deny the validity of the declaration of the dividend.

[2] Appellant's contention is that the holding of the trial court that F. A. Leard and Madge E. Milligan, directors, were not disqualified as witnesses by the death of the other director, Alva D. Milligan, was right, and that the finding from their testimony that Madge E. Milligan had no notice of the special meeting of the board of directors on April 20, 1918, at which the dividend in question purports to have been declared, was also right, and therefore that action of the board as shown by the record of the board's proceedings was void is also correct, but that the finding of the court that the corporation had ratified the action of the two in declaring a dividend, or that it is now estopped to deny the validity of the declaration of a dividend at that time, is not warranted by the evidence, and hence the finding should have been for defendant.

The question of the competency of F. A. Leard and Madge E. Milligan as witnesses to testify that no notice of the special meeting of the board of directors was given has been most ably briefed by counsel and many authorities cited to uphold the opposing contentions. Space will not permit a full review of these cases. The statute (now section 5410, Stat. 1919) by its very language imports that its provisions are to apply whenever there are two or more parties to a contract or cause of action that may thereafter be in issue and on trial in court, and at the time of the trial one of these parties shall be dead or insane. The purpose of this statute is to prevent a living party from giving, in his interest, his version of the contract or cause of action when death has closed the lips of the other



party, whose version of what occurred cannot be given in support of his interest.

The language of the statute and the reason of the rule contemplate that the parties to whom the prohibition of the statute applies mean parties whose interest in the contract or cause of action in issue are adverse to each other. This adversity of interest furnishes the reason for the rule, and if there is no adversity of interest, then there is no reason why the death of one party should disqualify the other party as a witness. The statute does not undertake to disqualify the living party absolutely. Its purpose is to disqualify him when and only to the extent that his testimony might be subject to question by the other party. *Elsa v. Smith*, 273 Mo. 396, 202 S. W. 1071.

In attempting to declare a dividend on April 20, 1918, we do not think F. A. Leard and Alva D. Milligan stood in the relation to each other and to Madge E. Milligan, the other director, as parties to a contract or cause of action within the meaning of our statute. They and Madge E. Milligan, the other director, were the agents of the corporation, charged jointly and mutually, not adversely, with the management of its affairs. They were each charged, with the same duty and were required to keep the same purpose in view in the performance of their duties as directors. Their interests were mutual and co-ordinate, not adverse. If the deceased director were now alive, his interest in the result of this litigation would be the same as the interest of the living members, who it is now contended are rendered incompetent as witnesses by his death. Except in torts, the statute was intended to apply to a situation in which there should be negotiation, as distinguished from consultation; that is, there must enter into the transaction the element of adverse interest in some way at the time the contract was entered into or the cause of action, whatever it be, was finally consummated, as distinguished from a consultation and agreement reached in relation to a matter in which the interests of all the parties were mutual.

If the statute should disqualify witnesses situated as are these parties, then the most baneful results might follow. Suppose a meeting of the board of directors of a corporation is regularly held and some important action is taken that might affect the entire future of the corporation, but by some oversight or accident the action taken is not entered on the record of the proceedings had at that meeting. Then, should it afterward become necessary to prove what action was taken by the board, it could be shown by the oral testimony of members of the board who were present. *Preston v. Mo. & Pa. Lead Co.*, 51 Mo. 43; *Taussig v. St. Louis & Kirkwood Ry. Co.*, 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674; *Sanitary Co. v. Reed*, 179 Mo. App.

164, 174, 161 S. W. 315; *Walker v. M. W. A.*, 190 Mo. App. 355, 363, 177 S. W. 331.

If the death of a member of the board should render all other members thereof incompetent to testify, then, if no record had been made of the board's action, no proof thereof could be made. We do not think the statute was meant to apply to a situation such as we have in this case, and we hold that the witnesses were competent, and the conclusion of the trial court that the order of April 20, 1918, declaring the dividend was void when made, is correct.

[3] Respondent contends that the stockholders ratified the declaration of a dividend by making no objection thereto. This is based on the fact found by the trial court that all of the stockholders were informed of the action taken on April 20, 1918, and also that stockholders are presumed to know what their board of directors do, and with this knowledge acquiesced in what was done, and by this acquiescence made the void order valid. We do not think that position tenable in this case. The trial court was in error in finding that all the stockholders were informed of the attempted declaration of a dividend on April 20, 1918. The court finds that what were termed "trial balances" were sent to all the stockholders soon after the dividend was declared, and that a number of trial balances were afterwards sent to all the stockholders, and that these "trial balances" showed this dividend. The court also found that all of the stockholders resided in Springfield, Mo., except Norvell W. Milligan. These findings are not supported by the evidence. The evidence shows that the "trial balances" were sent to stockholders upon request only, and there is no evidence that Mary Milligan Clement, one of the stockholders, lived in the city of Springfield, Mo., or that she ever knew in any way or heard of this dividend, or that she ever received a "trial balance." This failure of proof eliminated any consideration of the effect of action or want of action on the part of the stockholders, based on actual knowledge, for it is conceded that if the stockholders could bind the corporation at all by a ratification of the order of April 20, 1918, their action must be unanimous.

It is next contended by respondent that the law presumes that the stockholders knew what the board of directors had done, and are held in law to have had knowledge of their action even though they had no actual knowledge thereof, and we are cited to the cases of *Feld v. Roanoke Inv. Co.*, 123 Mo. 603, 27 S. W. 635, *Kitchen v. Railroad*, 69 Mo. 224, and *Evans v. Railroad*, 64 Mo. 453, to sustain that position. There is language used in those cases that indicates that the court held that view, but when the facts of those cases are considered, it will be seen that they are so dissimilar to the facts in this

case that the expressions there used can hardly be taken as authority for applying that presumption to Mary Milligan Clement in this case; but, be that as it may, we do not think the want of action on the part of the stockholders is a controlling factor in this case, nor do we understand that the trial court based its judgment on the failure of the stockholders to protest against the declaration of this dividend.

[4] Our statute (section 10153, Stat. 1919) places the power to declare dividends in the board of directors, and we do not understand that the stockholders possess that power. We do not say that a distribution of corporate earnings among the stockholders by unanimous consent might not, under some circumstances, be binding on the corporation, but that question is not involved here. This is a question of the ratification of a void act of two of the three members of the board of directors in attempting to declare a dividend. The stockholders could not, even in the most formal way, at a legal stockholders' meeting and by unanimous vote, declare a dividend and enforce its payment without the consent of the board of directors. Neither could they by the same formal action have ratified the order of April 20, 1918, in this case, and made the order valid, without the consent of the board of directors.

Since the stockholders had no power to declare a dividend in the first instance, they could not, by any form of ratification of the illegal act of another, impart life to that which they were powerless to create. Ratification, to be effective, must be by the same body invested with the power to act in the first instance. *Clark & Marshall on Corporations*, § 682; *Calumet Paper Co. v. Haskell Show Prtg. Co.*, 144 Mo. 331, 338, 45 S. W. 1115, 66 Am. St. Rep. 425.

[5, 6] Ratification, then, to be effective, must come about by some action or want of action by the board of directors acting as such, who alone had the power to declare a dividend. Whatever is done by them must be done as a board. If, too, the corporation is to be bound by the nonaction or silence of the board, it must be such nonaction or silence as applies to the board as such. The corporation cannot be bound by the individual action or silence of the members of the board acting separately. On this phase of the case the situation is as follows: Dividends had been declared many times before, and on being declared it had been the universal practice of the corporation to place the amount of the dividend due each stockholder to his credit on the books of the corporation and then pay to the stockholders. The same course as to entering the credits to the individual stockholders was followed in this instance. The credits were entered on April 22, 1918, just two days after the order declaring the dividend was made. There was

evidence to justify a finding that one stockholder had been permitted to withdraw part of the dividend credited to him at one time, but when he afterward sold his stock to another stockholder he was required by the purchaser to return the amount drawn out and the credit to him was then transferred to the credit of the purchaser. The evidence further shows that the stock owned by Alva D. Milligan was sold by order of the probate court, and after that sale the dividend which stood to his credit was transferred on the books of the corporation to the credit of the purchaser of that stock. The by-laws of the corporation required the board of directors to meet regularly once every six months, in January and July. Whether or not a meeting of the board was held in July, 1918, does not appear, but a meeting was held in January, 1919, and the record of that meeting does not show that any action was taken in relation to this dividend. The entries in the books showing this dividend and the credits of it to the stockholders were not changed, and when this suit was brought in November, 1919, the dividend still stood to the credit of the stockholders as it had remained since June 22, 1918, except that as to what stock had been sold it was transferred on the books from the account of the seller to that of the purchaser. We are of the opinion that the above facts would warrant a finding that the board of directors as such had ratified the void act of June 20, 1918, and made it valid. The board controlled the business of the corporation, and it is well settled that what would bind an individual by estoppel binds the corporation, and what would amount to ratification of the unauthorized act of an agent of a private person will operate as a ratification by a corporation. *Chouteau v. Allen*, 70 Mo. 290, 325, 326.

[7] It is also true that ratification may be shown without showing any formal action of the board of directors or proving it by a record of the proceedings of the board at a regular meeting. *Chouteau v. Allen*, 70 Mo. 290; *First National Bank v. Fricke*, 75 Mo. 178, 183, 42 Am. Rep. 397; *Washington Savings Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405.

Anything from which it may be clearly found as a fact that the board as a board had agreed that the void act should be binding will suffice. It seems to us that the fact that the dividend was credited on the books of the corporation to the individual stockholders immediately after it was purported to be declared, and had been permitted to so remain for about 18 months before this suit was brought, and that in the meantime at least one regular meeting of the board was held and no order made of record disaffirming the former order declaring the dividend, and no order made directing a change in the credits thereof to the stockholders, is sufficient

to justify a finding by the trier of the facts that the board as a board had decided to let the order remain and had thereby ratified and made it binding.

The trial court intermingled his conclusions of law with the finding of facts, but we think the theory on which the trial court reached his conclusion that plaintiff should recover is indicated in the following excerpts, which are found near the end of the finding of facts:

"Because the directors of the corporation, individually and when acting as a board, conducted the business of the corporation on the assumption that the dividend of April 20, 1918, was valid, and because plaintiff knew of that conduct on the part of the corporation and relied upon it, and because the corporation cannot restore the status quo ante, the corporation is estopped from questioning the validity of the dividend."

"The corporation's act of declaring the dividend of April 20, 1918, was within its jurisdiction, but defectively exercised in this: That the dividend was declared when one of its directors was neither present nor notified. The declaration of the dividend on the face of the defendant's records was valid. It was up to the corporation to either reject it or accept it. The corporation accepted it by failing to challenge it at any of the corporate meetings and by permitting it to be carried on the books of the corporation for more than a year, not as a corporate asset, but as credits in favor of the respective stockholders in accordance with their interests therein."

The second paragraph quoted above expresses the conclusion of the trial court that the board of directors had ratified the declaration of the dividend. This we have already discussed and approved the conclusion reached.

By the first paragraph quoted above, it will be seen that the trial court held that by the conduct of the board of directors, coupled with the fact that the plaintiff had relied on the validity of the declaration of the dividend of April 20, 1918, the corporation is estopped from questioning the validity of the dividend. This conclusion is based on the facts found, that the record of the corporation showing the declaration of this dividend was fair on its face; that the dividend was immediately thereafter passed to the credit of the individual stockholders and so remained until after the death of Alva D. Milligan and the sale of his stock by plaintiff as his executrix by order of the probate court; and that in the probate proceedings the stock was appraised at its book value, exclusive of the dividend, and that the sale of the stock was based on its value without the dividend. We think the court's conclusion on these facts was correct. The books of the corporation showed the dividend segregated from the stock. The probate court had ordered the stock, not the dividend, sold. The law required the stock to be appraised before the

sale, and in determining its value for the purpose of appraisement the dividend was not, and could not be, considered, because it had been segregated from the stock and could not and did not pass with the sale of the stock. Madge E. Milligan, who purchased the stock, may have understood, and we infer from her testimony that she did understand, that the dividend went with the stock, but we cannot, nor could the trial court, in this action relieve against a mistake in judgment of the purchaser of this stock as to what went with it. Neither the estate of Alva D. Milligan nor the corporation could be bound by an opinion of the purchaser of the stock that was at variance with the correct conclusion to be drawn from the facts shown on the face of the records and books of the corporation and the proceedings in the probate court under which the purchase was made. After the sale of this stock we have the following conditions with which to deal: An order appears on the records of the corporation showing a dividend declared. The books of the corporation show the dividend credited to the individual stockholders as their interests appear. The executrix of a deceased stockholder has sold the stock of her testator under order of the probate court, with the dividend segregated. As far as this executrix is concerned, the board of directors could not, after the sale of that stock, disaffirm the dividend and turn her part thereof into the treasury of the corporation, because to do so would result in injury to the estate in her charge. We think these facts justify the application of the doctrine of estoppel.

[8] Complaint is made that the declarations of law given at the request of plaintiff were erroneous. We have carefully examined these declarations, and while we think some of them are erroneous, we are convinced that the trial court's final conclusions were correct. The only office filled by declarations of law in a case tried before the court without a jury is to show the theory on which the trial court decided the case, and when a finding of facts is filed and it appears from the facts found that the final conclusion of the court is correct, his judgment should be affirmed, notwithstanding the erroneous declarations of law. *Baxter v. Troll*, 152 Mo. App. 557, 560, 133 S. W. 1188; *Schoen Plumbing Co. v. Hugunin*, 156 Mo. App. 68, 74, 135 S. W. 967; *Smoke Preventer Co. v. St. Louis*, 205 Mo. 220, 232, 103 S. W. 513; *Rothenberger v. Garrett*, 224 Mo. 191, 202, 123 S. W. 574.

What we have said will also dispose of the contention that the court erred in refusing declarations of law asked by defendant.

Judgment affirmed.

FARRINGTON and BRADLEY, JJ., concur.

**TUCKER v. ST. LOUIS-SAN FRANCISCO  
RY. CO. (No. 2905.)**

(Springfield Court of Appeals, Missouri.  
June 18, 1921. Rehearing Denied  
Aug. 9, 1921.)

1. Carriers  $\Leftrightarrow$  20(3)—Statute providing penalty for discrimination in facilities for transportation of freight held not to include discrimination in favor of one individual as against another individual; "other;" "commission merchants."

Under Rev. St. 1919, § 9975, providing a penalty for discrimination in facilities in transportation of freight between "commission merchants or other persons engaged in the transportation of freight" and individuals, the rule of ejusdem generis prevents inclusion of all other shippers, such as lumber dealer or sand dealer, in phrase "or other persons engaged," etc., since the definition of "other" is "other such like," and the term "commission merchants" does not designate an all-inclusive class, but the term, while used synonymously with "factor," "broker," etc., is not always synonymous, and intent to include discrimination between individuals not being clear.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commission Merchant; Other.]

2. Statutes  $\Leftrightarrow$  194—Exception to a rule of ejusdem generis stated.

The exceptions to the rule in construction of statute of ejusdem generis are that it does not apply where it clearly appears from the statute as a whole that no such limitation was intended, nor where the specific words of the statute signify subjects greatly different from one another, nor where the specific words embrace all subjects of their class, so that the general words must bear a different meaning from the specific words or be meaningless.

3. Carriers  $\Leftrightarrow$  20(3)—Converting public switch to a private one held not to subject railroad to penalty at suit of injured individual.

Rev. St. 1919, § 9975, providing a penalty for discrimination by railroad in facilities for shipping naming different classes of shippers and forbidding discrimination by them as against individuals, does not authorize penalty where railroad converts a public switch to a private one for use of an individual, thereby injuring an individual who was compelled to transport over a more distant switch, since, aside from the rule of ejusdem generis, discrimination between individuals was not contemplated.

4. Statutes  $\Leftrightarrow$  241(1)—Penal statute strictly construed.

Penal statute must be strictly construed.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by D. T. Tucker against the St. Louis-San Francisco Railway Company. Judgment for defendant and plaintiff appeals. Affirmed and motion for rehearing denied but case certified to Supreme Court

by reason of conflict with opinion of that court.

Corbett & Stiles, of Caruthersville, for appellant.

W. F. Evans, of St. Louis, and Ward & Reeves, of Caruthersville, for respondent.

BRADLEY, J. Plaintiff filed his petition in 31 counts to recover the penalty provided in section 9975, R. S. 1919. A trial before the court and a jury resulted in a verdict and judgment for the defendant. Unsuccessful in motion for new trial, plaintiff appealed.

Plaintiff alleges in his first count that on July 1, 1920, and for a long time prior thereto, defendant maintained a public switch track running from its station in Caruthersville a distance of about 300 yards to the bank of the Mississippi river, and near which switch and the river bank plaintiff had for a long time been operating a sawmill; that the defendant had been for a long time prior to July 1, 1920, furnishing cars on said switch for plaintiff to load his lumber; that on or about July 18, 1920, plaintiff requested defendant to furnish him cars on said switch to ship lumber to Hayti, Mo.; and that defendant refused, but informed plaintiff that said switch had been leased to the Caruthersville Sand Company, and that if plaintiff desired cars to ship lumber he would have to take them on another switch. Plaintiff further alleges that he was compelled by reason of such refusal to furnish him cars on the said switch to haul his lumber from his mill to a much more distant switch at much extra expense; that the defendant permitted the sand company to use said switch, and denied plaintiff the use thereof; and that by reason of the premises defendant furnished the sand company superior facilities for the transportation of freight, in violation of section 3174, R. S. 1909, now section 9975, R. S. 1919. Plaintiff prayed judgment on this count in the sum of \$30, the amount of the freight charges on a car shipped July 18, 1920. The remaining counts are the same except as to the date of the shipment and the amount. In the aggregate plaintiff asked judgment for \$930. The defendant answered by a general denial.

The switch in question extends from near the depot in Caruthersville in a northeasterly direction to or near the river. It crosses the river levee, and a public road or street is between the levee and the river. Plaintiff's sawmill is on the river bank on what may be called the north side of the switch, and the sand company's sand bins are on the bank of the river and somewhat southeast of plaintiff's mill. Plaintiff's mill has been so located for some five years, and he and the public generally, including the sand company, have been using this switch. A

portion of the switch at its river terminus had not been in repair for some time, how long is not clear, due to a cave-in of the river bank. On March 15, 1920, the sand company entered into a contract with defendant railway company by which defendant agreed to construct at the sand company's expense a spur leading from the switch in question. This spur connects with the southeasterly side of the switch 530 feet from the point where the switch connects with the main track near the depot, and said spur extends from the point of connection in an easterly direction a distance of 291 feet. The first 95 feet of this spur are on the right of way of defendant, and the remaining 196 feet are on the property of the sand company. The sand company is to pay for the upkeep of the whole spur, but defendant owns outright that part on its right of way. It is provided in the contract that defendant shall have the right at any time when in its opinion the business furnished by the sand company does not justify the maintenance of the spur, on giving 30 days' notice in writing, to discontinue the use of the spur.

This spur cost the sand company \$1,060, and J. A. Riggs, who constituted the sand company, testified that in 1913 he, under a contract like the one of March 15, 1920, built 200 feet on the main switch at a cost of \$233. It would appear that this extension on the main switch track was to repair that part that had been wrecked by the cave-in of the river bank. The main switch-track is about 900 feet long, and the sand company under the contract, so far as appears, had no special interest in the switch track except the 200 feet. The contract under which the sand company extended the switch or repaired it was not put in evidence. The sand company extended the main switch track under its sand bins, and had its own motive power to move cars after they were placed on the switch track. By this means it could load six or eight cars daily, if they were placed on the switch for its use. It used the spur it built to place cars on after being loaded so as to have them out of the way. If plaintiff used the switch, the sand company would not have sufficient room for its cars. The Pierce Oil Company has its tanks on the east side of the switch track, but up near the depot, between the point where the switch track leaves the main track and the levee. The oil company uses this switch, and there is an understanding between the sand company and defendant that when the oil company is using the switch the sand company may not be accommodated with all the empty cars it may desire.

Here is the situation as we see it: The sand company extended the switch track 200 feet in 1913. Plaintiff began using this switch, but not the 200 feet, to load his lumber in 1915, and continued to so use it as did

the general public until July, 1920. The switch had been a public switch for 25 years, except for that portion, if any, which the sand company built anew or repaired in 1913. In March, 1920, the sand company had a private spur built connecting with this switch track, and in July, 1920, the defendant discontinued the whole switch track as a public switch, and converted it into a private switch, thereby compelling plaintiff to haul his lumber to a more distant switch and at considerable expense. According to the contract of March 15, 1920, and the one the sand company claims to have for the 200-foot extension, there is no private switch except the 200-foot extension and spur built in 1920. At most, this is all that both the contracts cover, and the remaining 700 feet of the main switch is private merely by a course of conduct on the part of defendant.

Plaintiff makes several assignments of error, but in our view it is not necessary to consider but one question. Under the facts, and granting that plaintiff has been discriminated against in facilities, may he invoke the penalty provided in section 9975, R. S. 1919? This section reads as follows:

"Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. No railway company, corporation or association shall hereafter make any discrimination in charges or facilities in transportation of freight or passengers between transportation companies and individuals, nor in the transportation of freight between commission merchants or other persons engaged in the transportation of freight and individuals, in favor of either, by abatement, drawback, or otherwise, nor shall any such company, corporation or association, nor any lessee, manager or employé of any such company, corporation or association make any preference between the parties aforesaid in furnishing cars or motive power, for the purpose aforesaid. Any company, corporation or association, or manager, lessee or employé, violating the provisions of this section, shall forfeit and pay to the party injured the whole amount of such transportation charged, to be recovered before any court of competent jurisdiction: Provided, that excursion or commutation tickets may be issued at special rates."

[1] The concrete question is: Does the statute cover a case where the railway has discriminated against one individual in favor of another individual? The statute says that no railway company shall make any discrimination in charges or facilities in the transportation of freight or passengers between (1) transportation companies and individuals, nor in the transportation of freight between (2) commission merchants or other persons engaged in the transportation of freight and individuals, nor shall such company make any preference between the parties aforesaid in furnishing cars or motive power for the purpose aforesaid. Neither

plaintiff nor the sand company is a transportation company, hence not embraced in the first classification of the statute. The second class mentioned is commission merchants or other persons engaged in the transportation of freight and individuals. Neither plaintiff nor the sand company is a commission merchant; hence they are not in the second classification so far as the first part of the second classification is concerned. But in the second classification the statute says commission merchants or other persons engaged in the transportation of freight and individuals. It is apparent that, unless the clause "or other persons engaged in the transportation of freight" will embrace the sand company or plaintiff, plaintiff cannot recover. As used in the statute, what class of shippers does the clause "or other persons," etc., cover? If the clause includes all classes of shippers, then it includes plaintiff and the sand company; but if the class included in the description or other persons, etc., is limited in its scope, and includes only shippers of the same or similar class to the class designated as commission merchants, then such description does not include plaintiff or the sand company.

[2] Respondent railway company invokes the rule of *ejusdem generis*, and contends that the description "or other persons," etc., has reference only to a class of shippers similar to commission merchants. In *State v. Eckhardt*, 232 Mo. 49, 133 S. W. 321, the Supreme Court, in discussing the rule of *ejusdem generis*, quotes from 36 Cyc. 1119, as follows:

"The rule is based on the obvious reason that, if the Legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. The words 'other' or 'any other,' following the enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind and character. The doctrine of *ejusdem generis*, however, is only a rule of construction, to be applied as an aid in ascertaining the legislative intent, and does not control where it clearly appears from the statute as a whole that no such limitation was intended. Nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another; nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless."

The court says of this definition that it clearly explains the meaning, purpose, manner of applying, and the limitations of the rule of *ejusdem generis*. Our Supreme Court approves the definition of "other" contained in 36 Cyc., supra. It means "other such like." Applying this definition to the words "or other persons," etc., as used in the statute under consideration, and substituting

the definition for "other," the statute would then read: Commission merchants or other such like persons engaged in the transportation of freight and individuals. There are several exceptions mentioned in the definition quoted, supra, where the rule of *ejusdem generis* does not apply: (1) It does not apply where it clearly appears from the statute as a whole that no such limitation was intended. (2) The rule does not apply where the specific words of the statute signify subjects greatly different from one another. (3) The rule does not apply where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless. It certainly is not clear from the statute as a whole that no limitation was intended by the use of the general description "or other persons engaged," etc. On the other hand, it appears clear from the statute that individual shippers were considered, on the one hand, and some other class of shippers, on the other. In other words, it is by no means clear from the statute that the penalty therein provided may be invoked where there is a discrimination between individuals. Therefore the first exception mentioned in the definition does not apply. The second exception cannot apply because the statute is aimed at protecting individual shippers, on the one hand, against some favored class, on the other hand. The third exception is where the specific words embrace all the objects of that class. If commission merchants cover the whole field of that class, then the clause "other persons engaged in the transportation of freight" has reference to a separate and distinct class and is broad enough to embrace individuals. But we are unwilling to hold that commission merchants as used in the statute covers the whole field of shippers of that class, because "commission merchant," "factor," "broker," etc., while frequently used synonymously, are not always synonymous. In *State ex rel. v. Thompson*, 120 Mo. 12, 25 S. W. 346, the court says:

"A factor or commission merchant is an agent; and it is to be observed at the outset of this case that the character of factor and broker is often combined in the same person, and in such cases we are to distinguish between his acts in the one character and in the other. Story on Agency (9th Ed.) § 32a. And in like manner the character of agent and servant may be, and often is, combined in one and the same person, and in such cases a distinction must be made between his acts as servant and those as agent. A factor or commission merchant is generally defined to be 'an agent employed to sell goods or merchandise, consigned or delivered to him by or for his principal, for a compensation, commonly called factorage or commission.' Story on Agency (9th Ed.) § 33. Again, a factor is 'a

commercial agent, transacting the mercantile affairs of other men, in consideration of a fixed salary or certain commission, and, principally, though not exclusively, in the buying and selling of goods."

A commission merchant is sometimes spoken of as a commercial agent; so also is a "drummer" spoken of as a "commercial agent."

[3, 4] But, independent of the rule of ejusdem generis, we do not believe that the language of the statute will justify the construction that it was intended to apply where there is a discrimination between individual shippers, this because the very language itself points to the conclusion that the legislative aim was to prohibit discrimination between one class of shippers, on the one hand, and individuals, on the other. Further, this is a penal statute and must be strictly construed. This statute with reference to the question here has not heretofore been construed, although it has been referred to and construed with reference to other phases not involved in the case at bar. *Heman Construction Co. v. Railroad*, 206 Mo. 172, 104 S. W. 67; *City of Nevada to use v. Eddy et al.*, 123 Mo. 546, 27 S. W. 471; *Skaggs v. Kansas City Terminal Ry. Co.* (D. C.) 233 Fed. 827; *Hyde v. Railroad*, 110 Mo. 272, 19 S. W. 483; *Farber v. Railroad*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350; *Schubach v. McDonald et al.*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452; *Brown v. Railroad*, 137 Mo. 529, 38 S. W. 1099; *Christie v. Railroad*, 94 Mo. 453, 7 S. W. 567; *Hobart-Lee Tie Co. v. Stone*, 135 Mo. App. 438, 117 S. W. 604; *Southern Wire Co. v. Railroad*, 38 Mo. App. 191; *Chouteau v. Railroad*, 22 Mo. App. 286; *American Central Insurance Co. v. Railroad*, 74 Mo. App.

89; *Idalia Realty & Development Co. v. Railroad* (Sup.) 219 S. W. 923.

The case of *Hobart-Lee Tie Co. v. Stone*, supra, gives some support to plaintiff's construction of the statute, but in that case nor in any other was it sought to recover the penalty provided in what is now section 9975, and in all the cases where the question here has been approached the decision went off either on Constitution, art. 12, §§ 14 and 23, or other sections of the statute.

We do not think the defendant could lawfully convert a public switch into a private one as the facts show here, where to do so would result in a discrimination between shippers who had located their business with reference to the switch prior to the conversion, and with no reason to expect such a conversion. But other sections of the statute afford the remedy when the injured shipper cannot invoke the penalty in section 9975, R. S. 1919.

The judgment below should be affirmed, and it is so ordered.

COX, P. J., and FARRINGTON, J., concur.

#### On Motion for Rehearing.

PER CURIAM. Plaintiff strongly contends in his motion that our opinion is squarely in conflict with *Hobart-Lee Tie Co. v. Stone*, 135 Mo. App. 438, 117 S. W. 604, by the St. Louis Court of Appeals. We stated in the opinion filed that the *Hobart-Lee Tie Co.* Case gives some support to plaintiff's construction of the statute in question. We have concluded that our opinion is in conflict with the opinion in that case, but overrule the motion and order this cause certified to the Supreme Court.

**FORT et al. v. NOE.**

(Supreme Court of Tennessee. Nov. 24, 1920.)

**1. Appeal and error  $\S$  1011(1)—Finding on conflicting evidence not reviewable.**

The trial court's decision on the facts on conflicting evidence will not be reviewed by the Supreme Court.

**2. Justices of the peace  $\S$  159(2)—No appeal on pauper's oath where defendant worth more than \$5,000.**

On defendant's appeal to the circuit court from judgment by a justice of the peace, on a pauper's oath, conclusive proof that defendant had property worth more than \$5,000 held to establish the falsity of his affidavit of poverty.

**3. Justices of the peace  $\S$  159(2)—Pauper's oath itself not considered as evidence on question of its truth or falsity.**

On appeal to the circuit court from justice of the peace upon a pauper's oath, the pauper's oath itself cannot be considered as evidence on the question of truth or falsity of affidavit of poverty.

**4. Justices of the peace  $\S$  159(2)—Burden of proving falsity of defendant's affidavit of poverty on plaintiffs.**

On defendant's appeal upon a pauper's oath to the circuit court from judgment by a justice of the peace, the plaintiffs had the burden of proving the falsity of the affidavit of poverty.

**5. Statutes  $\S$  231—Interpretation of Code section aided by reference to original act.**

The interpretation of a section of the Code may be aided by reference to the words of the original act.

**6. Justices of the peace  $\S$  159(2)—Court required to dismiss appeal on pauper's oath on conclusive showing of falsity of affidavit of poverty.**

On appeal on pauper's oath, where falsity of oath of poverty is conclusively shown, the court is required to dismiss the appeal under Shannon's Code, § 4932, providing that where it is made to appear to the court by testimony of disinterested persons that the allegation of poverty is probably untrue, or the cause of action frivolous or malicious, the action "may be dismissed," since the court in such case could not by arbitrary exercise of discretion decline to do that which the proof showed ought to be done, but was required to decide the question in the same manner as any other question coming before it for decision, subject to a review of its decision by an appellate court, in view of the legislative history of such statute.

**7. Justices of the peace  $\S$  159(2)—Statute as to appeal on pauper's oath liberally construed in favor of poor person.**

Shannon's Code, § 4932, relating to appeal on pauper's oath, will be liberally construed in favor of the rights of poor persons.

Certiorari to Court of Civil Appeals.

Action by C. H. Fort and another against H. F. Noe. Judgment of dismissal on appeal

from judgment for plaintiffs by a justice of the peace, and defendants appealed to the Court of Civil Appeals. Case remanded for new trial, and plaintiffs bring certiorari. Judgment of Court of Civil Appeals reversed, and judgment for plaintiffs, rendered by a justice of the peace, affirmed.

John R. King, of Morristown, for plaintiffs in error.

W. N. Hickey, of Morristown, for defendant in error.

SMITH, Special Justice. This action was commenced before a justice of the peace by the plaintiffs, Fort Bros., to recover of the defendant, Noe, on account, for cash overpaid on a timber contract. The justice of the peace rendered judgment in favor of the plaintiffs and against the defendant in the sum of \$158.78. From this judgment the defendant appealed to the circuit court upon the pauper's oath. Before the trial in the circuit court the plaintiffs moved to dismiss the defendant's appeal, on the ground that the defendant had falsely and fraudulently taken and filed the pauper's oath, and upon this motion, the testimony of disinterested witnesses was introduced, which showed that at the time the pauper's oath was taken and filed the defendant owned personal and real property of the value of more than \$5,000. The circuit judge, after hearing this evidence, overruled the motion. Exception to the action of the court was taken at the time, and properly preserved by bill of exceptions.

On the hearing of the case upon its merits before the jury a verdict was rendered in favor of the defendant, upon which judgment dismissing plaintiffs' suit was pronounced. The plaintiffs appealed to the Court of Civil Appeals.

One assignment of error in the Court of Civil Appeals was that there was no evidence to sustain the verdict. This assignment was properly overruled.

Other assignments of error were directed at the charge of the court to the jury, and these assignments were properly sustained.

There was an assignment to the effect that the court erred in not dismissing the appeal of the defendant from the justice of the peace. This assignment was overruled.

The action of the court in holding that there was error in the charge of the trial judge and remanding the case for a new trial is not brought into question in this court, as no petition for certiorari has been filed by the defendant. But the action of the court in overruling the assignment based upon the action of the trial judge in refusing to dismiss the defendant's appeal from the justice of the peace is challenged by the plaintiffs, a petition for certiorari having been filed by them in this court.

So the only question is whether or not the



circuit judge should have dismissed the defendant's appeal from the justice of the peace. If he should, then the Court of Civil Appeals ought to have rendered judgment affirming the judgment of the justice of the peace, instead of remanding the case for a new trial.

The question turns upon the proper construction of section 3194 of the Code of Tennessee, carried into Shannon's Code at section 4932, which reads as follows:

"If it be made to appear to the court, at any time before the trial, by the testimony of disinterested persons, that the allegation of poverty is probably untrue, or the cause of action frivolous or malicious, the action may be dismissed."

The contention of the plaintiffs is that the word "may" in this statute is to be read as "shall," and that, inasmuch as the proof showed the pauper's oath filed by the defendant to be false, the circuit judge had no discretion under this statute. On the other hand it is contended that by the use of the word "may" in the statute the Legislature intended merely to confer a discretion upon the circuit judge to dismiss a case when it was made to appear that the allegation of poverty was probably untrue, and that, having exercised that discretion by overruling the motion, his action is not reviewable.

[1-4] Of course, if the evidence were in conflict, this court would not review the trial judge's decision, but there is no conflict in the evidence. It conclusively shows that the defendant had property worth more than \$5,000, and this was ample to establish the fact that his affidavit of poverty was untrue unless the pauper's oath itself can be considered as evidence upon this question. It cannot be so taken. Its truthfulness being challenged, whether it was true or false could not be judged of by the affidavit itself. The burden was, of course, on the plaintiffs to show the falsity of the affidavit. Any proof tending to show that was open to contradiction. The defendant did not go upon the stand himself, or introduce any proof to contradict the testimony of the disinterested witnesses which showed the amount of property the defendant had.

Therefore we come to consider whether, notwithstanding this evidence, the circuit judge was clothed with discretion to disallow the motion, or, if so, whether that discretion was reasonably exercised.

[5] The section of the Code involved was taken from chapter 22 of the Acts of 1821, and its interpretation may be aided by reference to the words of the original act. The original act provided that the clerks of the different courts of record should issue writs without demanding security, on the application of poor persons, but that before issuing any such process the applicant should take

and subscribe to an oath to the effect that, owing to his poverty, he was unable to bear the expense of a suit, and that he was justly entitled to a recovery. Following this provision, and in section 5 of the act, we find the words from which the Code section in question was taken:

"At the return term [if] it shall appear to the said court by the affidavit of one or more disinterested person or persons, that said allegation of poverty made by the plaintiff is probably untrue, or that his cause of action is frivolous, or malicious, the said court shall be and is hereby authorized to dismiss the same."

[6] Thus it will be seen that the Legislature, in carrying this act into the Code, instead of using the words which conferred authority upon the court to dismiss the case, used the words, "the action may be dismissed." Clearly, the meaning of the original act and that of the Code is the same. There was no authority in the court to dismiss a suit commenced upon the filing of the oath without this section. The Legislature, in conferring the authority to dismiss the suit, evidently intended that the suit should be dismissed if the facts were made to appear to be such as to give the court the authority. It will be observed that this same authority is conferred upon the court when it is made to appear that the cause of action is frivolous or malicious. It could hardly be thought that the court could exercise a discretion against the dismissal of a suit when it was made to appear that it was frivolous or malicious. The truthfulness of an allegation of poverty being properly challenged, this provision authorized the court to judicially determine the issue. It certainly did not mean that the circuit judge could by arbitrary exercise of his discretion decline to do that which the proof showed ought to be done. The opposite party was entitled to invoke the action of the court upon the authority conferred, and it was his duty to decide it just as he would any other question coming before the court for decision. His action is subject to review, just as is his action upon any other question coming up for decision.

[7] We recognize the rule of liberal construction in favor of the rights of poor persons under this statute, but we think there can be no doubt as to the meaning of this provision, and that under it the action of the court is subject to review. The evidence all being one way upon the question, the court's duty was plain, and his action in refusing to sustain the motion upon that evidence was erroneous. It results that the judgment of the Court of Civil Appeals, remanding the case for new trial, is reversed, and judgment will be rendered here affirming in favor of the plaintiffs the judgment obtained by them before the justice of the peace, with interest and cost.

DAVIDSON et al. v. WELLS, County Judge,  
et al. (No. 8566.)

(Court of Civil Appeals of Texas. Dallas.  
June 18, 1921.)

1. Highways ⇨103—County commissioners have broad discretion as to where macadamized roads shall be laid out and built.

Under Sp. Acts 36th Leg. (1919) c. 67, as to constructing and maintaining macadamized roads in Rockwall county, the county commissioners have broad discretion as to where the roads shall be laid out and built, and the execution of the plans determined on by them can be interfered with by injunction only in case of abuse of discretion, which is not shown by acts disclosing merely bad judgment, or that the building of a particular road is being given preference over others of equal or greater importance, but facts would have to be established either positively proving the proposed action to be fraudulent or having the necessary effect of showing it to be fraudulent.

2. Highways ⇨103—Law construed not to require completion of one macadamized road to county line before commencing others.

Under Sp. Acts 36th Leg. (1919) c. 67, as to constructing and maintaining macadamized roads in Rockwall county, the commissioners' court held not required to complete the road No. 1, mentioned in the act, east to the line between Rockwall county and Hunt county before any other road is commenced.

3. Injunction ⇨135—Granting or refusing is discretionary.

Granting or refusing or dissolving a temporary injunction is within the sound discretion of a district court, and unless it clearly appears that such discretion has been abused the court's action is not to be reviewed on appeal.

Appeal from District Court, Rockwall County; Joel R. Bond, Judge.

Suit by W. E. Davidson and others against J. R. Wells, County Judge, and others. From judgment for defendants, plaintiffs appeal. Affirmed.

H. L. Carpenter, of Greenville, for appellants.

H. M. Wade, of Rockwall, and T. B. Biddle, of Breckenridge, for appellees.

HAMILTON, J. This suit was filed by appellants, seeking to enjoin the commissioners' court of Rockwall county and the advisors of said court from diverting certain road funds.

It was alleged by appellants that, at an election properly held under the provisions of the general law of Texas, Rockwall county voted to issue its bonds for \$800,000, for the purpose of preparing, maintaining, and operating macadamized roads in said county; that the bonds were sold, and that the proceeds were in the county treasury.

It was alleged that the provisions of a

special act of the Thirty-Sixth Legislature (Acts 36th Leg. c. 67), which became operative March 15, 1919, directed how these funds should be spent, and that it required a road designated as highway No. 1 to commence at the line between Dallas county and Rockwall county and extend east through the towns of Rockwall, Fate, and Royse, to the county line, and also required that it should be built before the construction of any other road provided for in the act was undertaken.

And it was alleged that the commissioners' court and its advisors, the latter selected and acting under authority of the special road law, had surveyed and located said highway No. 1, commencing at a point in the Dallas county line, extending east through the towns of Rockwall and Fate, and into the town of Royse, near the business center of which it ended; and that they had made surveys and plans of highway No. 3, and were proceeding to build this road, commencing at a point on the Collin county line near the city water reservoir at Royse, extending thence south through the town of Royse, and intersecting highway No. 1 in Royse; that this was being done without first having constructed highway No. 1 from its terminus in Royse east to the county line; and it was alleged that, if the defendants were permitted to carry out their design and intention, the funds arising from the bond sale would "be exhausted without the completion of said highway No. 1 to the east line of the county, and its construction will never be completed."

The acts of appellees were alleged to amount to an unlawful diversion of public funds of the county from the purposes designated by law for their use. A temporary injunction was granted, and thereafter, upon appellees' motion, it was dissolved, and the act of the court dissolving it has resulted in this appeal.

[1] In the absence of some mandatory provision of the special act specifically requiring the building of the roads in conformity with particular lines, the commissioners' court would have broad discretion as to where the roads should be laid out and built. Only in case of abuse of such discretion could the execution of the plans determined upon by that body be interfered with by injunction. And under the authorities abuse of its discretion could not be declared because of acts merely disclosing bad judgment or acts merely showing that the building of a particular road was being given preference over others of equal or greater importance. Facts would have to be established either positively proving the proposed action to be fraudulent, or having the necessary effect of showing it to be fraudulent. *Grayson County v. Harrell*, 202 S. W. 160.

[2] But appellants say, in substance, that the special law mandatorily requires the construction of road No. 1 before work is to be

begun on any other road for the building of which the law provides. This, they say, deprives the commissioners' court of any discretion. They contend not only that the legislative fiat expressed in the enactment requires the construction of road No. 1 before beginning any other, but also requires that it extend east to the line between Rockwall county and Hunt county, subject only to the limitation in the special law that such construction be not in conflict with the provisions of some requirement made by the state or federal government. We do not think that from a consideration of the different sections of the law together there can be derived the construction that road No. 1 must be constructed east to a point in the Hunt county line, and that it must be completed before any other road is commenced.

Section 7 of the law seems to recognize the right and duty of the commissioners' court to exercise discretion in selecting the route and course of all the roads. That section is as follows:

"In the construction of the permanent roads and highways with the proceeds of the bonds voted as aforesaid, the commissioners' court shall lay out same in the most direct and practicable route, taking into consideration the economy, cost of construction, the people served, looking to and securing the best possible road and results for the cost of construction."

Section 13 is as follows:

"The highway to be constructed under federal and state aid shall commence at the Dallas county line and pass through the town of Rockwall and across the public square and through the town and streets of Fate and through the city of Royse to the county line unless some provision of the requirement of the federal and state government prohibits."

Section 15 is as follows:

"It is provided that the road from Dallas county line east through the town of Rockwall, Fate and Royse to the county line and known as state highway number one, shall be the first road constructed and shall be of concrete or other hard material in conformity to the requirements of the Highway Department of the state of Texas and Federal Highway Engineer. The second road to be constructed is highway number two and shall run from the courthouse in Rockwall through McLendon and Chisholm to Kaufman county line. The next road to be constructed is highway number three extending from the Collin county line crossing near the city water reservoir of Royse and extending through the town of Royse in a southerly direction and connecting with highway number two at some point near Chisholm or McLendon. The next highway to be constructed is highway number four from a point on highway number one in the town of Rockwall extending in a southerly direction to the town of Heath and on to Kaufman county line. The next highway to be constructed is highway number five leading south or southeast from the town of Fate beginning at highway number one and intersecting highway number three

at some point near or beyond Blackland. The next highway is highway number six leading from the town of Rockwall and from some point on highway number one and extending north or northeast and then east passing near Mt. Zion church and connecting with the highway number one at a point near Old Fate or some point which will connect the east end of same with highway number one. The next highway to be built is highway number seven which leads in a southeast direction from Royse at a point on highway number one and, if practicable connect with the Hunt county highway or at least give the Royse precinct a highway which shall consist of four and one-half miles of road, the same to be left to the discretion of the commissioners' court. The next highway is highway number eight and shall extend from a point southeast of Rockwall on highway number two in an easterly direction, to connect with highway number three at some point near Blackland, the same to be left to the discretion of the commissioners' court. The next highway is highway number nine and shall extend from a point at Heath or near Heath on highway number four and extend in an easterly or northeasterly direction to connect at some point with highway number two, the same to be left to the discretion of the commissioners' court. The next highway is highway number ten and shall extend, if not otherwise provided for, north out of the town of Rockwall from a point of connection with highway number one to a distance of at least three miles, if possible and practicable to the Collin county line; the commissioners' court to use their discretion. It is compulsory on the commissioners' court to build highway number one, two, three, four and five, but the other highways designated may be changed if the commissioners' court in their judgment deem same proper, right and necessary. "The commissioners' court may build any other lateral roads out of any funds remaining on hand after above roads have been completed." Gammel's Laws of Tex. vol. 19, p. 210 et seq.

It appears that Rockwall county is bounded on the west by Dallas county, on the north by Collin county and on the east by Hunt county. With reference to the true meridian we are unable to say how much, if any, the line between Collin county and Rockwall county varies from exact east. But assuming this line to be straight, and to run in an easterly and westerly direction (if indeed we must not judicially know these facts), whatever its true direction by the compass, the record discloses that in no event could road No. 1 run true to exact east and follow the specific requirements as to the points through which it is to pass as the following uncontroverted statements of appellants' verified petition disclose, to wit: That the town of Rockwall is three miles south of the Collin county line, which does in fact run in an easterly and westerly direction; that the town of Royse is about one-half mile south of the Collin county line and that the town of Fate is somewhere between Rockwall and Royse. The general course of the road speci-

fied then appears to be north of east. It is also disclosed that the place in Royse, where appellants claim road No. 1 ends, as laid out, is only one and one-half miles from the Hunt county line. These facts show an absence of legislative ascertainment and determination that the road should run exactly east from the Dallas county line to the Hunt county line.

The language of the road law contained in sections 13 and 15 thereof we believe requires the building of the road through Rockwall, Fate, and Royse, and out of Royse to a county line. But we do not find any language in those sections of the law, or in any other section of it, specifically requiring the road to be built out of Royse either directly east or to the Hunt county line.

Furthermore, there is evidence in the record to warrant a finding that the engineers of the state and federal governments had submitted to them alternate routes out of Royse to the county line, and that they approved the road leading from Royse to the Collin county line, in all respects just as the appellees propose to build it, with reference to time of construction, location, and method of building. This action by the state and federal highway engineers reasonably may be said to constitute a prohibition by the state and federal governments of extending the road to the Hunt county line. And, in addition to this, the conclusion is well sustained by the record that the special road law evidences a legislative purpose to extend certain great highways through Rockwall county in effecting a complete state-wide system of roads, and that the only, or, at least, the most practicable way of accomplishing this purpose, in the instance contended over, was to connect with the "Bankhead Highway," a transcontinental road from Washington to Los Angeles, on the south boundary of Rockwall county, very near the western boundary of Hunt county. The proof warrants the further conclusion that, if road No. 1 were built exactly east from Royse to the western line of Hunt county, it would connect with no macadamized road there, but would, it might be said, terminate in a cul de sac.

While section 15 of the special law does provide that road No. 1 shall first be constructed, it also provides that the construction of Nos. 1, 2, 3, 4, and 5 shall be compulsory. This language, we believe, can indicate nothing less than that all these roads are placed by the Legislature upon an equal footing of importance with each other, and we therefore think the power exists in appellees, under the terms of the law, to combine No. 1 with No. 3 for the short distance of one and one-half miles out of Royse to the county line, if the state and federal highway departments, in effect, choose to select such course, as they seem to have done. If the proceeds of the bonds hold out, those liv-

ing along the short distance of  $1\frac{1}{2}$  miles intervening between Royse and the Hunt county line can still be served with a road to Royse connected with Nos. 1 and 3 there at their intersection. For the law amply provides for the construction of subsidiary or lateral roads. If, however, the funds are to be exhausted in building the roads, the building of which is made compulsory, still appellants have no greater equities or higher rights than others who may live in different portions of the county, and this was a matter doubtless considered by the trial judge in connection with the action of the commissioners under the direction of the state and federal highway engineers, assailed by appellants.

[3] We do not think it can be said that the record contains no substantial evidence whatever to support the judgment. Granting or refusing or dissolving a temporary injunction is within the sound discretion of a district court, and, unless it clearly appears that such discretion has been abused, that court's action is not to be reviewed on appeal. *Sutherland v. City of Winnsboro*, 225 S. W. 63. Since there is evidence to sustain the action of the court, no error or abuse of discretion is disclosed by the record, and the judgment is therefore affirmed.

Affirmed.

#### MOTEX OIL CORPORATION v. TAYLOR. (No. 9604.)

(Court of Civil Appeals of Texas. Fort Worth.  
April 23, 1921.)

Courts  $\Rightarrow$  170—Allegation of value of stock is necessary in mandamus suit to compel the corporation to issue the stock.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 1705, 1763, 1764, providing that county court has original and exclusive jurisdiction in civil cases involving from \$200 to \$500, and that it has concurrent jurisdiction with the district court in cases involving from \$500 to \$1,000, and in cases exceeding \$1,000 that the district court has exclusive jurisdiction, a petition for mandamus to compel a corporation to issue stock must contain an allegation of the value of the stock, and an allegation of the number of shares and their face value is not sufficient to show jurisdiction of a district court to determine the issue.

Appeal from District Court, Wichita County; Edgar Scurry, Judge.

Suit by H. G. Taylor against the Motex Oil Corporation. From a judgment granting writ of mandamus, defendant appeals. Reversed and remanded, with instructions.

Bonner & Bonner, of Wichita Falls, for appellant.

Lemuel H. Doty, of Wichita Falls, for appellee.

DUNKLIN, J. H. G. Taylor sued the Motex Oil Corporation for a writ of mandamus to compel the defendant to issue to him capital stock in the corporation. The trial court granted the writ and suspended its issuance pending this appeal by the defendant company.

By one of the assignments of error presented here the contention is made that plaintiff's petition failed to show jurisdiction in the district court to grant the relief prayed for, and that in the absence of such a showing the judgment should be reversed. The basis of that contention is that plaintiff failed to allege the value of the stock which he sought to have issued to him, and which was personal property. We have carefully examined the petition and find that, while it describes the stock to which plaintiff alleges he is entitled as several thousand shares, of the face value of \$1 per share, there is no allegation as to the real value of such stock. We are of the opinion that it was incumbent upon the plaintiff to allege the actual value of the stock in order to show jurisdiction of the district court to determine the issue in controversy. It is a matter of common knowledge that the capital stock of many corporations showing a face value of large sums of money is absolutely worthless.

By article 1763, V. S. Civ. Statutes, the county court is given exclusive original jurisdiction in civil cases where the matter in controversy shall exceed in value \$200, and shall not exceed \$500, exclusive of interest, and by article 1764 concurrent jurisdiction with the district court when the matter in controversy shall exceed \$500, and shall not exceed \$1,000, exclusive of interest. By other articles, of the statutes, exclusive jurisdiction is vested in the district court where the matter in controversy exceeds \$1,000. In *Smith v. Horton*, 92 Tex. 21, 46 S. W. 627, it was held that the county court has power to grant extraordinary writs, such as mandamus and injunction, in cases over which it has jurisdiction of the amount in controversy. In that case it was further held, in effect, that it was necessary for the petition to contain allegations of the value of the property in controversy in order to show that the district court had jurisdiction to grant the writ of injunction which was prayed for in that case to restrain the sale of certain personal property. In *People's Ice Co. v. Phariss*, 203 S. W. 86, which was a suit to foreclose a chattel mortgage, it was held that a failure to allege the value of the property mortgaged to secure the debt was fundamental error, requiring a reversal of the judgment of the trial court in the absence of any exception or plea by the defendant presenting that question. Many decisions are cited in the opinion which fully support the conclusion reached.

Upon the authorities cited, the assignment of error now under discussion is sustained, the judgment of the trial court is reversed, and the cause is remanded, with instructions that the same be dismissed, unless plaintiff's pleadings shall be so amended as to show jurisdiction in the trial court to determine the controversy.

This conclusion renders it unnecessary to determine the merits of other assignments in appellant's brief, which, therefore, will not be discussed.

Reversed and remanded.

DAVIS et al. v. WALKER et al. (No. 9593.)

(Court of Civil Appeals of Texas. Fort Worth. April, 1921.)

1. Vendor and purchaser  $\S$  279—Junior lienor not necessary party to suit to foreclose lien.

In suit to foreclose a lien on land, a junior lienor, although a proper party, is not a necessary party defendant, except to preclude him by the judgment, the only really necessary party defendant being the owner of the equity of redemption.

2. Judgment  $\S$  395—Judgment in suit to enforce vendor's liens vacated in part.

Judgment rendered in favor of the purchaser of a first vendor's lien note foreclosing the lien as against the ultimate purchaser of the land should remain in full force and effect, but the judgment in favor of the attorney for the first purchaser of the land, his wife, and others, as intervenors, foreclosing a second lien against the ultimate purchaser of the land, should be vacated in its entirety, where necessary in adjusting the rights of all parties interested in the note which the second lien secures, etc.

3. Vendor and purchaser  $\S$  257—Junior lienor cannot pay off senior lien and take over property until he forecloses own lien and buys equity.

A holder of a junior lien who is not made a party defendant to foreclosure of a prior lien has no right to pay off the senior lien and take over the property until such junior lienholder first forecloses his lien and buys the equity of redemption under the foreclosure.

4. Vendor and purchaser  $\S$  289—Right of junior lienholder to foreclose and redeem property under prior foreclosure of senior lien an absolute right.

For a junior lienholder to foreclose his lien, it is not necessary for him to show that the property is worth more than the price realized therefor under the judgment foreclosing the prior lien to which he was not a party, as his right to foreclose his lien and buy in the property, thereafter to redeem from the purchaser under the prior foreclosure, is an absolute right.

Error from District Court, Tarrant County; R. E. L. Ray, Judge.

Action by J. T. Davis and others against A. W. Walker and others. To review judgment for defendants, plaintiffs bring error. Affirmed in part, and reversed and rendered in part.

Geo. W. Polk and J. C. Terrell, both of Fort Worth, for plaintiffs in error.

B. F. Bouldin, John W. Estes, E. S. Allen, and W. L. Coley, all of Fort Worth, for defendants in error.

DUNKLIN, J. On March 29, 1912, A. W. Walker conveyed to D. T. Davis a certain lot of land situated in the city of Fort Worth. The consideration recited in the deed was \$305 cash paid, and two vendor's lien notes, one for \$800, carrying a first lien on the property, and the other for \$745, secured by a second lien. Later, the second note was paid off and the lien securing the same was released by the vendor Walker. The other note for the principal sum of \$800 was sold by Walker to the Texas Securities Company, who later filed suit thereon, and under a judgment of foreclosure of the lien securing the same, decreed in that suit, the property was sold under a writ of execution and purchased by A. W. Walker, who later sold it to J. R. Black. Prior to the institution of that suit, D. T. Davis and wife, Mrs. M. C. L. Davis, conveyed the property to Mrs. Lilly Matkin and her husband, J. T. Matkin, the consideration recited in that conveyance being \$1,000 cash and a vendor's lien note for \$1,000, payable to the grantor D. T. Davis. In that suit D. T. Davis, A. W. Walker, Lilly Matkin, and her husband, J. T. Matkin, were made parties defendant, and a personal judgment was sought against D. T. Davis as the maker of the note and A. W. Walker as indorser, and a foreclosure was prayed for against the Matkins as subsequent purchasers of the property.

After the institution of the suit and prior to its trial, D. T. Davis died intestate. After his death, J. R. Black, assuming to act as attorney for Mrs. M. C. Davis, wife of D. T. Davis, and for J. T. Davis, Walker Davis, Mattie Butcher, and Mrs. Lilly Matkin, as children and heirs of D. T. Davis, deceased, and for Shirley Butcher, husband of Mattie Butcher, and J. T. Matkin, husband of Mrs. Lilly Matkin, filed a plea of intervention in the suit, alleging the death of D. T. Davis, and that the interveners were his only heirs, and prayed that they be substituted as parties defendant in the foreclosure suit instead of D. T. Davis, deceased. Accordingly, the judgment of foreclosure was against all of those interveners as such heirs of D. T. Davis.

That plea of intervention also contained allegations of the execution of the \$1,000 vendor's lien note given by Mrs. Lilly Matkin and her husband J. T. Matkin, in favor of D. T. Davis, in part consideration of the sale of

property by him to them, coupled with a prayer for judgment on that note and for foreclosure of that lien which it was alleged was superior to the lien claimed by the plaintiff, the Texas Securities Company.

In the judgment foreclosing the lien of the plaintiff Texas Securities Company, there was also a foreclosure of the lien claimed in the plea of intervention just noted; but subject to the lien asserted by the plaintiff, which was decreed to be a prior and superior lien. And it was provided in the judgment that any excess remaining after the satisfaction of the plaintiffs' judgment be applied to the judgment in favor of the interveners against Mrs. Lilly Matkin and her husband, J. T. Matkin. At the sheriff's sale under the foreclosure decree, the property sold for the sum of \$1,260, which was the exact amount of the judgment rendered in favor of the Texas Securities Company, with the court costs added.

The present suit was instituted by J. T. Davis, Walker Davis, Mattie Butcher, joined by her husband, Shirley Butcher, Lilly Matkin, joined by her husband, J. T. Matkin, and D. W. Evans, guardian of the estates of Willie and Harry Davis, minors, who were grandchildren of D. T. Davis and Mrs. M. C. L. Davis, and who were not parties to the former foreclosure suit, to set aside the foreclosure sale and to cancel the deed made thereunder to Walker, and also the deed from Walker to Black, and that said property be ordered resold to satisfy whatever may be justly due thereon and plaintiffs be given an opportunity to purchase the same at such sale, and further that said judgment of foreclosure be so reformed as to dispose of the interests of all the parties to this suit. It was alleged that Mrs. M. C. L. Davis had died intestate soon after the rendition of the former judgment of foreclosure, and plaintiffs sued as heirs of her and D. T. Davis.

The principal ground alleged for the relief sought was that the plea of intervention had been filed in the suit by Black without the authority, knowledge, or consent of the plaintiffs in this suit, for which reason it was alleged that the judgment in the former suit was without binding effect upon these plaintiffs; and the jury, in answer to special issues, sustained all of those allegations as to plaintiffs Mrs. Butcher and her husband, Shirley Butcher, J. T. Davis, and Walker Davis, but further found that plaintiffs Lilly Matkin and her husband did authorize Black, as their attorney, to file the plea of intervention against them. The jury further found that Walker Davis did authorize Black to represent him as a defendant against the suit of the Texas Securities Company to foreclose the lien claimed by that company, but there was no finding that Mrs. M. C. L. Davis did not authorize Black to file the plea of intervention in her behalf.

The jury further found that at the time J. R. Black purchased the property from Walker he knew that the minor plaintiffs in this suit were the heirs of D. T. Davis and Mrs. M. C. L. Davis. The jury further found that the price realized for the property at the sheriff's sale was its full market value. In the present suit judgment was rendered denying the plaintiffs any of the relief prayed for, and plaintiffs have appealed.

The record shows without controversy that in the foreclosure suit instituted by the Texas Securities Company Mrs. Lilly Matkin and her husband were duly cited to answer the petition, and at that time they were the owners of the equity of redemption, having previously purchased the property from D. T. Davis and wife, Mrs. M. C. L. Davis. Thus it appears that the plaintiffs in the present suit are the sole owners of the note upon which the plea of intervention was based; that the judgment of foreclosure on that note under and by virtue of the plea of intervention was valid as against Mrs. Lilly Matkin and her husband, as defendants in that intervention, and as to Mrs. M. C. L. Davis, plaintiff in that intervention, but was not valid as to Mrs. Butcher and her husband, and Walker Davis and J. T. Davis, and the minor plaintiffs in this suit, Willie and Harry Davis, represented by their guardian, D. W. Evans.

In the present suit, plaintiffs did not allege that the property was sold for less than its market value at the foreclosure sale, nor did they offer to pay off the amount of the judgment rendered in favor of the Texas Securities Company in that suit, nor do they pray specially for a foreclosure of the vendor's lien note inherited by them from D. T. Davis and wife, which was executed by the Matkins when the latter purchased the property, but they did pray:

"That said judgment be so reformed as to dispose of the interests of all parties to this suit \* \* \* and that said property be resold for the amount due thereon, and these plaintiffs be given an opportunity to purchase said property at said sale, \* \* \* and plaintiffs further pray that the court render such further orders, judgments, and decrees in this case as under the facts of this case they may be entitled to, either at law or in equity."

That prayer followed allegations of the facts related above, and under such circumstances we believe it was a sufficient basis for the relief hereinafter awarded to the plaintiffs. 27 Cyc. 1599.

[1] It seems to be well settled that in a suit to foreclose a lien on land a junior lienholder, although a proper party, is not a necessary party defendant, except for the purpose of precluding him by the judgment; the only really necessary party defendant being the owner of the equity of redemption. Since Mrs. Lilly Matkin and her husband were duly cited to answer the suit of the Texas Securi-

ties Company, the foreclosure of the lien of the plaintiff in that suit and the sale thereunder were valid, and cannot be set aside at the instance of the plaintiffs in the present suit, notwithstanding the lack of authority of J. R. Black to represent some of them, as noted above. In 15 R. C. L. p. 699, the following is said:

"The rule at common law is that a judgment is necessarily an entirety, and therefore, if void as to some part, it must be set aside in toto. Thus a judgment against several defendants, one of whom is dead at the time it is rendered, is considered as a unit as to all the defendants, and on a proper motion being made therefore it can be vacated as to all. But the better rule, and that now generally adopted, is that a judgment may be vacated against one defendant, and left in force as against his codefendant. Thus the court may set aside a judgment recovered against two in a civil action to recover damages for unlawful imprisonment, as to one of the defendants, and permit it to stand against the other, where it clearly appears that the latter performed acts which would have rendered him liable if sued alone. The liability of defendants in a judgment for the payment of money, originating in a joint and several contract, is several in nature, and an irregularity in its rendition, as against one defendant, furnishes no sufficient reason to vacate the judgment regularly rendered as to the other parties defendant therein. For the same reason, if a judgment is entered against several obligors on a bond, one of whom was dead when suit was brought, such irregularity is not a sufficient ground upon which to vacate a judgment regularly rendered as to the other defendants."

See, also, 23 Cyc. 900.

[2] In accordance with the doctrine there announced, we see no reason why the judgment rendered in the former suit in favor of the Texas Securities Company, foreclosing its lien as against the Matkins, should not remain in full force and effect, and also the sale thereunder of the property in controversy to A. W. Walker, as well as the sale by Walker to Black. But we believe that the judgment in favor of the interveners, foreclosing the second lien against the Matkins, should be vacated in its entirety. While it is true, as noted, that judgment was valid as to Mrs. M. C. L. Davis, as plaintiff in the intervention, and as against the Matkins as defendants therein, yet it will be necessary to vacate it in its entirety in order to properly adjust the rights of all parties interested in that note, and in order to have one final judgment thereon against the Matkins binding upon all the parties interested in the note, all of whom were necessary parties to that foreclosure. And to the same end we think it necessary to vacate the foreclosure decreed to plaintiff, the Texas Securities Company, as against Mrs. M. C. L. Davis and Walker Davis, as well as the other interveners, notwithstanding it appears they filed answer to that suit.

[3, 4] In *McDonald v. Miller*, 90 Tex. 309, 39 S. W. 89, it was held that a holder of a junior lien, who is not made a party defendant to a foreclosure of a prior lien, has no right to pay off the senior lien and take over the property until such junior lienholder first forecloses his lien and buys the equity of redemption under such foreclosure. Under the rule announced in that decision, it follows that plaintiffs in the present suit, as the owners of the note executed by the Matkins, and secured by the vendor's lien note upon the property, have no right to redeem the property from Walker or Black, as purchasers, under the judgment in the prior suit, since they are in no position to claim that right until they have foreclosed their lien and purchased the equity of redemption under a sale made under a judgment. And since they had no right to so redeem the property, they were not required to make any tender to any of the defendants as a condition for the right to maintain this suit. Nor do we understand the law to be that, in order for a junior lienholder to foreclose his lien, it is necessary for him to show that the property is worth more than the price realized therefor under the judgment foreclosing the prior lien, to which he was not a party. His right to foreclose his lien and buy in the property under such foreclosure, and thereafter to redeem the property from the purchaser under the prior foreclosure by paying to him the necessary amount, is an absolute right. *Bexar Bldg. & L. Ass'n v. Newman*, 25 S. W. 464; 27 Cyc. 1541, 1545, 1548, 1793, 1806, 1811, 1826, 1853; 2 Jones on Mortgages, 1038a, 1057, 1059, 1064. And it may be noted further that there was no finding by the jury of the value of the property at the time of the trial or at any time since it was sold under the former foreclosure, which was April 1, 1919; although defendant Black testified that the property is now worth \$3,000 to \$3,500, but that he had expended \$800 for improvements which he placed on it.

For the reasons noted, the judgment of foreclosure in favor of the plaintiff, the Texas Securities Company, in the former suit as against Lilly Matkin and her husband, the sale thereunder to A. W. Walker, and the deed made by Walker to Black, are all held to be valid and final, and not subject to the attack made thereon by the plaintiffs in the present suit. But the judgment of foreclosure in the former suit in favor of the Texas Securities Company, plaintiff therein, as against Mrs. M. C. L. Davis, Walker Davis, and the other apparent interveners in that suit, as the owner of the note upon which the intervention was based, and also the judgment in favor of the interveners in the former suit against Lilly Matkin and her husband, are vacated and set aside. And judg-

ment is now here rendered in favor of the plaintiffs in the present suit against Lilly Matkin and her husband, J. T. Matkin, for the amount due on the promissory note, executed by said Mrs. Lilly Matkin and J. T. Matkin in favor of D. T. Davis, referred to above, together with a foreclosure of the vendor's lien on the property in controversy in this suit to satisfy said note, and said property is ordered sold as under execution to satisfy that judgment, but subject to the title and all equities and rights acquired by Walker and Black under and by virtue of said former foreclosure in favor of the Texas Securities Company, and the sale thereunder. And since Mrs. Matkin inherited an undivided interest in the note which is made the basis of said judgment, the proceeds of such sale and any amount that may be otherwise collected on said judgment shall be apportioned among the plaintiffs, including Mrs. Matkin, share and share alike; D. W. Evans, as guardian of the estates of the two minors, Willie and Harry Davis, being entitled to one share, which represents the interests of both minors. All costs of this appeal are taxed against the appellants.

Affirmed in part, and reversed and rendered in part.

#### GOLDEN ROD OIL CO. NO. 1 et al. v. NOBLE, Liquidating Agent, et al. (No. 9657.)

(Court of Civil Appeals of Texas, Fort Worth. June 4, 1921. Rehearing Denied July 2, 1921.)

1. Appeal and error  $\S$ 724(4)—Reasons given under assignment of error to support it not part of assignment.

The reasons given to support an assignment of error may be good or bad without in any way affecting the sufficiency of the assignment itself.

2. Assignments for benefit of creditors  $\S$ 248—Purchasers from assignee not required to see to application of payments.

Purchasers of an oil lease from the assignee bank, which took the assignment of the lease as collateral security for creditors, were not required to see to the application of the proceeds of sale to the payment of the assignor's debt to the bank.

3. Assignments for benefit of creditors  $\S$ 261—Assignee or trustee may be held responsible by assignor or creditors.

If the assignee or trustee fails to perform the duties of his trust, he may be held responsible by the assignor, or by the creditors for whose benefit the assignment was made.

4. Assignments for benefit of creditors  $\S$ 240—Valid assignment places title to property in assignee.

A valid assignment as security for creditors places title in the assignee for the purpose of



the trust, and acceptance of the assignment by the assignee or trustee authorizes him to sell the property or so much of it as is necessary for the payment of the assignor's debts.

**5. Assignments for benefit of creditors**  $\Leftrightarrow$  217  
—Valid assignment not invalidated by trustee's neglect.

A valid assignment for the benefit of creditors cannot be rendered invalid by the subsequent neglect of the assignee properly to discharge his duties under the assignment.

**6. Evidence**  $\Leftrightarrow$  80(1)—Presumption of identity of law of other state with that of forum.

The court must presume that the law of Oklahoma is the same as that of Texas in the absence of proof to the contrary.

**7. Evidence**  $\Leftrightarrow$  373(6)—Copy of letter from Oklahoma bank commissioner appointing plaintiff liquidating agent for bank admissible.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3696, copy of letter signed by the bank commissioner of Oklahoma to plaintiff, appointing him liquidating agent for a defunct bank, held admissible when supported by affidavit purporting to be signed by the bank commissioner that the letter was a true and correct copy of the appointment of plaintiff as liquidating agent.

**8. Appeal and error**  $\Leftrightarrow$  889(3)—Petition of liquidating agent of insolvent bank treated as amended to make state of Oklahoma party plaintiff.

Though suit to collect a note which the bank commissioner of Oklahoma has taken over as part of the assets of an insolvent bank should be brought in the name of the state on the relation of the bank commissioner, where the suit is brought in the name of the liquidating agent appointed by the commissioner to take charge of the affairs of the bank, and no one can be prejudiced, the petition will be treated as amended to make the state of Oklahoma the party plaintiff.

**9. Banks and banking**  $\Leftrightarrow$  63½—Suit of liquidating agent held not both on negotiable instruments and on settlement contracts.

Suit of the liquidating agent of an insolvent Oklahoma bank for debt and foreclosure of an alleged lien on an oil and gas lease held not on a promissory note and drafts executed and drawn by the defendant and also on an agreement in an accord and satisfaction settlement, in violation of plaintiff's inability to sue both on the instruments of liability and on the contracts attached to his petition.

Appeal from District Court, Wichita County; P. A. Martin, Judge.

Suit by Charles F. Noble, liquidating agent, against E. P. Pumphrey and another, wherein the Golden Rod Oil Company No. 1 and others intervened. From judgment for plaintiff against the named defendant and the interveners, etc., such defendant and the interveners appeal. Judgment reversed and rendered in part, and affirmed in part.

Cooke-Dedmon & Potter, of Fort Worth, and Scurlock & Dale, of Wichita Falls, for appellants.

Carrigan, Montgomery, Brittain & W. J. Townsend, of Wichita Falls, for appellees.

BUCK, J. This suit was instituted April 29, 1919, by Chas. F. Noble, as liquidating agent of the Citizens' State Bank of Tulsa, Okl., against E. F. Pumphrey and the American National Bank of Tulsa, Okl., for debt and foreclosure of an alleged lien upon a certain oil and gas lease on 10 acres of land situated in Wichita county.

By amended petition, filed September 13, 1920, plaintiff alleged that E. F. Pumphrey was indebted to the Citizens' State Bank as surety on a certain note for \$1,500, with interest and attorney's fees, payable to the Citizens' State Bank, and signed by Carrol York, and upon two certain drafts drawn by E. F. Pumphrey, payable to the order of the Citizens' State Bank, one for \$3,331.42, drawn upon F. A. Fuller, Denver, Colo., and the other for \$4,110.32, drawn upon W. G. Alcock, Chanute, Kan. He alleged, further, that since said indebtedness was incurred the Citizens' State Bank had become insolvent, and the assets of said bank had been turned over to the authorities of the state of Oklahoma and delivered to plaintiff as liquidating agent for said bank, and the plaintiff was entitled to receive all assets of the said bank and to collect all indebtedness due said bank, etc.; that on or about February 27, 1919, the defendant E. F. Pumphrey was the owner of the 10 acres of land in Wichita county, hereinabove mentioned, and that on said last-mentioned date said Pumphrey was indebted to the American National Bank of Tulsa, Okl., in some sum of money, the amount of which was unknown to plaintiff, and that on said date defendant Pumphrey and the American National Bank and the Citizens' State Bank of Tulsa, Okl., entered into a valid and binding agreement, under the terms of which Pumphrey transferred and assigned to the American National Bank of Tulsa, Okl., all his leasehold estate and interest in and to the above-described 10 acres of land; that said assignment was absolute on its face, but in truth and in fact it was intended by said assignment to secure the defendant American National Bank and the said Citizens' State Bank in the payment of the indebtedness due by the said defendant E. F. Pumphrey, to them, and that it was understood by all parties to the contract that the American National Bank would take said assignment in its name, hold, handle, and dispose of the same for the mutual benefit of all three of said parties; that, in the event that said lease should be sold by the American National Bank, the proceeds of the sale thereof should be divided between the American National Bank and the Citizens'

State Bank in proportion to the amount of indebtedness held by each respectively against said Pumphrey; that since the failure of the Citizens' State Bank, and the appointment of the plaintiff as liquidating agent thereof, the American National Bank had repudiated its said agreement with the Citizens' State Bank and the defendant Pumphrey, and was now denying that the Citizens' State Bank of Tulsa is entitled to any rights, interest, equity, or benefit by reason of said lease and leasehold estate, and its assignment to defendant American National Bank, and that said American National Bank was now making an effort to dispose of said lease, and that it will dispose of said lease for a large sum of money, all of which will be appropriated by the American National Bank, in violation of the rights, interest and equities of the plaintiff as liquidating agent for the Citizens' State Bank. Plaintiff further alleged that, by reason of the facts hereinabove mentioned, he is the owner and holder of an equitable lien to secure the indebtedness above set out, and is entitled to a foreclosure of said lien as against the defendant Pumphrey and the American National Bank, and is entitled to have said lease and leasehold estate sold, and to have the proceeds apportioned between the American National Bank and the plaintiff, as their interests may appear. Plaintiff further alleged that Pumphrey still owns the equitable title to said lease, held by the American National Bank, subject only to the lien created by virtue of the assignment executed on February 27, 1919. Plaintiff alleged in its amended petition that on or about May 23, 1919, defendants were claiming an offset against the Citizens' State Bank, and the right to collect damages against it in the sum of approximately \$1,500 for alleged negligence of said bank in failing to collect for it certain drafts and other sums of money, and that plaintiff was insisting that defendants were due and owing to him the sums of money hereinabove set forth, and that the defendant Pumphrey and plaintiff, on May 23, 1919, entered into an agreement whereby Pumphrey acknowledged that he owned the plaintiff the sum of \$9,749.58, and agreed to pay into the registry of the district court of Wichita county said amount in cash within 45 days from the date of the agreement; that said agreement was in writing, and signed by both parties, and it further provided that out of the \$9,749.58, which Pumphrey agreed to deposit in the district court, he should be paid the sum of \$1,339.20, in satisfaction of his claim for negligence against the Citizens' State Bank in failing to forward in due course a certain draft for the sum of \$6,872.30, drawn on one Ed L. Reed, of Blackwell, Okl.; that it was further agreed in said written contract of settlement that Pumphrey claimed that the American National Bank of Tulsa while in possession of the paper in-

involved in the suit collected interest due on said paper in the sum of \$628.05, and that said paper was not credited with such interest payments, and that Pumphrey was entitled to a credit of said amount, and that he would endeavor to collect said amount from the said American National Bank; but that, if he should not be able to collect said amount from the American National Bank, he would be entitled to a repayment of said sum out of the moneys placed in the registry of the court.

Pumphrey filed his answer to the amended petition of the plaintiff on September 13, 1920, and pleaded a general demurrer, and specially excepted to said petition on the ground that plaintiff was therein seeking to recover on the note for \$1,500 and the two drafts heretofore mentioned, and also on the agreement of satisfaction and settlement entered into between Pumphrey and plaintiff on May 23, 1919; that plaintiff could sue either upon the instruments of liability or upon the contract of settlement, but not upon both. He specially excepted to the claim of \$1,500 surety debt for Carroll York, because it did not appear that the principal upon said note had been sued, nor was he joined as a party defendant in plaintiff's petition. He denied all the allegations of plaintiff's petition, and specially pleaded that defendant was the owner of a one-half undivided interest in the oil and gas lease on the 10 acres of land in Wichita county, and that C. H. and C. Q. Thorp owned the other one-half interest; that on or about February 27, 1919, the American National Bank, through W. L. Propst, cashier, entered into an agreement with defendant, by which defendant made an assignment of said oil and gas lease to the American National Bank, absolute on its face, but that the American National Bank contracted and agreed in writing with defendant that, if defendant did not sell said lease within 30 days after February 27, then the American National Bank had the power to sell said lease at private sale for the best price obtainable, and apply the proceeds, first, to the payment of the interest of C. H. and C. Q. Thorp; second, to the payment of \$10,500 and interest, approximately \$11,000, to the Interstate Pipe Company of Tulsa, Okl., and the balance, if any, to the American National Bank in satisfaction of what was known as the "Transit Account," which account included items claimed by plaintiff to be owing to the Citizens' State Bank; that the American National Bank did not sell said lease for cash, but conveyed and sold the same to the Golden Rod Oil Company No. 1 and the Golden Rod Oil Company No. 2, accepting and receiving therefor the sum of approximately \$90,000 in stock of the said two companies, and that said American National Bank by its cashier, W. L. Propst, organized the two said companies for the purpose of realizing as much as possible from the

said lease, and the said Propst became one of the trustees of said two companies, and that the stock was delivered to him and the other trustees, and sold by them, as far as possible, to the public; that with the proceeds of said sale the said Propst, acting for the American National Bank, paid the sum of \$12,000 to C. H. and C. Q. Thorp, and approximately \$11,000 to the Interstate Pipe Company of Tulsa, and the balance of \$33,000 was paid to the American National Bank in full liquidation of all indebtedness owed by Pumphrey to said bank and to the Citizens' State Bank, which plaintiff claimed to represent. Defendant Pumphrey alleged that the American National Bank had been guilty of negligence in the sale of the lease, and had sold the lease for less than the market value, for which he claimed damages in the sum of \$40,000.

The Golden Rod Company No. 1 and the Golden Rod Company No. 2, hereinafter called interveners, intervened in said suit, alleging that they were organized on or about May 4, 1919, to purchase the oil and gas lease described in plaintiff's petition, which property at said time was involved in numerous claims, litigations, and liens; that prior to the purchase of the property by the interveners Pumphrey had made an assignment, at least absolute on its face, to the American National Bank, and the interveners purchased the property from said bank, paying therefor approximately the sum of \$45,000, \$12,000 to C. H. and C. Q. Thorp, \$10,500 to the Interstate Pipe Company, and the balance to the American National Bank in payment of the amount due said bank on its transit account, said payments being made in compliance with the agreement between Pumphrey and the American National Bank and the Citizens' State Bank, under the assignment; that said agreement provided that the American National Bank should have full right and authority to convey the property at private sale, and that said bank did so convey it to the interveners. They further pleaded, in the alternative, that in case it should be held that the American National Bank did not have authority to convey a title, stripped of any lien in favor of the Citizens' State Bank, that interveners in good faith paid off and discharged the rights and liens held by the Thorps and the Interstate Pipe Company and the \$33,000 paid to the American National Bank, and that therefore they were entitled to be subrogated to the rights of said lienholders. They further pleaded that the suit of the plaintiff cast a cloud upon the title of their property and that said cloud should be removed. Both the interveners and Pumphrey alleged that the agreement between Pumphrey and the plaintiff was without consideration and void.

Plaintiff filed a supplemental petition to Pumphrey's answer, and further pleaded that

on April 29, 1919, a lis pendens notice of this suit was filed in the office of the county clerk.

Upon a trial before the jury the court gave a peremptory instruction for the plaintiff against the defendant E. F. Pumphrey for \$810.38, and for a foreclosure of an equitable lien against the oil and gas lease in controversy, against Pumphrey and the interveners, and instructed a verdict against the defendant Pumphrey and interveners on their cross action. From a judgment upon the verdict returned, the defendant Pumphrey and interveners have appealed.

Interveners' first assignment of error is as follows:

"The court erred in overruling interveners' motion for peremptory instruction in favor of interveners, for the reason set out in said motion, which said motion was as follows, to wit:

"First. The evidence shows that the plaintiff claiming a lien under an assignment made by Pumphrey to the American National Bank, being a voluntary assignment for the benefit of certain creditors, which assignment empowers the American National Bank as trustees to negotiate and sell said lease at private sale, which said American National Bank did to these interveners, and the said Noble is bound by said act of the American National Bank.

"Second. That citation in the case was not served upon any of the defendants until December, 1919, and the lis pendens was only effective from the date of the service of citation upon the defendants under the authorities.

"Third. Because there is no evidence that the plaintiff has or is entitled to any lien.

"Fourth. Because the suit at the time of the purchase of said property was upon certain assets of the Citizens' State Bank of Tulsa, Oklahoma, alleged to be defunct, and said assets were the property of the state of Oklahoma, and suits on same under the laws of Oklahoma can only be brought in the name of the state, on the relation of the Banking Commissioner or the Attorney General.

"Fifth. That, after the purchase of said property by the interveners, the plaintiff entered into an agreement which E. F. Pumphrey without the knowledge or consent of interveners, which agreement is sued upon herein, and not the obligations in the original suit, and the evidence conclusively shows that there is no liability upon the obligations originally sued upon.

"Sixth. The lis pendens is insufficient because it does not state the name of the party plaintiff in the capacity in which he sues, nor does it set forth the cause of action as alleged in the petition sued upon; does not state the number of the suit; was not indexed and cross indexed; that there was no citation on defendants.

"Seventh. Because the plaintiff has wholly failed to show any cause of action against interveners for the foreclosure of the said lien."

The second assignment attacks the action of the court in giving a peremptory instruction for the plaintiff and against the interveners.

These two assignments are treated together.

[1] Appellees object to the consideration of

the first assignment on the ground that it is multifarious. The complaint made in the assignments is first, in the failure of the court to give the peremptory instruction for interveners; and, second, in the action of the court in giving a peremptory instruction in favor of the plaintiffs against the interveners. The reasons given under the first assignment to support it are no part of the assignment itself. The reasons given may be good or bad, without in any way affecting the sufficiency of the assignment itself. See *M., K. & T. Ry. v. Washburn*, 184 S. W. 580, writ of error refused; *City of Fort Worth v. Burton*, 193 S. W. 228; *Bank v. Fuller*, 191 S. W. 830, writ of error refused; *Hess et al. v. Turney*, 109 Tex. 208, 203 S. W. 593; *M., K. & T. Ry. v. Patterson* (Com. App.) 228 S. W. 119. Hence the objections to the consideration of these two assignments are overruled.

[2, 3] The assignment by E. F. Pumphrey to the American National Bank is dated February 27, 1919, and conveys to the American National Bank all of Pumphrey's title and interest in the lease upon the land described, which, assignor states that he has title to and right to convey. There is no limitation in the instrument itself upon the assignee's right to sell, use, or dispose of the lease therein conveyed. The assignee made a written statement on the same day that the assignments were made, in which it agreed that Pumphrey had executed the assignment as a mortgage and collateral to secure the bank for certain debts due by him to the bank, including the indebtedness to the Citizens' State Bank; that the assignee would allow Pumphrey 30 days in which to try to sell said oil and gas lease, and if during that time he could find a purchaser therefor at a consideration satisfactory to him and sufficient to pay the indebtedness which the assignment was made to secure, then the bank would execute a formal assignment of said lease to the purchaser, accounting to Pumphrey for any balance that might be due him; that if Pumphrey could not sell the lease within the 30 days, then the bank should sell the same, and pay out of the proceeds the indebtedness due by Pumphrey to the Interstate Pipe Company, and pay the two Thorps for their interest in the lease. This last instrument does not appear to have been filed for record, but, even if the interveners had notice thereof, we do not think that it in any way restricts or limits the American National Bank in the sale of the lease after the 30 days allowed Pumphrey to sell. It is established by uncontradicted evidence that Pumphrey did not find a buyer for the property within 30 days. The interveners in purchasing the property were not required to see to the application of the proceeds to the payment of plaintiff's debt. If the American National Bank, even though it be held to be a trustee in the matter, did not apply the

payments made to it by the interveners pro rata to the debts owing the Citizens' State Bank, then plaintiff would be limited to an action against the American National Bank for misapplication of the funds so received, and to a judgment against Pumphrey. We do not see how, under the evidence, it could be legally held that plaintiff was entitled to a foreclosure of an equitable lien on the lease in question, and in our judgment the interveners were entitled to the peremptory instruction asked. If the assignee or trustee fails to perform the duties of his trust, he may be held responsible by the assignor or by the creditors for whose benefit the assignment was made. *Donley et al. v. Cundiff*, 35 Tex. 750; *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922; *Hudson v. Willis*, 65 Tex. 694, 699; *Wynne v. Simmons Hdw. Co.*, 67 Tex. 40, 1 S. W. 568.

[4, 5] A valid assignment places the title to the property in the assignee for the purpose of the trust. *Allen v. Willis*, 60 Tex. 155; *Tittle v. Vanleer*, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337. The acceptance of the assignment by the assignee or trustee authorizes him to sell the property, or so much of it as is necessary, for the payment of the debts. 2 R. O. L. p. 674, § 31, and page 710, § 61. A valid assignment for the benefit of creditors cannot be rendered invalid by the subsequent neglect of the assignee to properly discharge his duties under the assignment. *Eicks v. Copeland*, 53 Tex. 581, 37 Am. Rep. 760. In the last-cited case our Supreme Court held that, where the instrument authorized the assignee to sell for cash or on credit, such a provision was but a badge of fraud, and did not render the conveyance void. But in the instant case all parties pleaded that the American National Bank was paid the sum of \$33,000 out of the proceeds of the sale of the stock in the companies of the interveners, after paying other mentioned creditors the amounts of their claims, and it does not appear that such sums were not sufficient to satisfy the indebtedness of Pumphrey to the American National Bank and to the Citizens' State Bank.

This conclusion is independent of the attack made by the interveners on the sufficiency of the *lis pendens* notice filed on April 29, 1919. Said notice reads as follows:

"Chas. F. Noble, Plaintiff, v. American National Bank of Tulsa, Oklahoma, and E. F. Pumphrey, Defendant.

"Suit pending in the District Court of Wichita County, Tex. Filed 29th day of April, A. D. 1919.

"Notice is hereby given that the above entitled and numbered cause is now pending in the district court of Wichita county, Texas, wherein Chas. F. Noble is plaintiff and American National Bank of Tulsa, Oklahoma, and E. F. Pumphrey are defendants, and numbered 6670 on the docket of said court.

"Said suit is for the sum of \$8,921.73 alleged to be due and owing by the defendant E. F. Pumphrey to plaintiff upon a certain promissory note and two drafts aggregating the said sum of \$8,921.73, with legal interest thereon until paid, executed by said defendant E. F. Pumphrey, payable to the order of Citizens' State Bank of Tulsa, Oklahoma, and foreclosure of the equitable lien in and to an oil and gas lease covering ten acres of land out of block No. 75, Red River Valley Lands, being the south half of the southwest one-fourth of the southeast one-fourth, and the northwest one-fourth of southeast one-fourth, of block No. 75, Red River Valley Lands subdivision, which oil and gas lease was assigned by the defendant E. F. Pumphrey to the defendant American National Bank of Tulsa, Oklahoma, on or about the 27th day of February, 1919, for the purpose of securing the American National Bank and the Citizens' State Bank of Tulsa, Oklahoma, for certain indebtedness due by the said defendant E. F. Pumphrey to said bank. Plaintiff alleges that he is now the owner and holder of the indebtedness sued upon as liquidating agent of said Citizens' State Bank of Tulsa, Oklahoma."

Interveners urge that article 6838, V. S. Tex. Civ. Statutes, requires said notice to be indexed, both direct and reverse, under the names of each and all parties to the suit; and that article 6837 of our statutes provides that the notice shall set forth "the number and style of the cause, the court in which it is pending, the names of the parties thereto, the kind of suit, and a description of the land affected"; that the notice in this case was not indexed, did not describe the cause of action, and did not give the correct number of the suit. The number of this cause is 6700, while the number given in the notice is 6670. Doubtless, if interveners, before their purchase, had gone to the district clerk's office to see if cause No. 6670 in any way affected the title to the lease which they were purchasing, they would have found a case that had no reference to the lease which they were intending to purchase.

Other objections are urged to the sufficiency of the lis pendens notice, which we will not take time to discuss.

Appellant Humphrey's first assignment is that the court erred in peremptorily instructing a verdict for plaintiff against defendant because the evidence showed no liability of defendant to plaintiff as liquidating agent, and the pleadings and evidence showed all of said indebtedness had been paid. The first proposition under this assignment is that—

"The evidence showing conclusively that the indebtedness sued upon was the property of the state of Oklahoma, and that suits thereon under the laws of the state of Oklahoma must be brought in the name of the state of Oklahoma, the court erred in directing a verdict against appellant and in favor of the appellee."

The right of the plaintiff to prosecute this suit was partly based on the testimony of

E. A. Gipson, a practicing attorney of the state of Oklahoma for nine years, and formerly an attorney of the State Banking Board, who testified that for the collection of paper of a bank, which had been closed by order of the banking board or the courts, suit must be brought by the Banking Commissioner or the Attorney General; that they must be brought in the name of the state of Oklahoma, on the relation of either the Banking Commissioner or the Attorney General; that as soon as the board takes over the assets they become, under the law, the property of the state. Plaintiff offered a letter purporting to be signed "Fred G. Dennis, Bank Commissioner," to Chas. F. Noble, appointing him liquidating agent for the defunct Citizens' State Bank of Tulsa, Okl., and a certificate purporting to be signed by Dennis that said letter was a true and correct copy of the appointment of said Noble as said liquidating agent. Interveners objected to the introduction and evidence of this letter and its accompanying certificate, and present an assignment of error thereto, and the appellant Pumphrey adopts certain assignments contained in the interveners' brief, including the sixth.

Article 3696, V. S. Tex. Civ. Statutes, provides that:

"It shall be the duty of the Secretary of State, Attorney General, Commissioner of the General Land Office, \* \* \* Commissioner of Insurance and Banking, and State Librarian, to furnish any person who may apply for the same with a copy of any paper, document or record in their respective offices, and also to give certificates, attested by the seal of their respective offices, certifying to any fact or facts contained in the papers, documents or records of their offices, to any person applying for the same; and the same shall be received in evidence in all cases in which the originals would be evidence."

[§, 7] Presuming that the law of Oklahoma is the same as that of Texas, which we are required to do in the absence of proof to the contrary, the copy of the letter signed by Fred G. Dennis and his certificate thereto were properly admitted in evidence. E. J. Franklin witness for plaintiff, testified:

"I know Fred Dennis. He is State Banking Commissioner of Oklahoma. I know his signature. The two documents presented were signed by Fred G. Dennis."

There was no objection to the admission of the certificate because of the absence of the seal.

[§] In *Bailey v. Lankford*, 54 Okl. 692, 154 Pac. 672, the Supreme Court of Oklahoma held that a suit to collect a note which the Bank Commissioner had taken over as part of the assets of an insolvent bank should be brought in the name of the state on the relation of the Bank Commissioner; but where suit is brought in the name of the Bank Commissioner, and no one can be pre-ju-

diced thereby, the petition will be treated as amended in the Supreme Court. Following *Dolezal Co. v. Bostick, Co. Atty.*, 41 Okl. 743, 139 Pac. 964. Since in the instant case plaintiff appears to have represented the Bank Commissioner, and through him the state of Oklahoma, and it does not appear that any injury will result to the state of Oklahoma, the insolvent Citizens' State Bank, or defendants by our following the precedent set by the Oklahoma Supreme Court in the above case, we will overrule defendant Pumphrey's first assignment of error.

[9] We also overrule his third assignment, which alleges that plaintiff's suit was upon a certain promissory note and drafts executed and drawn by defendant Pumphrey, and also upon an agreement in an accord and satisfaction settlement, that plaintiff must sue either upon the instruments of liability or upon the contracts attached to his petition, but not upon both. While plaintiff did allege the signing of the York note by defendant as indorser, and the drawing of certain drafts on the Citizens' State Bank, yet in the trial petition he alleged that an agreement had been entered into between him and defendant, in which defendant acknowledged that he owed the amount sued for, and plaintiff alleged that as a part of said agreement he (plaintiff) made certain concessions. We think this assignment should be overruled as well as the second. While the defendant Pumphrey and the plaintiff might have been entitled to a judgment over against the American National Bank of Tulsa, yet neither assigns error to the failure of the court to render such judgment.

The judgment of the trial court as to the issues between plaintiff and the Golden Rod Oil Companies Nos. 1 and 2 is reversed, and judgment here rendered for such companies. The judgment as to the controversy between the plaintiff and the defendant Pumphrey is affirmed.

Judgment reversed and rendered in part, and affirmed in part.

#### BRIGHAM v. CASON. (No. 9605.)

(Court of Civil Appeals of Texas. Fort Worth. April 16, 1921.)

1. Brokers  $\S$  63(1)—Commission due when purchaser found although the owner refuses to convey because of facts known to broker.

Under a contract to find a purchaser for land, the commission is due when the purchaser is found, even if the owner refuses to convey on the ground that the land is a homestead belonging to him and his wife, who refuses to join in the conveyance, although the broker knew these facts at the time of making the contract of sale on the land.

2. Brokers  $\S$  63(2)—Commission due on finding purchaser, if refusal to convey is put on an insufficient ground, though purchasers demand abstract stipulated against by contract.

Where the refusal to convey was put on the ground that the land was the homestead of defendant and his wife, who refused to join in the conveyance, even if the prospective purchaser demanded an abstract which was not according to the contract of the owner with the broker, a commission of the broker is due on finding the purchaser ready and willing to buy.

3. Brokers  $\S$  44—Where the broker has no interest, contract is revocable at the will of the owner.

A contract of the broker to find a purchaser for land where it was without an interest in the broker was revocable at will, and where the owner revoked it before the sale was made, he is not liable under it.

4. Brokers  $\S$  72, 79 — Where contract is wrongfully revoked, broker may recover on quantum meruit.

Where contract to find a purchaser for land is wrongfully revoked, and the broker had a purchaser ready and willing to buy, he may recover on a quantum meruit for reasonable profit on the sale, and may recover expenses incurred.

Appeal from Cooke County Court; H. S. Holman, Judge.

Action by M. T. Brigham against S. B. Cason. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Webb & Cantrell, of Sherman, for appellant.

J. T. Adams, of Gainesville, for appellee.

BUCK, J. This is a suit by M. T. Brigham, appellant here, a real estate broker, for \$400 commission for finding a purchaser for a 160-acre tract of land in Cooke county, under a contract with S. B. Cason. January 3, 1920, Cason listed 160 acres of land with plaintiff below, at \$50 an acre, agreeing to pay 5 per cent. commission on the selling price. Plaintiff understood to and did find within the 30 days a purchaser, to wit, C. F. Pelphrey, who was ready, willing, and able to purchase said land on the terms mentioned. The land was the homestead of Mr. and Mrs. S. B. Cason, and when Mr. Cason went home after listing the land for sale with Brigham, he told his wife what he had done, and she refused to sell, and told him to go back to Brigham and tell him that she would not sell, and withdraw the land from the market. Cason, the next morning, did this, saying that he was willing to sell at the price mentioned, that he thought it was more than the land was worth, but that his wife was not willing. Brigham would not agree to the withdrawal of Cason from his written contract, and that day saw Pelphrey, who agreed to take the land at the price and

upon the terms specified. Upon a demand by Brigham upon Cason to come in with his wife and close the deal, and his failure so to do, this suit was filed.

Defendant pleaded that he was a married man, and the property offered for sale was the homestead of himself and wife, and that his wife had refused to sell, and that in consequence thereof, and in compliance with his wife's request, he went to plaintiff and, before the contract of sale was made between said plaintiff and Pelphrey, told him of his wife's refusal, and withdrew the land from the market.

Plaintiff tendered a special exception to this plea, and complaint is made of the failure of the court to sustain the same, in the first assignment of error. In the charge the court instructed the jury as follows:

"If you find that the defendant, S. B. Cason, was a married man, and that the land in controversy was the homestead of the defendant and his wife, and was occupied by them as such, and that these facts were known to plaintiff at the time he made such sale, if any, and that the wife of defendant refused to join in such sale, and execute a deed to the purchaser of said land, and that defendant was ready and willing to carry out his part of said contract of sale, and that the failure of his wife to execute said deed of conveyance was not participated in by defendant, and that these facts were known to plaintiff, then plaintiff cannot recover, and you will find for defendant."

Appellant has an assignment directed to the giving of this charge. We will discuss these two assignments together.

[1] A broker employed to procure a purchaser who produced a purchaser ready, willing, and able to buy on obtaining a good title has earned his commission, though the owner contracting to sell is unable to convey good title. *O'Reilly v. Cryer*, 175 S. W. 773; *McGowan v. Eubank*, 177 S. W. 512; *Slade & Bassett v. Crum*, 193 S. W. 723; *Hamburger & Dreyling v. Thomas*, 103 Tex. 280, 126 S. W. 561; *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922.

That a husband who employs a broker to find a purchaser for a homestead cannot escape payment of commission on the ground that the wife refused to sign the deed is likewise supported by ample authority. *Krebs v. Popp*, 42 Tex. Civ. App. 346, 94 S. W. 115, by this court; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76; *Cross v. Everts*, 28 Tex. 524; *Goff v. Jones*, 70 Tex. 572, 8 S. W. 525, 8 Am. St. Rep. 619; *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228; *Curry v. Whitmore*, 110 Mo. App. 204, 84 S. W. 1131; *McCray & Son v. Pfost*, 118 Mo. App. 672, 94 S. W. 998. Hence we conclude that the defense included in the quoted paragraph of the court's charge was not a proper one, and that reversible error was committed in submitting it.

[2] It is urged that the evidence shows

that the buyer wanted defendant to submit an abstract showing title, and that according to the written agreement defendant did not agree to furnish an abstract. Perhaps a sufficient answer to this contention, even if available, is that the refusal of Mrs. Cason to sign the deed was not based upon this ground, but upon the ground that she did not want to sell the homestead for any price.

[3] We cannot render judgment for appellant here, because the contract of agency, being one without interest in the subject-matter of the agency, is revocable at the will of the principal. 4 R. C. L. p. 253, and note 18 thereunder. In *McCallum v. Grier*, 86 S. C. 162, 68 S. E. 466, 138 Am. St. Rep. 1037, the Supreme Court of South Carolina says:

"The next question that will be considered is whether the defendant had the power to revoke the authority of her agent during the time fixed for the continuance of her contract with the agent. 'As between principal and agent, authority is revocable at any time, if not coupled with an interest. The authority of an agent to represent the principal depends upon the will and license of the latter. It is the act of the principal which creates the authority; it is for his benefit, and to subserve his purposes, that it is called into being; and unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent, obviously, except in the instance mentioned, can have no right to insist upon a further execution of the authority, if the principal himself desires it to terminate. It is the general rule of law, therefore, that, as between the agent and his principal, the authority of the agent may be revoked by the principal at his will at any time, and with or without good reason therefor, except in those cases where the authority is coupled with sufficient interest in the agent. And this is true, even though the authority be in express terms declared to be 'exclusive' or 'irrevocable.' But although the principal has the power thus to revoke the authority, he may subject himself to a claim for damages, if he exercises it contrary to his express or implied agreement in the matter. An agency is sometimes said to be irrevocable when it is conferred for a valuable consideration. It is believed, however, that this is only another form of stating the general rule that it must be coupled with an interest."

[4] That the broker can recover any expenses incurred in the effort to sell where the authority to sell is improperly revoked is well established, and he may recover a reasonable profit on the sale, where he has procured a buyer ready, willing, and able to buy. That this profit may be the same as agreed upon as the commission does not change the rule that in such case the broker is limited to a suit in quantum meruit.

In *Sedgwick on Damages*, § 177, it is said:

"It is the rule that a plaintiff may recover compensation for any gain which he can make it appear with reasonable certainty that the de-

fendant's wrongful act prevented him from acquiring, subject, of course, to the general principles as to remoteness, compensation, etc. His compensation will be measured by the most liberal scale which he can show to be a proper one."

Mechem on Agency (3d Ed.) § 621, says:

"When, however, there has been an employment for a definite period, and the agent is discharged without cause before the expiration of that period, or is not permitted to undertake the performance at all, the principal is liable to the agent for the damages for breach of contract."

In *Johnson & Moran v. Buchanan*, 54 Tex. Civ. App. 328, 331, 116 S. W. 875, 876, Associate Justice Dunklin, speaking for this court, said:

"As a contract of agency cannot be specifically enforced, the principal may revoke the authority given the agent when that authority is not coupled with an interest, even though the contract of agency expressly provides that it is irrevocable; but, while in this sense he has the right to revoke it, the exercise of this power in violation of the terms of the contract is subject to the same liability to the agent as would be incurred by the breach of any other contract."

For the reasons given, the judgment is reversed, and the cause remanded for a new trial, not inconsistent with this opinion.

### CAMPBELL et al. v. RICHARDS et al. (No. 9638.)

(Court of Civil Appeals of Texas. Fort Worth.  
May 14, 1921. Rehearing Denied  
June 18, 1921.)

1. Execution  $\S$ 251(2) — Judgment creditor may move to set aside sale where irregularities result in inadequate price.

Judgment creditor after a sale under an execution may by motion have the sale set aside by reason of irregularities resulting in a sacrifice of the property for an inadequate price.

2. Motions  $\S$ 10—May be filed after determination of issues involved.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 2118, 2120-2123, motions may be filed not only in suits pending, but also in such suits after a determination of the issues involved.

3. Execution  $\S$ 253(1)—Notice of motion to set aside sale under execution held sufficient.

A notice of motion in the following terms: "To the Sheriff or Any Constable of T. County—Greeting: You are hereby commanded that you serve J. the defendant in the above-stated cause, with accompanying certified copy of plaintiffs' amended original motion to vacate the sale of land and cancellation of sheriff's deed and deed to defendant J. to V. Company thereunder, who resides in the county of T."—was

sufficient under Vernon's Sayles' Ann. Civ. St. 1914, arts. 2118, 2120-2123, in view of article 5502, the motion and the notice being duly served, although such notice did not fix a day upon which the motion should be heard.

#### On Motion for Rehearing.

4. Judgment  $\S$ 379(1) — Meritorious defense necessary on application to set aside judgment.

A showing of a meritorious defense is necessary in an application to set aside a judgment granting a motion to set aside a judgment and cancel deeds resulting from sale under execution.

Error from District Court, Parker County; F. O. McKinsey, Judge.

Action by J. M. Richards against J. I. Campbell and others. Judgment for plaintiff. Motion of defendants Campbell and the Virginia Company to vacate the same was denied, and they bring error. Affirmed.

S. O. Padelford, of Fort Worth, for plaintiffs in error.

Shropshire & Bankhead, of Weatherford, for defendants in error.

CONNER, C. J. On November 13, 1918, the appellee, J. M. Richards, recovered a judgment against I. E. Smith as the maker of certain vendor's lien notes, amounting to some \$1,500, besides interest, and against J. I. Campbell foreclosing a vendor's lien on a certain tract of land in Glasscock county. Certain other parties were made defendants in the case, but, as their connection is not important, they need not be named.

The defendant Campbell had purchased the land through mesne conveyances from Smith, and the judgment as against Campbell was for the foreclosure of the lien only. Pursuant to the decree, an order of sale was issued directing the proper officer of Glasscock county to sell the land to satisfy the judgment. The order of sale was issued on the 12th day of December, after the adjournment of the term of court at which the judgment was rendered. As appears from the return, the sheriff duly levied the writ, and after advertising the sale the land was sold on the 3d day of February, 1920, being the first Tuesday in said month, to the plaintiff in error J. I. Campbell for the amount of \$550.

Upon the return of the process the appellee, J. M. Richards, joined by the original defendant, I. E. Smith, filed a motion in the original case in the district court of Parker county, seeking to set aside the sale, and also seeking to set aside a deed made by Campbell to the Virginia Company, a private corporation. This motion was later amended. In the amended motion it was alleged that Campbell had conspired with a representative of the plaintiff, Richards, who had been



selected to attend the sale in Richard's interest and bid it in for him; that it had been agreed between Richards and Campbell that the judgment should be so rendered and the land so sold in order to clear Campbell's title of certain claims on the part of others; that Campbell attended the sale, conspired with the plaintiff's said agent, who in fact did not attend, and thus procured the sheriff's deed at a very grossly inadequate price; that the deed from Campbell to the Virginia Company was colorable, etc.

Upon the filing of the amended motion there was issued a precept or notice directed to the proper officer of Tarrant county, where it had been alleged that both J. I. Campbell and the Virginia Company resided. The notice is in the following terms:

"To the Sheriff or Any Constable of Tarrant County—Greeting:

"You are hereby commanded that you serve J. I. Campbell, the defendant in the above-stated cause, with accompanying certified copy of plaintiffs' amended original motion to vacate the sale of land and cancellation of sheriff's deed and deed to defendant Campbell to Virginia Company thereunder, who resides in the county of Tarrant of Fort Worth, and state of Texas.

"Herein fail not, but of this and the execution thereof make due return within five days after service.

"Given under my hand and the seal of this court this 16th day of April, A. D. 1920. G. W. Buchanan, Clerk of District Court of Parker County."

The return of the officer thereon is as follows.

"Came to hand the 17th day of April, 1920, and executed on the 7th day of May, 1920, by delivering to the within-named defendant J. I. Campbell the accompanying certified copy and a true copy of this writ. Sterling P. Clark, Sheriff of Tarrant County, Texas."

A similar notice was issued and served on the Virginia Company. Neither Campbell nor the Virginia Company appeared in answer to the motion, and the district court in Parker county, which had rendered the original judgment, after having heard the motion and evidence submitted in support thereof, entered its decree setting aside the sale of the land by the sheriff of Glasscock county and canceling his deed to J. I. Campbell, and also canceling the later deed made by Campbell to the Virginia Company.

On the 22d of May, 1920, the defendants J. I. Campbell and the Virginia Company presented a motion to set aside and vacate the court's judgment entered upon the 20th day of May, which, having been duly heard by the court, was overruled, and from this ruling the defendants Campbell and the Virginia Company have prosecuted this writ of error.

The motion to set aside the judgment, vacating the sale and canceling the deeds as

above related was duly verified. Exception was taken to the jurisdiction of the court, to the failure to receive proper notice of the motion, denial of frauds alleged, etc., and the material questions presented here are:

(1) Did the district court of Parker county have jurisdiction to entertain the motion of the defendants in error to set aside the sheriff's sale and cancel the deeds to Campbell and the Virginia Company as was done?

(2) Whether or not the defendants Campbell and the Virginia Company had been sufficiently notified or cited to appear, it being the contention in behalf of plaintiff in error that the suit is, in effect, one in trespass to try title, or to remove cloud from title and could only have been prosecuted by a separate and independent suit or proceeding, and not by motion, as was done, and that the notice served upon them was wholly deficient in that it failed to state the names of the parties, give the number of the suit, or otherwise identify the proceeding, and failed in other essentials of a citation as prescribed by the statute.

[1] The first question above noted seems to have been settled by the decisions. The case of *De Witt v. Monroe*, 20 Tex. 289, was one wherein the plaintiff in the execution moved to set aside the entry of satisfaction that had been entered thereon. The trial court in that case proceeded to vacate the sale made under the execution. On appeal the judgment was reversed, not on the ground that the trial court was without jurisdiction to entertain the motion to set aside the proceedings, but on the ground that the record failed to show that the defendant had notice. While the question of the court's power to so proceed is not discussed in that case, it could hardly have escaped the notice of the Supreme Court had it been of the opinion that there was no power on the part of the trial court to so proceed. Later, in the case of *Hansbro v. Blum*, 3 Tex. Civ. App. 108, 22 S. W. 270, the question was directly presented, and the power of a court to so proceed was expressly upheld. It is there said:

"The right of a judgment creditor to apply by motion to the court in which his judgment was obtained to set aside a sale which has, through irregularities in making it, resulted in a sacrifice of the property for an inadequate price, has been recognized by our Supreme Court in many cases."

In support of this statement are cited a number of Texas cases and text-writers. In that case *Hansbro* was a purchaser at the execution sale, and not a party to the judgment; nevertheless he was subjected to the ruling, the court stating that—

"The reasons assigned in the cases for the exercise of such a power over a purchaser who is a stranger to the suit in which the sale took place is that, by a purchase under its process,

he submitted himself to the jurisdiction of the court over such process, and became subject to its power to revoke a sale which had been improperly made thereunder."

We have found no case and none has been cited that announces a doctrine contrary to that announced in the case of *Hansbro v. Blum*, and we accordingly conclude that the first and principal question presented in behalf of the appellants must be decided against them.

As pertinent to the second question, we refer to the following articles of our statutes:

Article 2118, V. S. Tex. Civ. Stats., provides that the clerk of the court shall keep a motion docket, in which he shall enter every motion filed in his court, the number of the suit in which it is made, etc. The next article, 2119, provides:

"Whenever, in the commencement or progress of any suit, it shall be necessary to serve any notice on any party to such suit, such notice may be served either by an officer authorized by law to serve original process of the court in which the suit is brought or may be pending, or by any person who would be a competent witness upon the trial of such suit," etc.

Article 2120 reads:

"Notice of motions in a suit pending is given by the filing of the motion and entry thereof in the motion docket during the term."

Article 2121 reads:

"All motions relating to a suit pending which do not go to the merits of the case may be disposed of at any time before the trial of the cause."

Article 2122 reads:

"Where a motion does not relate to a pending suit, and where the time of service is not elsewhere prescribed, the adverse party shall be entitled to three days' notice of the motion."

Article 2123 reads:

"All motions not relating to a suit pending shall be taken up and disposed of in their order as other suits are required to be."

[2] By reference to the statutes mentioned, it will be seen that motions may be filed not only in suits pending, but also in such suits after a determination of the issues involved, as in the case of the motion before us. It is to be further noted that it is essential that the opposing party or the party to be affected by the motion must receive notice of its filing, but the statutes prescribe no particular form of notice to be given. Our laws provide (article 5502, V. S. Stats.) that "the ordinary signification shall be applied to words" in construing civil statutory enactments, except only when words relating to some art or particular trade are used. A number of definitions of the term "notice" is thus given by Mr. Webster:

"Intelligence, by whatever means communicated; knowledge given or received; information; intimation; notice, as to give or receive notice of a storm," etc.

[3] Tested by the statute and the rule so indicated, we feel unable to say that appellants did not receive timely and sufficient notice of appellee's motion to set aside the deeds as he sought to do. The motion required the proper officer to deliver to appellants the certified copy of the motion which accompanied the precept, and this was duly served. Appellants were thereby given full notice of the fact of the motion having been filed, and of the suit wherein it was filed, and of the court wherein filed and of the purpose of the proceeding. The notice was given some ten days prior to the court's action thereon, and appellants, in their motion to set aside the judgment appealed from, make no excuse for their failure to appear before the district court of Parker county and to present their defense to the motion, if they had any. We do not think it can be said that it was essential that the notice should have fixed the day upon which the motion should be heard. Article 2123 of the Statutes, already quoted, provides that motions of the character here involved shall be taken up and disposed of in their order as other suits are required to be, and of this statute appellants must be effected with knowledge. In other words, upon having received notice of the filing of the motion as they did, it was incumbent upon them without further notice to seasonably appear and answer the motion, if answer they had. And, not having shown any excuse for their failure to do so, the judgment of the court below on the motion will not be disturbed.

All assignments of error are accordingly overruled, and the judgment is affirmed.

#### On Motion for Rehearing.

Appellants present a lengthy motion for rehearing which we will not undertake to discuss in detail. We think the controlling questions presented by their assignments of error have been sufficiently, though briefly, discussed in our original opinion, and, inasmuch as we have been unable to arrive at final conclusions at variance with those originally expressed, we think the motion for a rehearing must be overruled.

[4] To what we originally said, however, we add that in addition to the failure of appellants to show a sufficient excuse for their failure to appear before the district court and there contest appellees' motion to set aside the sheriff's deed and the deed to the Virginia Company as colorable, they also failed to show a meritorious defense, and such a showing in an application to set aside a judgment, of a character of the one from which this appeal has been prosecuted, is

uniformly held to be necessary. See *Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254; *Johnson v. Templeton*, 60 Tex. 238.

Motion for rehearing overruled.

**ACREY et al. v. CASTLEBERRY et al.**  
(No. 707.)

(Court of Civil Appeals of Texas. Beaumont.  
June 21, 1921. Rehearing Denied  
June 29, 1921.)

1. Homestead  $\S$  13—One cannot have both rural and urban homestead.

One cannot have both a rural and an urban homestead.

2. Appeal and error  $\S$  1008(1)—Trial court's conclusion on issue of fact must be sustained.

On an issue of fact as to abandonment of homestead, the trial court's conclusion must be sustained.

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Suit in partition by B. C. Castleberry and others against Horace Acrey and others, in which Lige Acrey intervened. Judgment for plaintiffs, and defendants appeal. Affirmed.

A. A. Seale and S. W. Blount, both of Nacogdoches, for appellants.

Harris & Harris, of Nacogdoches, for appellees.

**WALKER, J.** This was a suit in partition. During the lifetime of his wife, Mary, Lige Acrey and his family, negroes, had their homestead on four acres of land, her separate property. She left surviving her Lige and five children. Lige soon married again and made his home with his wife on property owned by her in the town of Nacogdoches. His former homestead was in the country. Appellee bought the interest of two of Lige's children in the homestead, and then filed suit against the others for partition. Lige intervened, claiming a homestead interest in the land. The case was tried to the court without a jury. Judgment was rendered ordering a partition. Appellants duly excepted, and on their motion the trial court filed conclusions of fact and law. They concede that the only question in the case is their assignment attacking the trial court's conclusion of fact that Lige had abandoned his homestead claim in the property in controversy. This assignment is overruled. Appellants make the statement that Lige is now living with his second wife on property owned by her, and which constitutes their homestead. They say if the second wife was dead, and "Lige was claiming homestead rights in her home, a different question would arise."

[1, 2] Lige could only claim such a right in his wife's property on the theory that it was his and her homestead. He cannot have both a rural and an urban homestead. Though he has cultivated his old homestead a part of the time since his wife's death, and possibly has kept some of his personal property on the old homestead, and has had access thereto at all times since his wife's death, in view of the entire record, the most that could be said in Lige's favor is that he raised an issue of fact that he had not abandoned his homestead claim, and the trial court's conclusion of fact against him must be sustained by us. As we construe appellants' authorities (*Foreman v. Meroney*, 62 Tex. 723; *Powell v. Naylor*, 32 Tex. Civ. App. 840, 74 S. W. 338; *Flynn v. Hancock*, 35 Tex. Civ. App. 395, 80 S. W. 246; *Hall v. Fields*, 81 Tex. 558, 17 S. W. 82; *Baum v. Williams*, 41 S. W. 841; and *Clements v. Maury*, 50 Tex. Civ. App. 158, 110 S. W. 185), they support this conclusion, especially *Foreman v. Meroney*.

The judgment of the trial court is in all things affirmed.

**TEXAS PACIFIC COAL & OIL CO. v. BRUCE et al.** (No. 9588.)

(Court of Civil Appeals of Texas. Fort Worth.  
April 16, 1921. Rehearing Denied  
June 4, 1921.)

1. Wills  $\S$  88(2)—Instrument held a deed and not a void will.

Instrument executed by husband, designating a "deed," reciting that "I \* \* \* have given, granted and conveyed, and by these presents, give, grant and convey," described land to the wife, that "it is my intention in making this conveyance," etc., and that, "This deed, however, under no condition or circumstances is to be made a matter of record or become absolute until after my death," held to convey a present estate to the wife to take effect on husband's death, under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1111*, as against the contention that it was intended for a will, and was void for noncompliance with requirements as to execution under article 7857.

2. Mines and minerals  $\S$  73½—Oil held to have been "discovered" prior to certain date.

Where oil well was shot about five weeks before a certain date with the result that oil arose some 150 feet in the hole, and where five or six days later the drillers put in a second shot, connected the well with the receiving tank, and on returning the next morning found some 30 to 50 barrels of oil in the tank, whereupon they commenced to clean out the well and remove the debris dislodged by the nitroglycerine, and where 150 barrels were saved prior to such date, oil had been "discovered" on such date within lease providing

for expiration on such date, unless oil had been "discovered" prior thereto.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Discovered.]

3. Mines and minerals  $\frac{3}{4}$ —Whether oil is being produced in paying quantities under lease is for exclusive determination of lessee acting in good faith.

Where oil lease provided that the lease should continue in full force as long as oil was produced in "paying quantities," the question of whether oil is being produced in paying quantities is exclusively for the determination of the lessee, acting in good faith, and fraud in the exercise of such determination will not be presumed, but must be alleged and proven.

4. Mines and minerals  $\frac{3}{4}$ —Well held to produce oil in "paying quantities" within a lease.

Well, producing from 30 to 50 barrels of oil a day, though considerable time had been lost in cleaning out well and getting the pump to work satisfactorily, held to produce oil in "paying quantities" within lease providing for continuance thereof while oil is being produced in "paying quantities" (citing Words and Phrases, Paying Quantities).

5. Deeds  $\frac{3}{4}$ —Husband held to have delivered to wife deed by which he conveyed land, to take effect on his death.

Where husband handed to wife his deed, by which he had conveyed land to wife to take effect on his death, and told wife to read it, and later took the paper upstairs, and where on husband's death the deed was found in his trunk, there was a good delivery.

Appeal from District Court, Stephens County; W. R. Ely, Judge.

Action by E. P. Bruce and others against the Texas Pacific Coal & Oil Company and others. From judgment rendered, the named defendant appeals. Affirmed in part; reversed and rendered in part.

John Hancock and W. J. Oxford, both of Fort Worth, for appellant.

Levy & Evans, of Ranger, and McLean, Scott & McLean, of Fort Worth, for appellees.

BUCK, J. On May 28, 1913, P. J. Bruce, of Ranger, Tex., went to R. L. Weeks, notary public, and asked him to write a will. This the notary did, but when Bruce learned that the will would have to be witnessed, he asked the notary why he could not acknowledge it. The notary told him that he could prepare a deed conveying his property to his wife, Mrs. Jennie M. Bruce, to take effect at grantor's death, and did prepare the instrument hereinafter set out, which Bruce said was satisfactory, and duly acknowledged it. Bruce died October 21, 1913, and the wife had the instrument put on record in the deed records of Stephens county. This instrument, omitting formal parts and description

of the lands, consisting of 319 acres in Stephens county, reads as follows:

"Know all men by these presents that I, P. J. Bruce, of the county of Eastland, state of Texas, for and in consideration of the natural love and affection which I have and bear for my beloved wife, Jennie M. Bruce, have given, granted and conveyed unto the said Jennie M. Bruce. \* \* \* [Here is a description of 319 acres of land in Stephens county.] It is my intention in making this conveyance to vest her, the said Jennie M. Bruce, with complete power to sell, rent, lease, transfer or use the property herein conveyed, in any shape or form that she may think best for her support and comfort, or the support, comfort or education of my children (by name), Elsie, Earl, Lloyd, Floyd, Olan and Vida Bruce. This deed, however, under no condition or circumstances is to be made a matter of record or become absolute until after my death."

Then follows the usual habendum clause, limiting and warranting the estate conveyed to Jennie M. Bruce and her heirs "of whom I am the father."

After executing and acknowledging this conveyance, he took it home and presented it to his wife, and told her that here were "those papers," to "read them," and see the provision he had made for her and the children, if anything should happen to him. But she was busy with her household duties and did not read it. He took the paper upstairs, and it was found in his trunk after his death. Mrs. Bruce testified that her husband said at the time he presented the paper to her, "Of course, they are no good at all until after I am gone. Then it is yours."

On January 21, 1915, Mrs. Bruce, then a widow, executed an oil and other mineral lease to the Texas & Pacific Coal Company (subsequently changing its name to the Texas Pacific Coal & Oil Company) appellant here. This lease was for five years, and expired at midnight of January 21, 1920, unless it can be said that oil was "discovered" on the land prior to said time. If so discovered, then the lease was to "continue in full force and effect so long as any of these [named minerals] are produced in paying quantities."

Mrs. Bruce received the down payment of \$79.25, and a like amount as annual rental thereafter for four years. On November 4, 1919, Earl P. Bruce, for himself and as next friend for Floyd, Olan, and Vida Bruce, minors, and Lloyd Bruce and Elsie Bruce Davis, joined by her husband, James Davis, filed suit against their mother, Mrs. Jennie M. Bruce, and the Texas Pacific Coal & Oil Company, the Quakins Petroleum Company, and Mrs. Sallie James, for the lands alleged to have been left to them by their deceased father, and alleged to have been the separate property of their deceased father, except as to 160 acres, the N. W.  $\frac{1}{4}$  of survey No. 51, block 6, Texas & Pacific Railway Company

land, which they alleged was the community estate of their father and mother. They further alleged that the instrument left by their father was intended to be his last will and testament, though executed in form and manner similar in some respects to a deed. They further alleged that P. J. Bruce never delivered said instrument to any one before his death, and hence it was void as a deed, and was void as a will because not witnessed or otherwise executed in the form and manner required for a will.

The Texas Pacific Coal & Oil Company, hereinafter mentioned as Coal & Oil Company, and the Quakins Petroleum Company, answered by general demurrer, a plea of not guilty, and a general denial, and further pleaded that they were the owners of a lease for oil and other minerals on the land described in Stephens county, by a lease from Mrs. Bruce, the owner, and that they had discovered oil on said premises within the life of the lease, and had expended large sums of money in the drilling of a well and otherwise developing said land for oil, and that with full knowledge of said facts the plaintiffs had acquiesced in and encouraged the defendants to expend such large sums of money in such development.

Mrs. Jennie M. Bruce and Sallie James answered by a general denial and a plea of not guilty, and by special answer in the way of cross-action to the answer of the Coal & Oil Company and the Quakins Petroleum Company's special pleas denied that the last-named defendants' claims were made in good faith, and prayed for the cancellation of the lease. The cause was tried before a jury, and the jury answered the following special issues, to wit:

(1) That P. J. Bruce, in executing the instrument of May 28, 1913, did not intend it as a deed conveying his estate in said lands to commence after his death.

(2) That said instrument was delivered by P. J. Bruce, during his lifetime to Mrs. Jennie M. Bruce.

(3) That the defendants Coal & Oil Company and Quakins Petroleum Company were not producing oil in paying quantities on the land involved on January 22 (21?), 1920, at 12 o'clock midnight, or had they so produced same at any time within the five-year period of the lease.

(4) That 150 barrels of oil were produced on the lease in question before January 21, 1920.

(5) That 750 barrels were produced from the well on said premises subsequent to January 21, 1920.

(6) That the total cost to the defendant oil companies of the production of oil produced from the well prior to January 21, 1920, was \$750.

(7) That the total cost of the oil produced from the well subsequent to January 21, 1920, was \$3,000.

Upon this verdict, the court entered judgment canceling the lease made by Mrs. Bruce to the Coal & Oil Company, awarding Mrs. Bruce the one-half undivided interest in the northeast one-fourth of section No. 51, block No. 6, and a lifetime estate in one-third of the lands awarded to the plaintiffs. The judgment awarded to Mrs. Sallie James an undivided one-fortieth interest in the one-half interest of the 160 acres above described, and which the court found to be the community estate of P. J. Bruce and Jennie M. Bruce. All other lands involved were awarded to the children, share and share alike.

The two main questions in this appeal are, to wit: First, is the evidence sufficient to support the finding of the jury in answer to issue No. 1, that P. J. Bruce, in executing the instrument of May 28, 1913, did not intend the same to be a deed conveying his estate in said land to commence after his death; second, did the defendants the Coal & Oil Company and the Quakins Petroleum Company discover oil on the land in question prior to midnight, January 21, 1920?

Article 1111, V. S. Tex. Civ. Stats., provides:

"An estate or freehold or inheritance may be made to commence in futuro, by deed or conveyance, in like manner as by will."

In *Ferguson v. Ferguson*, 27 Tex. 339, 343, our Supreme Court quotes the following extract from 1 Williams on Executors, 87:

"The true principle to be deduced from the authorities appears to be that, if there is proof, either in the paper itself or from clear evidence dehors: First, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, if death was the event that was to give effect to it; then, whatever may be its form, may be admitted to probate as testamentary. And there seems to be this distinction in the consideration of papers which are in their terms dispositive and those which are of an equivocal character, that the first will be entitled to probate, unless they are proved not to have been written *animo testandi*, whilst in the latter the animus must be proved by the party claiming under them."

Article 7857, V. S. Tex. Civ. Stats., provides:

"Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator or by some other person by his direction and in his presence, and shall, if not wholly written by himself, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names thereto in the presence of the testator."

[1] This instrument under consideration did not comply with the requirements of the statute with reference to the form and manner of executing a will. It was not written

by Bruce himself, but by the notary, and the failure to have the instrument witnessed by two witnesses, as provided by the statute, condemns it as a valid will, subject to probat. Moreover, Bruce himself in the instrument calls it a deed, and the instrument contains the usual and customary words of conveyance. The expressions "have given, granted and conveyed, and by these presents, give, grant and convey," and "It is my intention in making this conveyance," etc., evidence an intention on the part of the grantor to convey a present estate in the land, to commence, it is true, at his death. We do not think this plain and apparent intention is contradicted or made ambiguous by the statement in the conveyance that—

"This deed, however, under no condition or circumstances is to be made a matter of record or become absolute until after my death."

There is nothing in the instrument that reserves in the grantor the right or power to revoke, defeat or impair his act. In *Crocker v. Smith*, 94 Ala. 295, 10 South. 258, 16 L. R. A. 576, and quoted with approval by the Austin Court of Appeals in *Eckert v. Stewart*, 207 S. W. 317, the Alabama Supreme Court says:

"The intention of the maker is the ultimate object of inquiry—whether it was intended to be ambulatory and revocable, or to create rights and interests at the time of execution which are irrevocable. If the instrument cannot be revoked, defeated, or impaired by the act of the grantor, it is a deed; but if the estate, title, or interest is dependent on the death of the testator, if in him resides the unqualified power of revocation, it is a will."

As said by the appellants in their brief:

"No one dare insist that by the use of the phrase, 'when this deed shall become absolute,' to be found in vendor's lien deeds, no present estate is granted thereby, or that such instruments are testamentary."

See, also, *Hart v. Rust*, 46 Tex. 556; *Rogers v. Kennard*, 54 Tex. 30; *Bombarger v. Morrow*, 61 Tex. 417; *Chavez v. Chavez* (Sup.) 13 S. W. 1018; *Jenkins v. Adcock*, 5 Tex. Civ. App. 466, 27 S. W. 21; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40, 26 S. W. 759; *Leslie v. McKinney*, 38 S. W. 378, writ denied; *Stevens v. Haile*, 162 S. W. 1025; *Emerson v. Pate*, 165 S. W. 469; *Low v. Low*, 172 S. W. 590; *Wright v. Giles*, 60 Tex. Civ. App. 550, 129 S. W. 1163; *Smith v. Smith*, 200 S. W. 540.

We are forced to the conclusion that from the instrument itself it is apparent that it was the intention of the grantor to convey a present estate in the lands mentioned to his wife, but to take effect at his death, and that the trial court should have so instructed the jury. It becomes unnecessary to consider other assignments relating to this deed, and we will now direct our attention to the ques-

tion of whether the cancellation of the lease from Mrs. Bruce to the Coal & Oil Company was justified.

[2, 3] The uncontradicted evidence shows that on December 15, 1919, the well on Mrs. Bruce's land reached 3,770 or 3,775 feet. That on the 17th of December it was shot. The result of the first shot was that oil rose some 150 feet in the hole. Some five or six days later, the drillers put a second shot, and before going home that night connected the well with the receiving tank. Returning the next morning, the workmen found some 30 to 50 barrels (the jury found 50 barrels) of oil had flowed out of the well into the tank. From that time until about three weeks of the trial below, in June, 1920, the workmen were occupied in cleaning out the well, removing the debris dislodged by the nitroglycerine. The record showed that 150 barrels of oil were saved up to January 20th. During this time and until the cleaning out of the well was completed, it flowed "by heads." The drillers had considerable trouble in removing the dislodged sand and rock, and even at the time of the trial they were having trouble with the pump, owing to the fact that the sand cut out the valves so they would not lift the oil. This condition required the rods to be pulled, and the putting in of new valves. The jury found that subsequent to January 21, 1920, 750 barrels were produced. Certainly, under this evidence, oil was "discovered" on the land within the life of the lease, and the lease provides "that in case natural gas, petroleum, etc., are discovered on said premises that this lease shall continue in full force and effect so long as any of these are produced in paying quantities." The testimony of F. J. Bates, superintendent, is that the cost of drilling the well and cleaning out of the well, such as swabbing or lifting out the debris, etc., is an expense chargeable to development, and is not chargeable to production or operation. The oil from the well was sold for \$3.25 a barrel, and at the time of the trial the market price was \$3.50 a barrel. As to whether oil was produced after its discovery in paying quantities is a question exclusively left to the determination of the lessee, acting in good faith, and fraud in the exercise of this determination will not be presumed, but must be alleged and proven. In *Aycock v. Paraffine Oil Co.*, 210 S. W. 851, it is said:

"The following general definition of 'paying quantities' is given in Words and Phrases, vol. 6, p. 5247: 'The term "paying quantities," as used in an oil lease for a given term and as much longer as oil can be produced in paying quantities, means paying quantity to the lessee. If the well pays a profit, even small, over operating expenses, it produces in paying quantity, though it may never repay its cost, and the operation as a whole may result in a loss. The phrase "paying quantities," therefore, is to be construed with reference to the operator,

and by his judgment, when exercised in good faith.'"

In Thornton's Law of Oil & Gas (3d Ed.) § 149, p. 24, it is said:

"Upon discovery of oil and gas in paying quantities, the lessee acquires a vested interest in the oil and gas granted by the lease as long as it can be produced in paying quantities."

In section 148, page 232, of the same work, it says:

"A very common expression in oil and gas leases is that they are to continue so long as oil or gas is or can be produced in paying quantities. This is a clause for the benefit of the lessee; for it is obvious that a prudent man would not want to pay rent for premises after they had ceased to be productive; nor would he care to operate them, on even a royalty, where the operating expenses were more than the income. Occasionally the phrase might be of value to the lessor; for should the lessee occupy considerable surface of the ground leased, it might be of more value to him for other purposes than to have it continued for oil or gas purposes."

In Young v. Forest Oil Co., 194 Pa. 243, 45 Atl. 121, the Supreme Court of Pennsylvania says:

"But if a well, being down, pays a profit, even a small one, over the operating expenses, it is producing in 'paying quantities,' though it may never repay its costs, and the operation as a whole may result in loss."

In Colgan v. Forest Oil Co., 194 Pa. 234, 45 Atl. 119, 75 Am. St. Rep. 695, the following is said by the Supreme Court of Pennsylvania:

"The basis necessary to sustain the bill, therefore, is fraud, and that, of course, must be affirmatively and clearly proved. There is no relation of special trust or confidence between lessor and lessee in gas or oil leases, any more than in any other. Like all other contracting parties, they deal at arm's length, each for his own interest. So long as the question is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor; and the parties must be left, as in other cases, to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere. \* \* \*

"So long as the lessee is acting in good faith on business judgment, he is not bound to take any other party's [judgment], but may stand on his own. Every man who invests his money and labor in a business does it on the confidence he has in being able to conduct it in his own way. No court has any power to impose a different judgment on him, however erroneous it may deem his to be. Its right to interfere does not arise until it has been shown clearly that he is not acting in good faith on his business judgment, but fraudulently, with intent to obtain a dishonest advantage over the other party to the contract. Nor is the lessee bound, in case of difference of judgment, to surrender

his lease, even pro tanto, and allow the lessor to experiment. Lessees who have bound themselves by covenants to develop a tract, and have entered and produced oil, have a vested estate in the land, which cannot be taken away on any mere difference of judgment. It is not within the jurisdiction of any court to oust the owner and forfeit the title to estates in that way, and the jurisdiction of equity to decree any specific act or declare forfeiture depends on fraud averred and fully proven."

In Thornton's Oil & Gas Law, p. 235, the following is said:

"It is for the operator, acting in good faith, to determine when the lease is no longer profitable; and the lessor cannot terminate it because it is not profitable to him to have it continue."

In Zeller v. Book, 28 Ohio Cir. Ct. R. 119, it is said that it is unnecessary for the lessee to show that he can get back from the operation of the wells the cost of drilling, since he is entitled to whatever salvage may be obtained from the operation, and so long as he is acting in good faith in making an effort to get some production out of the wells he has the right to decide for himself whether or not it is profitable.

Numerous other authorities might be cited in support of the rule that the stipulation that the lease shall continue so long as oil or gas is found in "paying quantities" is a stipulation for the benefit of the lessee, and that the lessee may in good faith exercise his judgment as to whether he shall continue operation or abandon the lease, but we think sufficient have been cited.

[4] Without attempting to quote the testimony, which we have carefully read, the evidence tends to show that the well has produced, under pump, from 30 to 50 barrels a day. It is true that the driller lost a good deal of time in cleaning out the well, and in getting the pump to work satisfactorily, but we believe the evidence establishes, without contradiction, facts which will support the good faith of the appellants in their claim that they are producing oil in paying quantities on the lease in question. In Ardizzone v. Archer (Okla.) 178 Pac. 263, it is held that the expenses necessarily incurred in the equipment of an oil well should not be taken into account in determining whether or not the production therefrom is in paying quantities. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Oil & Gas Rights by Morrison & De Soto, page 90, 91.

We conclude that the evidence fails to sustain plaintiff's theory that the instrument made by P. J. Bruce to his wife, Jennie M. Bruce, was not a conveyance of the present estate in the lands mentioned, and we hold that said Jennie M. Bruce had authority under this deed to lease the lands to the Texas Pacific Coal & Oil Company. We are

further of the opinion that the evidence is insufficient to support a judgment canceling said lease, but that the evidence before us requires us to render judgment for the defendants Coal & Oil Company and Quakins Petroleum Company upon this issue. No cross-assignment in the brief of Mrs. Jennie M. Bruce and Mrs. Sallie James is found complaining of the judgment of the trial court decreeing to the children an interest in these lands; hence we will leave that part of the judgment undisturbed. But that part of the judgment canceling the lease is hereby reversed and here rendered for appellants, awarding them the leasehold interest in the lands described as given by the lease from Mrs. Bruce.

[5] The evidence sustains the findings of the jury that there was a delivery of the instrument to Mrs. Bruce by P. J. Bruce. *Earl et al. v. Mundy*, 227 S. W. 970; *Brown v. Brown*, 61 Tex. 56.

Reversed and rendered in part, undisturbed in part.

**KOONTZ et al. v. SAVELY et al.**  
(No. 6593.)

(Court of Civil Appeals of Texas. San Antonio. June 15, 1921. Rehearing Denied June 29, 1921.)

1. Chattel mortgages  $\S$  138(3)—Landlord and tenant  $\S$  245—Landlord's statutory lien applies to land rented part for a dairy and part for farming.

Where the rental of a farm, to be used partly for dairy but mostly for agricultural purposes, was a gross sum, and the contract was entire and indivisible, the lien of the landlord on the crops for rent and for advances to help in making the crop under *Vernon's Sayles' Ann. Civ. St.*, 1914, art. 5475, will attach for the whole rental, and is superior to a chattel mortgage given by the tenant on the crop, and is good against all who purchase any of the crop grown within the period stated in the statute.

2. Courts  $\S$  121(3)—District court held to have jurisdiction in suit to foreclose chattel mortgage.

In a suit to foreclose a chattel mortgage on cotton securing a note for \$362.25, brought against a landlord and others claiming an interest in, or lien on, the property, in which the landlord asked judgment for about \$1,400, the value involved was within the jurisdiction of the district court.

Appeal from District Court, Victoria County; John M. Green, Judge.

Action by M. A. Koontz against J. R. Savely and others. From a judgment in favor of defendant Crutsinger, sustaining his landlord's lien giving it priority over certain liens and mortgages, plaintiff and certain defendants appeal. Affirmed.

Fly & Ragsdale, of Victoria, for appellants. R. L. Daniel, J. T. Linebaugh, J. P. Pool, and Proctor, Vandenberg, Crain & Mitchell, all of Victoria, for appellees.

COBBS, J. This suit was brought by appellant Koontz against J. R. Savely, V. M. Crutsinger, the People's National Bank, Victoria National Bank, Victoria Manufacturing Company, Planters' Gin & Mill Company, and Ed. Jones.

It was alleged that J. R. Savely was indebted to appellant, evidenced by a promissory note, dated January 1, 1920, for the sum of \$362.25, due September 1, 1920, secured by a certain chattel mortgage of even date therewith on 60 acres of cotton and 25 acres of feedstuff to be grown during the current year on the farm of appellee Crutsinger, which chattel mortgage was duly filed for record.

It was alleged that the crop was grown thereupon and duly harvested; that appellee Planters' Gin & Mill Company took possession of six bales of the cotton between August 24, and September 17, 1920, and converted the same to their use, of the value \$600; that appellee Savely stored four more bales of cotton, raised by him, in the warehouse of appellee Victoria Manufacturing Company; that appellee delivered warehouse receipts for three more bales of the cotton to People's National Bank and a receipt for one bale of said cotton to appellee Victoria National Bank, and that said banks were asserting some kind of title, interest, or claim thereto; that the value of the four bales of cotton stored in the warehouse of Victoria Manufacturing Company were of the value of \$600; that appellee Crutsinger took into his possession and converted to his own use certain sorghum, cotton, cotton seed, and grain, being a portion of the crop raised by appellee Savely, of the value of \$318; that Ed. Jones was asserting some kind of claim or lien against all or a portion of the crop; that all the above-described property came under and was subject to appellant's said prior chattel mortgage lien.

The prayer of the petition was for a judgment for the appellant's debt against appellee Savely and for the foreclosure of the lien; judgment against appellee Planters' Gin & Mill Company, and against appellee Crutsinger for the value of the mortgaged property converted by them, and for judgment against appellee Victoria Manufacturing Company for the four bales of cotton stored with it and held adversely to appellant, or for its value in the sum of \$600.

Appellee Crutsinger answered and filed exceptions, general denial, and cross-action, asserting a prior landlord's lien for rent and advances made to the tenant, Savely, appellee, the purchase price of certain chattels



and advances made to him as his landlord, aggregating \$2,509.70, less a credit of \$1,867.50, representing the resale to him by appellee Savely of the major part of chattels by him purchased from Savely, appellee, of sorghum, cotton, and cotton seed, constituting a part of the crop in controversy, of the value of \$288, and for rents for the use of the farm in the sum of \$650.

Appellee Crutsinger also set up a written contract between him as landlord and Savely, his tenant, for the rent of the premises and dairy farm business, for which he was to receive as a rental the sum of \$650 to cover the rent for the entire rental period from the 16th day of September, 1919, to January 1, 1921. Appellee Crutsinger pleaded that the crop raised was four bales, stored with Victoria Manufacturing Company (no value given); five bales converted by Planters' Gin & Mill Company, of the value of \$700, two bales of cotton sold to Planters' Gin & Mill Company with Crutsinger's consent (no value given); sorghum, cotton, and corn and cotton seed purchased by Crutsinger from Savely, \$288; and fixed the debt due by Savely to him at \$930, representing the difference between the sale price of the chattels and the repurchase price of the same, \$30.75 cash advances and \$650 as rental of the entire premises under the contract, a total of \$1,322.95 for which judgment was asked against Savely for foreclosure of the landlord's lien as superior to the lien of plaintiff and all other defendants. The two banks answering in reference to the warehouse certificates representing three bales of cotton stored with Victoria Manufacturing Company, asserted liens inuring to their benefit against the bales of cotton by virtue of the furnishing by them of certain funds to Savely to defray the expenses of cotton picking, and asked that their liens be given preference.

The Victoria Manufacturing Company answered that it had ginned four bales of cotton stored in its warehouse, and that the ginning charges were paid in a sale to it by Savely of the cotton seed, and that after the charges were paid there remained an overplus of \$9.86, which it paid to Savely. It offered to surrender the four bales of cotton upon payment of warehouse charges and the surrender of the receipts for cancellation.

Defendants Savely and Jones did not answer.

Appellant pleaded in abatement to the answer of appellee Crutsinger in attempting to assert a landlord's lien under the Landlord and Tenant's Act (Laws 1915, c. 38 [Vernon's Ann. Civ. St. Supp. 1918, art. 5475]), which creates a lien in favor of landlord for rents and advances in excess of the value of one-fourth of the cotton and one-third of the grain raised on the farm; that the contract contemplated a twofold purpose, the raising of a crop and the operation of a dairy farm,

all covered by a gross rental amount, which created no express lien itself, and not such an undertaking as to permit the landlord to invoke the statutory lien.

Crutsinger amended his answer and brought cross-action substantially the same, and divided the \$650 annual rental into two sums, one for \$410, as reasonable rental for the premises for farming purposes, and the other, \$240, the reasonable rental value of the premises for dairy purposes, prayed for a foreclosure only for \$410 for farm rental and balance due on sale and repurchase of chattels, together with \$30.75 cash advances, and waived any landlord's lien on the \$240, the alleged reasonable rental value for dairy purposes.

The case was tried by the court without a jury, and judgment was rendered in favor of appellee Crutsinger against Savely for the amount due and sustaining appellee Crutsinger's landlord's lien, giving it priority over appellant's mortgage.

The testimony developed that Roos Mercantile Company held a prior mortgage to plaintiff's on the first bale of cotton marketed and one bale only, and Planters' Gin & Mill Company who had purchased said bale, together with other bales, had satisfied Roos Mercantile Company, and the latter had released its mortgage. The court refused to give judgment to appellant against appellee Victoria Manufacturing Company for said \$9.86.

It will be impossible to separately discuss the 65 assignments of error presented by appellants, as well as those presented by the other parties. In fact they all together present but few material questions for us to decide. The findings of fact and conclusions of law of the trial court are too lengthy to copy. The rental contract between the landlord and tenant being in writing, we here set it out:

"Victoria, Texas, Sept. 16, 1919.

"This memorandum of agreement entered into this 16th day of September, 1919, between V. M. Crutsinger, party of the first part, and J. R. Savely party of the second part witnesseth:

"That the said party of the first part agrees to sell to the party of the second part all live stock and implements, and feed, etc., as shown by invoice list of this date, which are located on the farm of said party of the first part about 3 miles from Victoria, at a price of \$2,509.70, and that the party of the first part agrees to lease said farm to the party of the second part until January 1, 1921, with an option of renewal.

"That the party of the second part agrees to pay the above-named price for stock and implements, etc., as follows: \$500 on or before October 1, 1919, in cash; and \$500 on or before January 1, 1920, in cash; and any balance left unpaid of the total price of \$2,509.70 to be covered by bankable notes on January 1, 1920. The party of the second part further agrees to pay an annual rent of \$650 for the lease on

the entire farm aforesaid—the rent to be paid monthly as follows:: \$30 or more beginning March 1, 1920, each month; and any unpaid balance of the total rent of \$650 to be paid in the fall when the first cotton is sold from said farm.”

[1] Appellant's first assignment complains that the court erred in not sustaining the plea in abatement to appellee Crutsinger's answer seeking to assert a landlord's lien on the crop of 1920 because it showed a rental contract in contravention of the laws of the state, in that it required said appellee to pay the landlord \$650, which showed on its face to be in excess of the value of one-third of the grain and one-fourth of the cotton raised on the leased premises, and, second, it is an attempt to secure rental for the use of a dairy farm for which the statute provided no lien.

The important question raised in this case is as to the alleged priority of appellant's chattel mortgage over the excess of property or money claimed to have been produced by the tenant on the 60 acres of cotton and 25 acres of feed stuff to be grown during that current year by Savely, the tenant, on the rented premises of appellee Crutsinger. This chattel mortgage was duly and promptly registered according to law.

There is no question, under the law, in respect to the value of the use of said land and for supplies, etc., furnished and to be furnished by the landlord necessary for tenant to make a crop for the current year, he has a superior valid lien, for a certain period of time prior to the claim of any third person whosoever upon the crops grown upon the rented premises.

Does such a relation of landlord and tenant exist in this case as subordinates the appellant's chattel mortgage lien to the alleged Crutsinger's lien as landlord for both claims; that is: First, for the use of any part of the premises for the so-called dairy purposes; and, second, for agricultural purposes?

We find no difficulty in holding, as to the sums of money due for farming the land and growing a crop thereupon and for the proper advances for that purpose, that the landlord, Crutsinger, is entitled to his superior lien for the rental value for the use of the land for cropping, and the necessary advances for growing, making and harvesting the same. By reference to the testimony and the rental contract, it will be observed that the contract was made for the entire use of the rented premises, and the recited consideration thereof, for the entire rental period, was for the total sum of \$650, as was expressed in the rental contract.

The contract itself, introduced in this case as the basis of Crutsinger's rights, shows the relation of landlord and tenant existing between them. Appellee Crutsinger pleaded that he also advanced \$20.50 to buy feed and provisions to enable the tenant to prosecute his farming operations.

When the contract was entered into, it was in the contemplation of the minds of the parties that the place could be and might be used as a dairy in a small way and as a farm, too, the latter purpose is further illustrated by the fact that the chattel mortgage was given on the crop to appellant. Savely, the tenant, testified that the landlord stated to him at the time that the rent for dairy purposes would be worth \$20 or \$30 a month, with a small number of cows. He said he (Savely) did not agree to pay anything separate from the balance of the property for the grass, but “was to pay \$650 for the rent of the entire place, including everything; \* \* \* would not have taken the farm with the cultivated land without the house and barn and other improvements there as a farming property.” The testimony shows: That the stock was used in the necessary conduct of the farm and the benefits secured thereby for that purpose. The milk was used by the family. No dairy was operated. That any small excess of milk or butter, if any above use for the family, was sold, but the operation of the farm for dairy purposes was not done at all, all being used for agricultural purposes and as a necessary aid thereto. All the property was used by him, improvements, stock and pasture—a mere necessary adjunct to his farming purposes, home, etc.

As said in *Thomas v. Tucker, Zeve & Co.*, 40 Tex. Civ. App. 358, '89 S. W. 802:

“The item of \$18 for pasturage was shown to have been for the pasturage of the work stock owned and used by Nations in cultivating the farm, and for his cows, from which he obtained milk for his family during the time he was cultivating said farm. The contract for this pasturage was included in the rent contract, and we think it clear, under these facts, that pasturage so furnished comes under the head of supplies, for which the statute gives a landlord's lien.”

We would hesitate very much to support a contention that no lien was created in supplying a farmer, struggling to make a crop, with the benefit of cows to give milk and butter necessary to the family use, and lands with which to pasture them. The consideration in this contract was in gross, and no lien was created in the same by any express agreement, neither was the landlord's lien, so created by operation of law, in any manner waived. This contract and the testimony both show that, at the time the contract was made, it was to be entire and indivisible as to the amount to be paid for the whole property as rental. It is entire, because it shows by its nature or purpose and express terms that there was to be paid but one rental. *Del Curto v. Billingsley*, 169 S. W. 393; *Jones v. Gammel*, 94 S. W. 191; *Jones v. Eastham*, 224 S. W. 223; 6 Ruling Case Law, § 246, p. 858.

For the consideration of this case we do not think it necessary to discuss the so-called

Ferguson Act (Laws 1915, c. 38 [Vernon's Ann. Civ. St. Supp. 1918, art. 5475]). That has been sufficiently considered by the Court of Civil Appeals in *Rumbo v. Winterrowd*, 228 S. W. 261, and it may lie in the "bosom of the deep" until called forth by further treating by our Supreme Court.

The landlord, by virtue of the rental contract, had a superior lien. Article 5475, Vernon's Sayles' Civil Statutes; *Hawthorn v. Coates Bros. et al.*, 202 S. W. 804; *Green v. Prince*, 201 S. W. 200; *Rutledge v. Murphy*, 230 S. W. 1034 (opinion of this court, delivered April 20, 1921, not yet [officially] published).

This lien in favor of the landlord is superior to and enforceable against all persons who purchase or buy any of the crop grown on the rented premises, within the stated period of time within which the lien is operative. *Templeman v. Gresham*, 61 Tex. 51; *Thomas v. Tucker, Zeve & Co.*, 40 Tex. Civ. App. 337, 89 S. W. 802.

The appellee Crutsinger pleaded that at the time he rented the premises to his tenant, Savely, he was conducting a small dairy business in connection with his farming, and the premises were equipped for conducting a dairy business in a very small way, and he had a large amount of pasturage, etc., which was taken in consideration in fixing the rental value of the premises, which was reasonably worth the sum of \$20 per month. That the parties intended that the premises were rented for the purpose of farming, and the fact that a small dairy could be used in connection therewith, did not destroy the landlord's lien to secure the entire rental.

It is the intention of this opinion to consider and dispose of all the errors assigned by appellants, as well as all those presented and urged by all the other parties who have answered and all those who have filed briefs, cross-assignments, and counter propositions.

[2] The amount or value of the property involved in this case, as shown by the pleadings of all parties, and the facts, show the same within the jurisdiction of the district court. Appellee Crutsinger himself appeared, answered, and pleaded affirmatively for judgment for something like \$1,400.

The question of the jurisdiction was not raised by plea or exception that the amount or value in controversy brought it below the jurisdiction of the court. If it had been, the proof showed the value of the security given, and the value or amount in controversy brought it within the jurisdiction of the court. *Tarbox et al. v. Kennon*, 3 Tex. 7; *Marshall v. Taylor*, 7 Tex. 235; *Bohl v. Brown*, 2 Willson, Civ. Cas. Ct. App. § 542; *Poulter v. Southwestern National Bank*, 146 S. W. 561; *Walker Mercantile Co. v. Raney*, 154 S. W. 317; *Hall v. Johnson*, 225 S. W. 1110.

And this rule applies to those purchasing any part of the incumbered property. *Templeman v. Gresham*, 61 Tex. 50; *Small v. Rush*, 63 Tex. Civ. App. 126, 132 S. W. 874.

We think the district court had complete jurisdiction of the parties and the res. As said in *Templeman v. Gresham*, 61 Tex. 53, supra:

"The general rule is that all persons who claim an interest in property on which a lien is sought to be foreclosed should be made parties. *Hall v. Hall*, 11 Tex. 547; 2 Story's Equity, 1526; *Trittippe v. Edwards*, 35 Ind. 467; *Jones on Chattel Mortgages*, 783."

We think the trial court has made the correct disposition of the case, and we overrule all assignments of all the parties, because we find no reversible error assigned, and affirm the judgment of the court.

### MONTGOMERY et al. v. TURNER et al. (No. 9596.)

(Court of Civil Appeals of Texas, Fort Worth.  
April 9, 1921. Rehearing Denied  
May 14, 1921.)

1. Pleading  $\Rightarrow$  On plea of privilege, jurisdictional allegations of petition considered as made in good faith.

In suit for the partition of realty, where defendants' plea of privilege contained no allegation that the real and only purpose of plaintiffs was to recover title to land situated in the county of defendants' residence, or that the allegation on which partition of personal property was sought was made for the fraudulent purpose of conferring jurisdiction on the district court of the other county in which suit was brought, the jurisdictional allegations contained in the petition must be considered as having been made in good faith.

2. Pleading  $\Rightarrow$  On hearing of plea of privilege, petition admissible to show character of suit.

In suit for partition of realty, on determination of plea of privilege in statutory form, there was no error in admitting the petition in evidence to show the character of the suit instituted; that being the only proper method of making such proof.

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Suit by M. L. Turner and others against Emma P. Montgomery and others. From an order overruling their plea of privilege, defendants appeal. Affirmed.

Templeton & Milam, of Fort Worth, and J. W. McDavid, of Henderson, for appellants.

Ike A. Wynn, of Fort Worth, for appellees.

DUNKLIN, J. This appeal is by Mrs. Emma Montgomery and J. O. Montgomery,

who reside in Rusk county, from an order of the trial court overruling their plea of privilege to be sued in that county. The suit was instituted by Mrs. M. L. Turner and others against the two Montgomerys named, who were alleged to reside in Rusk county, and against P. A. Collins, who was alleged to reside in Tarrant county, and H. J. Collins, whose residence was alleged in plaintiffs' petition to be in El Paso county. The suit was for a partition of property belonging to the estate of A. B. Collins, deceased, the property consisting of 182 acres of land situated in Rusk county, and personal property of the value of \$10,000, all of which property was alleged to belong to A. B. Collins, deceased at the time of his death, and it was further alleged that the land was the homestead of the decedent at the time of his death.

The plea of privilege was in statutory form. It alleged that the two Montgomerys resided in Rusk county, and that—

"none of the exceptions to exclusive venue in the county of one's residence mentioned in articles 1830 and 2308 of the Revised Statutes of this state exist in this cause, and that this suit does not come within any of the exceptions provided by law in such cases, authorizing this suit to be brought or maintained, rendering them or either of them suable in Tarrant county, Tex., or elsewhere outside of Rusk county, Tex., their place of domicile and residence."

In reply to that plea, the plaintiffs filed a controverting plea, duly verified, alleging that the suit instituted by them, as appears from their petition, was a suit for partition, and that one of the defendants, to wit, P. A. Collins, resides in Tarrant county, Tex., and did so reside there when the suit was filed, and has continued to reside in Tarrant county until the present time.

Upon the hearing of the plea of privilege, plaintiffs introduced their petition, which showed on its face as a conclusion of law that it was a suit for partition. Plaintiffs also introduced proof that one of the defendants, P. A. Collins, resided in Tarrant county at the time the suit was filed, and has continued to reside in that county ever since, and that evidence was uncontradicted. By article 1830, V. S. Tex. Civ. Stats., it is provided:

"No person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in the following cases, to wit:"

Then follow some 80 subdivisions of that article of the statutes by way of exceptions to that general provision, and subdivision 13 of the article, as amended by Acts 36th Leg. c. 93, which became effective March 20, 1919, reads as follows:

"Suits for the partition of lands or other property may be brought in the county where

such lands or other property or a part thereof, may be, or in the county in which one or more of the defendants reside, and any such suit for partition of lands or any other property may be brought and prosecuted in the county of the residence of any one or more of the defendants, notwithstanding any one or more of such defendants may assert an adverse interest in such property, or claim to be the owner thereof, or seek to recover the title to the same, provided that nothing herein shall be construed to fix venue of any suit whose real purpose is to recover the title to land other than in the county where such land, or part thereof, may lie, but whenever on the trial of the case, the cotenancy of the parties or any of them is established, or becomes an issue of fact, it shall not be held that the real purpose of the suit was to try the title of the land."

[1] The plea of privilege contained no allegation to the effect that the real and only purpose of plaintiffs was to recover title to land situated in Rusk county, and that the allegations upon which partition of the personal property was sought were made for the fraudulent purpose of conferring jurisdiction upon the district court of Tarrant county. Hence the jurisdictional allegations contained in plaintiffs' petition must be considered as having been made in good faith.

[2] We fail to perceive how there could be any error in admitting the petition in evidence to show the character of the suit instituted, since that was the only proper method of making such proof. That proof, in connection with the uncontroverted testimony that P. A. Collins was a resident citizen of Tarrant county when the suit was instituted, clearly brought the case within subdivision 13 of article 1830 of the Statutes, as amended.

For the reasons stated, the judgment of the trial court is affirmed.

HERNDON et al. v. WILLIAMS. (No. 9654.)

(Court of Civil Appeals of Texas. Fort Worth.  
May 21, 1921. Rehearing Denied  
July 2, 1921.)

1. Appeal and error  $\S$ 93(1)—Court of Civil Appeals must accept testimony which supports judgment.

Where the testimony is conflicting, the Court of Civil Appeals in deference to the trial court's finding must accept as true the testimony which supports the judgment.

2. Brokers  $\S$ 56(1)—Commissions not earned by broker abandoning efforts before owner sells.

Where, before sale of the property was consummated by the owner, the broker, previously authorized by him to sell, had abandoned all efforts to make a sale at the price the owner

asked, such broker is not entitled to commission on the sale.

On Motion for Rehearing.

3. Brokers  $\S$ 82(4) — Testimony admissible under general denial.

In a broker's action to recover commission on sale of realty by defendant owner, testimony of a detective employed by defendant owner that plaintiff broker told him that a prospective buyer had refused to pay more than a certain price for the property, and that the broker then gave it up as a hopeless job, held admissible under the general denial.

Appeal from Tarrant County Court; W. P. Walker, Judge.

Suit by J. H. Herndon and another against H. A. Williams. From a judgment for defendant in a justice court plaintiffs appealed, and from a judgment for defendant in the county court they again appeal. Affirmed.

R. H. Smith and W. D. Avra, both of Fort Worth, for appellants.

Wm. R. Booth, of Fort Worth, for appellee.

BUCK, J. J. H. Herndon and R. J. Caperton, real estate brokers, sued H. A. Williams in the justice court for 5 per cent. commission on the sale of a piece of property sold for \$4,000. From an adverse judgment in the justice court, plaintiffs appealed to the county court, where a jury was waived, and the defendant again prevailed, and the plaintiffs have appealed.

The evidence shows that the defendant in August, 1919, owned a number of pieces of property in Fort Worth; that Lon Jewell & Co. and W. O. Kitchen had these properties listed for sale, and that plaintiff J. H. Herndon also had listed with him some 17 pieces of property belonging to defendant; that Herndon took a prospective purchaser to see certain of the houses belonging to Mr. Williams; that when he went to the house occupied by Mr. Ludke Mrs. Ludke told him that they had been thinking of buying the property, but that Miss Joe Jewell had offered them the property for \$3,500. The defendant had listed this house with the plaintiffs at \$4,000. Mr. Herndon did not show the customer this house at that time, but later returned and saw Mr. Ludke and made a contract with him to sell him the place at \$3,500, Mr. Ludke putting up a cash payment of \$25, with the understanding, as Herndon testified, that they would wait until Mr. Williams, who was out of the city, returned to see if he would take \$3,500 for the property. On his return Mr. Herndon called him up, and they went together to see Mr. Ludke. Mr. Williams refused to take less than \$4,000, and the question of sale remained in this condition for several days.

In about a week Herndon called upon Williams for final settlement for other property he had sold for Williams, and the latter asked him what he had done about the Ludke deal. Herndon remarked, "That is all off." Two or three days later Mr. Williams called at Mr. Ludke's store to purchase some groceries, and the latter asked him about the \$25 deposited. Williams promised to see that he got it back. On a later occasion, when Herndon called at Williams' home, Williams deducted from the commission due Herndon on another sale the \$25 deposited by Ludke, and still held by Herndon. About two weeks later, after Williams had retired, Ludke called up Williams over the telephone and wanted to know what he was going to do about the deal. Williams replied that he did not know of any deal that they had, and Ludke said that he had a contract with Mr. Herndon to purchase the property at \$3,500; that he had consulted with his lawyer who had advised him that he could hold defendant to the contract. Later in the night Ludke called up Williams again over the telephone and told him that he had talked with friends who said that the place was worth \$4,000 and that he would take it at that price. Whereupon the contract of sale was made.

[1] R. W. Watson testified that he was a private detective and had been employed by the defendant subsequent to the filing of the suit in the justice court to have a conversation with Herndon, and that the latter told him that Ludke had refused to pay more than \$3,000 for the property, and that Herndon then gave the proposition up as a hopeless job. The plaintiff denied these statements testified to by Watson, but inasmuch as the testimony is in conflict as to whether Herndon stated that upon Williams' refusal to take \$3,500 for the property, and Ludke's refusal to pay more than that for it, he gave up the effort to sell we must, in deference to the trial court's evident finding accept as true the testimony which supports the judgment.

In Goodwin v. Gunter, 109 Tex. 56, 185 S. W. 295, our Supreme Court speaking through Chief Justice Phillips, says:

"A different state of case is presented and therefore a different rule prevails where the broker's effort with a particular buyer has, after fair opportunity and without any fault of the owner, come to naught, resulting in the failure and termination of his negotiation; and later the owner by direct and independent negotiation effects a sale to the same buyer, though upon the same terms originally authorized to the broker. Under such circumstances the broker cannot be justly considered the procuring cause of the owner's sale, and the latter incurs no liability to him on that account."

See, also, Pryor v. Jolly, 91 Tex. 86, 40 S. W. 959; Hancock v. Stacy, 103 Tex. 219, 125

S. W. 884; *Aukerman v. Bremer*, 209 S. W. 261.

[2] It was further in evidence that Lon Jewell & Co. and W. C. Kitchen had talked to Ludke, who was a tenant of Williams, about selling the property to him, but we think the judgment of the trial court should be sustained on the evidence noted, to the effect that before the sale was consummated between Williams and Ludke that Herndon had abandoned the effort to sell the property at the price Williams asked for it. Therefore all assignments are overruled, and the judgment is affirmed.

**On Motion for Rehearing.**

[3] Appellants earnestly insist that the evidence requires a reversal of the judgment and a rendering in favor of them. We have again considered the issues presented in the briefs, the statement of facts and transcript, and find that the evidence is sufficient to sustain the judgment below on the ground that Herndon abandoned the effort to sell the property for \$4,000, and so stated to Williams before the latter sold it to Ludke. We do not think such defense required a special pleading to make admissible the testimony referred to in our original opinion, and that said testimony was admissible under the general denial.

The motion for rehearing is overruled.

**DALTON et al. v. DALTON et al. (No. 9561.)**

(Court of Civil Appeals of Texas. Fort Worth.  
March 26, 1921. Rehearing Denied  
May 14, 1921.)

**1. Wills §324(2)—Issue of competency for jury.**

In suit to contest a will, issue of testatrix's competency *held* for the jury under the evidence.

**2. Evidence §322(5)—Testimony erroneous as importing rumor as to testatrix's incompetency.**

In proceeding to probate a will contested on account of incompetency, testimony of proponents' witness as to whether he had not heard of testatrix's being sick at a certain time and place, and whether he had not heard that her mind was gone at such time, *held* inadmissible, as importing into the case a mere rumor or report favorable to contestants.

**3. Evidence §314(2)—Testimony inadmissible, as injecting inference witness' mother thought something the matter with testatrix's mind.**

In suit to probate a will, contested for testatrix's incompetency, testimony by contestants' witness that during the year his attention had been attracted by his mother to the condition of testatrix's mind was inadmissible, as

injecting the inference that the mother was of the opinion that something was the matter with testatrix's mind.

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Proceeding to probate a will by C. A. Dalton and others against Ed Dalton and others. From judgment for contestants, proponents appeal. Reversed and remanded.

P. A. Martin, of Wichita Falls, Ritchie & Ranspot, of Mineral Wells, and R. B. Cousins, Jr., of Strawn, for appellants.

Penix, Miller, Perkins & Dean, of Mineral Wells, and P. C. Sanders, of Strawn, for appellees.

CONNER, C. J. This proceeding was instituted in the county court of Palo Pinto county by C. A. Dalton and others to probate the last will and testament of Mrs. Jane Volentine, deceased. It was alleged that the will had been lost or destroyed and could not be produced, but that it had been executed with all the customary and required statutory formalities, and that the testatrix at the time of its execution was of testamentary age and capacity. Further allegations were made, showing the jurisdiction of the court, but they need not be here noticed, as no question relating thereto is presented. Ed Dalton and others appeared and contested the probating of the will, denied its execution, but further alleged that, if made, the testatrix was not at the time of testamentary capacity, and that its execution had been secured by undue influence. Upon a hearing in the county court, the will was admitted to probate, but upon appeal to the district court the case was tried before a jury, to which was submitted a single special issue, to wit:

"At the time Mrs. Jane Volentine signed and executed the instrument of writing witnessed by J. L. Cunningham and A. O. Jordan, was her mind and memory sufficiently sound to enable her to know and understand what she was doing and the nature and effect of the act then being done by her?"

To which the jury answered, "No," and the court thereupon entered a judgment in favor of the contestants, denying the probating of the will, and the proponents, C. A. Dalton and others, have appealed.

That Mrs. Jane Volentine, in due form and manner, executed a will in September or October, 1912, is undisputed. The contested question is whether at the time of its execution she was of testamentary capacity. Appellants insist, under their first and second assignments of error, that the evidence shows without dispute that she was, while appellees contend with equal earnestness that the evidence is sufficient to support the jury's finding to the contrary.

[1] We have carefully examined the evidence, and feel unable to say that the court erred in submitting the issue to the jury, or that the verdict in answer to that issue is wholly unsupported by the evidence. It is true that the eminent counsel who prepared the will, the banker of the deceased, the witnesses to the will, and others, testified and gave it as their unhesitating opinion that at the time of the execution of the will Mrs. Volentine was sound of mind and of testamentary capacity. On the contrary, however, contestants and others testified to long-continued and intimate relations with the deceased, and gave opinions that she was not of sound mind, and in connection with such opinions stated numerous abnormal actions, words, and apparent delusions of the deceased, which, on the whole, as it seems to us, leaves the questions one of fact, proper for the determination of the jury. We cannot therefore reverse the judgment as urged on this issue.

[2] We are of the opinion, however, that the court erred, as set forth in the sixth, seventh, and eighth assignments of error. The question presented in the sixth and seventh assignments may be illustrated by the bill of exception taken during the examination of the witness J. L. Cunningham. J. L. Cunningham had testified as a witness in behalf of the proponents to the effect that he had long been the banker of Mrs. Jane Volentine; that at or about the time of the execution of the will in question she had consulted him with reference thereto, and that at the time of its execution, in his judgment, Mrs. Volentine was of entirely sound and disposing mind. The bill of exception thus reads, omitting formal parts:

"During the cross-examination of proponents witness J. L. Cunningham, counsel for contestants asked the witness whether he had not heard of the deceased Mrs. Jane Volentine's being sick at Charlie Dalton's in the summer of 1912, as to how long she has stayed there, and whether he had not heard that her mind was gone at that time. Counsel for proponents objected to the questions and answers of the witness thereto on the ground that counsel was assuming that said Jane Volentine had been ill at Charlie Dalton's at the time mentioned, and that her mind was then gone, and thereby indirectly permitted to so testify before the jury, on the ground that it was wholly immaterial whether the witness had heard such rumors or reports, if there were such, and on the further ground that if witness had heard such rumors or reports same would be purely hearsay and inadmissible, touching the mental condition of the deceased, and because highly prejudicial to the proponents. Which objections were by the court overruled, and the witness was permitted to testify, and did testify, in answer to said questions in substance that he heard of the deceased being insane at Charlie Dalton's in the summer of 1912, and that, concerning whether the deceased's mind was gone at said time, it might be that way, but witness could not be positive about it. To which action of the court overruling said objec-

tions and in admitting said testimony and to the action of the counsel in propounding the questions aforesaid proponents excepted at the time and here now tender this their bill of exception No. 2, and ask that same be approved, filed, and made a part of the record in this case."

From this bill of exception, it is apparent, we think, that the court erred in thus permitting a mere rumor or report, favorable to contestants, to be imported into the case. The words, actions, and appearance of Mrs. Volentine at the time of her sickness at Charlie Dalton's in the summer of 1912, if she was then and there sick, were perhaps admissible on the issue of whether she was then of sound mind, but, if so, they should be shown by witnesses, if any, who then observed her and knew of her actions, etc. But a mere report, founded thereon, that became extant in the community, and that may have been heard by Mr. Cunningham, was only an opinion of unidentified persons, not under oath, not shown to have knowledge of the facts, and as to the proponents purely hearsay.

[3] Of a like character is the error of the court in permitting the contestants on direct examination of their witness Hal Fletcher to prove by him that during the year 1911 "his attention had been attracted by witness' mother to the condition of Mrs. Volentine's mind at that time." The circumstances, if any, which prompted the mother of witness to call his attention to the condition of Mrs. Volentine's mind at the time he speaks of, were not before the jury, so far as called to our attention, and to inject into the case as evidence the inference that Hal Fletcher's mother was of the opinion that something was the matter with Mrs. Volentine's mind was wholly unwarranted. If the mother knew anything relevant to the issue, she should have been called and sworn as a witness, to the end that the jury and court might pass upon whether her conclusion was reasonable or otherwise. Hal Fletcher gave his opinion, but contestants were not entitled to have it reinforced by the ex parte declaration or action of his mother as against the objections of the proponents.

The errors last above indicated, we think, require a reversal of the judgment. While we have decided that the evidence of Mrs. Volentine's sanity at the time of the execution of her will cannot be said, under the evidence as submitted to us, to be wholly undisputed, yet the evidence relating to the issues is very sharply conflicting, if indeed it does not preponderate in favor of the proponents. In view of which, we think the errors above indicated were highly prejudicial to the proponents, and because of which, as stated, the judgment must be reversed.

Other assignments have been examined, but are not of importance, and are overruled without discussion.

Judgment reversed and remanded.

**HODGES DRILLING CO. v. TYLER et al.**  
(No. 9744.)

(Court of Civil Appeals of Texas. Fort Worth.  
May 21, 1921. Rehearing Denied June 25,  
1921.)

**1. Appeal and error §384(1)—Partnership's appeal bond sufficient to give court jurisdiction.**

Recitals in an appeal bond filed by defendant partnership having shown a desire on the part of all defendants to appeal, and the bond being signed not only by the firm name, but by both of its members individually, *held*, that such appeal bond is sufficient to give the Court of Civil Appeals jurisdiction to determine the appeal, particularly in view of Vernon's Sayles' Ann. Civ. St. 1914, art. 1609, providing that, when there is a defect of substance or form in any appeal bond, on motion to dismiss it, the court may allow an amendment.

**2. Parties §40(2)—Intervener must show interest in subject-matter.**

To entitle one to intervene in a suit, he must show by proper averments that he has an interest in the subject-matter of the suit.

**3. Receivers §3—Receivership an auxiliary proceeding.**

In an ordinary civil action involving property rights between parties, the appointment of a receiver is merely an auxiliary proceeding, incidental to the relief sought; suit cannot be maintained solely to place property in the hands of a receiver.

**4. Parties §40(2)—In creditors' suit against drillers of oil well for intervenor, intervention improperly allowed.**

In suit against insolvent drillers of an oil well for appointment of receiver to finish the well in accordance with the terms of defendants' drilling contract with an intervenor that plaintiff creditor of the drillers might collect his debt from them, the intervenor not showing any interest in the subject-matter of the suit, *held*, that the intervention by the association for which the well was being drilled was improperly allowed; the suit not being in behalf of all creditors of the drillers to wind up their business.

**5. Receivers §35(1) — Ex parte petition must show pressing necessity for haste.**

To entitle plaintiff to appointment of receiver on ex parte hearing, the petition must not only allege sufficient facts, but must show that there is no other remedy which will protect plaintiff, and that there is a pressing necessity for haste.

Appeal from District Court, Stephens County; C. O. Hamlin, Judge.

Suit by Alfred Tyler against the Hodges Drilling Company, wherein the Pen-Breck Oil Association intervened. From an order appointing a receiver, defendant appeals. Order of appointment reversed, and receivership vacated.

Frank S. Roberts, of Breckenridge, and E. W. Bounds, of Fort Worth, for appellant. Bateman, Goggans & Leaverton, of Breckenridge, for appellees.

**DUNKLIN, J.** The Hodges Drilling Company, a partnership firm which was engaged in the business of drilling oil wells, has appealed from an order appointing a receiver, who was clothed with authority to immediately take charge of all the assets of the firm, including drilling machinery, tools, and supplies of every description.

The suit was instituted by Alfred Tyler, doing business in the name of the Breckenridge Casing Crew, and on the same day plaintiff's petition was filed a plea of intervention was filed by the Pen-Breck Oil Association, designating itself as a "trust estate," each of said pleadings containing a prayer for the appointment of a receiver, the intervenor adopting the allegations contained in plaintiff's petition of facts authorizing the appointment of a receiver, and in addition thereto alleging further facts to warrant that relief.

The appointment of the receiver was made without notice to the defendant on March 22, 1921. The order of appointment recited that leave was granted to the intervenor to file its plea, and that the receiver was appointed upon a consideration of the allegations in the plaintiff's petition and those in the plea of intervention, and, after hearing evidence thereon, plaintiff's petition and the plea of intervention were both duly verified.

[1] The appellees contend that this court is without jurisdiction to determine this appeal, upon the alleged ground that, as shown by the appeal bond, only the Hodges Drilling Company, and not the individuals composing that firm, has prosecuted an appeal, and that, since a partnership has no legal entity, it cannot, as a firm, independently of its constituent members, lawfully prosecute an appeal.

The appeal bond, after reciting the order of court appointing the receiver, contains this language:

"From which judgment the said Hodge Drilling Company, defendants, have taken an appeal to our honorable Court of Civil Appeals for the Second Supreme Judicial of the State of Texas, sitting at Fort Worth, Tex.

"Now, therefore, we, the said Hodges Drilling Company, a copartnership composed of S. T. Hodges, Jr., and John Haley, as principal and the other signers hereto, as sureties, acknowledge ourselves bound to pay to the said Alfred Tyler, plaintiff, and Pen-Breck Oil Association, as intervenors, the sum of \$200, conditioned that said Hodges Drilling Company shall prosecute their appeal with effect," etc.

The bond is signed "Hodges Drilling Company, Principal, by S. T. Hodges, Jr.," and by



F. E. Pearson, H. M. Harrison, S. T. Dodges, Jr., and J. W. Haley, as sureties.

We are of the opinion that the contention so made is without merit. The recitals in the bond clearly show a desire on the part of all the defendants to appeal, and the bond is signed not only by the firm name, but by both of its members individually. The fact that the individual members signed as sureties did not make their liability any less, and there were two other sureties also. The objection made is too technical to deprive the defendants of their right to be heard on appeal from the order complained of. Besides, article 1609, V. S. Tex. Civ. Stats., reads as follows:

"When there is a defect of substance or form in any appeal or writ of error bond, on motion to dismiss the same for such defect, the court may allow the same to be amended by filing in the said courts of civil appeals a new bond, on such terms as the court may prescribe."

No motion was made by appellees to dismiss the appeal for lack of a sufficient appeal bond, but the lack of jurisdiction of this court for alleged defects in the bond is made for the first time in briefs filed by appellees in reply to appellant's briefs and presented for the first time on a submission of the case on its merits.

In view of the fact that it clearly appears from the recitals in the bond that all the defendants were prosecuting an appeal from the order of the trial court, and since all those defendants signed the bond and became liable thereon, we perceive no sufficient reason why the article of the statute quoted above is not applicable; and we believe that this case is clearly distinguishable, on the facts, from the case of *Style v. Lantrip*, 171 S. W. 786, cited by the appellees.

[2] It is a familiar rule that to entitle one to intervene in a suit he must show by proper averments that he has an interest in the subject-matter of the suit. *Irvin v. Ellis*, 76 Tex. 164, 13 S. W. 22; *Ryan v. Goldfrank*, 58 Tex. 356; *Rodriguez v. Trevino*, 54 Tex. 198; *Faubion v. Rogers*, 66 Tex. 472, 1 S. W. 166.

[3] It is also true that in an ordinary civil action involving property rights between parties the appointment of a receiver is merely an auxiliary proceeding which is incidental to the relief sought, and that a suit cannot be maintained for the sole and only purpose of placing property in the hands of a receiver. *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342; *Hermann v. Thomas*, 143 S. W. 195; *T. & P. Ry. Co. v. Gay*, 86 Tex. 582, 26 S. W. 599, 25 L. R. A. 52; *High on Receivers*, § 17.

The petition of the plaintiff contained allegations substantially as follows: The defendants entered into a contract with the Pen-Breck Oil Association by the terms of which they agreed to drill for that associa-

tion what is commonly known as an oil or gas well upon a tract of 65 acres of land in Stephens county; the defendants agreeing to furnish labor, material, machinery, and appliances necessary to complete the well. Thereafter, at the special instance and request of the defendants, the plaintiff performed certain services in connection with the drilling on the well, for which defendants are indebted to the plaintiff, for the sum of \$480, and also performed labor in connection with the drilling of another well for which defendants are indebted in the sum of \$250, and defendants have failed to pay the plaintiff any part of the debts so owing to him.

The defendants are also indebted to many other parties for labor and material in connection with their effort to drill the well which they contracted to drill, and have failed and refused to pay such persons the amount they owe them therefor.

Upon information and belief, plaintiff alleged further that the defendants are now insolvent and without funds with which to pay their indebtedness to plaintiff and other persons, or to carry out and complete the drilling contract they made with the Pen-Breck Oil Association. It is further alleged that the defendants had given to plaintiff in part payment of the debt they owed him a worthless check for the sum of \$100. The petition contains these further allegations:

"Plaintiff further shows that, according to his information and belief, the defendants, and each of them, are insolvent and are unable to finance and otherwise carry out and perform their said contract and to pay this plaintiff the amount due to him. Plaintiff shows that he has no adequate remedy at law by which to collect the amount due to him by defendants, and that he will suffer irreparable injury by reason of the facts hereinabove set forth unless the properties of the defendants are taken in charge by a receiver and operated under his supervision and direction, and on account of all of said matters and the fraud heretofore perpetrated upon this plaintiff by giving and delivering to him a check which was afterwards dishonored as above shown, this plaintiff shows the court that a receiver ought and should be appointed herein with authority and power to carry out and perform the contract of the defendants with the Pen-Breck Oil Association and pay off and discharge the obligations of said defendants from the proceeds of such performance. Plaintiff also shows the court that the necessity for the appointment of such receiver is immediate and urgent and that such appointment should be made without any delay whatever.

"Premises considered, plaintiff prays that upon hearing hereof the court make and enter an order herein appointing some suitable and proper person as receiver of the properties and assets of the defendants herein, which are located upon the lands hereinabove described, and which are being, or have heretofore been, described, and which are being, or have heretofore been, used in connection with the drilling

operations on said lands, and that such receiver be given full power and authority to perform and carry out the contract above mentioned and pay off the claims of this plaintiff and such other claims as may be properly due and established herein, and that such receiver be given such other powers and authority as are usual and incident to receiverships in cases of this nature, and as may seem right and proper to the court."

Further than as above stated, the petition contains no allegations to support the conclusion alleged that there is an urgent necessity for an immediate appointment of a receiver to take charge of the property in order to insure the collection of plaintiff's debt, and that unless such appointment is made plaintiff will suffer irreparable injury; nor does the petition contain any showing that a receiver, if appointed, could secure funds necessary to finish the contract of drilling which defendants had made.

In the plea of intervention filed by the Pen-Breck Oil Association the allegations in plaintiff's petition were referred to and adopted as containing a showing of right for the appointment of a receiver. Furthermore, after alleging specifically the drilling contract made by defendants with it, which plaintiff had alleged, the plea of intervention contained further allegations to the effect that since the defendants began drilling the well contracted for they have pursued the work "at intervals," and have not given proper attention to the work, and have not given the work proper supervision, and have not prosecuted it actively and continuously, as required by the contract, and that defendants have been "desultory and careless about such drilling."

According to further allegations, defendants have not used some of the funds advanced by the intervenor to them on said contract for the purpose of drilling the well, but have used it for other purposes and have left unpaid certain debts incurred by them on account of drilling operations. It was further alleged that numerous parties who performed labor for defendants are threatening to file liens on the lease upon which the well was drilled; that intervenor, in order to prevent the filing of such liens, has advanced some \$850 to pay off said claims, and defendants have failed and refused to reimburse the intervenor therefor. It was further alleged that defendants had drilled the well to a depth of 1,700 feet, in doing which they had set 12½-inch casing to a depth of 1,535 feet, contrary to the instructions of the intervenor not to set such casing to a depth lower than 1,200 feet. On account of the great weight of such casing and on account of the depth to which it had been set, the casing had collapsed, and the well had thereby been ruined and lost. After the collapse of the casing defendants made an unsuccessful effort to remove it from the well, and, failing to accomplish that result, they abandoned the

well and "skidded" the rig and began another well, which apparently will not be a producing well because of the incompetency of the defendants to drill it properly, and because it is located too near the first well.

It was further alleged that in the drilling contract the defendants had agreed to pay intervenor a penalty of \$50 per day for their failure to finish the well within the time required by the contract, and that by reason of the breach of the contract defendants will become liable to the intervenors in the sum of \$25,000.

The plea of intervention contains this further allegation:

"This intervenor further shows that under the terms of the contract between intervenor and the defendants it is provided in substance that, if the defendants shall neglect or discontinue the work of drilling said well for the space of ten days, such neglect or discontinuance shall of itself be a forfeiture of all rights and claims of the defendants under said contract, without any notice or demand on the part of the intervenor, and that said intervenor shall have the right at any time, after such forfeiture, to take possession of said well and discontinue the drilling thereof, at its pleasure, dismantle or abandon the same, without any liability to defendants, if it so desires, and that at any time after such forfeiture, if it so elects, intervenor might take possession of the well and tools and appliances of defendant and drill said well to completion.

"This intervenor shows to the court that the defendants have in fact neglected and discontinued the work of drilling said well for a space of more than ten days, and that by reason thereof said defendants have forfeited all rights and claims under their contract with intervenor, and this intervenor has neglected to take charge and control of the tools, apparatus, and appliances of defendant on said lease, as is provided in said contract."

It was further alleged that during the suspension of the work on the well the defendants have left the rig and machinery untended, thereby subjecting it to danger of destruction by fire; that, if the well contracted for is unreasonably delayed, intervenor will be damaged in the loss of oil, which will be drawn from its lease by other wells on adjoining leases.

But the plea of intervention contains no allegation that a receiver of the property would probably be able to raise funds necessary to finish the well which defendants had contracted to drill, nor did the plea of intervention allege any facts other than those referred to above to show an urgent necessity for immediate appointment of a receiver to take charge of the property.

[4] Plaintiff's petition does not purport to be a suit in behalf of all of defendants' creditors, for the purpose of winding up their business and subjecting their assets to the payment of their debts generally. The same is true of the plea of intervention. In each

suit the chief purpose of the complaining party in desiring the appointment of a receiver was to have the receiver finish the well in accordance with the terms of defendants' drilling contract with the intervener, to the ultimate end that the pleader may, as a result of the completion of said contract, collect his debt. Under such circumstance and in view of the further fact that the intervenor did not show any interest in the subject-matter of plaintiffs' suit, we believe that the intervention was improperly allowed.

But, even though the plaintiffs' petition should be construed as a suit in behalf of all the creditors, the defendants, in which the intervener as one of the creditors had a right, to join for the purpose of winding up defendants' business, having all their assets placed in the hands of a receiver to be sold and the proceeds thereof applied to the payment of their debts, nevertheless we do not believe that there was a sufficient showing of such an emergent necessity for an immediate appointment of a receiver as to authorize such an appointment on an ex parte hearing and without notice to the defendants.

In *Security Land Co. v. South Texas Development Co.*, 142 S. W. 1194, the following is said:

"To entitle a plaintiff to the appointment of a receiver upon an ex parte hearing, the petition must not only allege facts sufficient to authorize the appointment of a receiver, but must further show that there is no other remedy which will protect plaintiff, and there is such pressing necessity for haste in making the appointment that plaintiffs would likely suffer irreparable loss if the appointment was delayed until notice was given the defendant and a full hearing had."

In *Haywood v. Scarborough*, 41 Tex. Civ. App. 443, 92 S. W. 815, the court used this language:

"If, under the allegations of the petition, it had been proper to appoint a receiver at all, clearly no case is made justifying such action without notice to appellant. In order to justify the appointment of a receiver, without notice to the adverse party, not only must a proper case be made for the appointment, but, in addition, the facts should be disclosed showing such pressing emergency and the existence of such circumstances as to render an immediate appointment without notice necessary for the protection of the rights of the applicant."

[5] Those excerpts contain correct announcements of the rule of law applicable in this case, and, tested by that rule, the allegations, one by the plaintiff and the other by the intervener, even if construed together, as the court did consider them, were insufficient to warrant the summary action of the court in appointing a receiver to take charge of the defendants' property, without giving them any opportunity to be heard. If, as

alleged by the intervener, it had the right to take charge of the defendants' machinery and tools and finish the well, no reason is shown why it has not done so, nor why it cannot do so. The pleading contains no allegation of the defendants' refusal to permit such a course, and if the intervener has the right to accomplish the same purpose which could be accomplished through a receiver, it is in no position to invoke the aid of a court of equity by the appointment of a receiver.

For the reasons noted, we are of the opinion that the court erred in appointing the receiver, and therefore the order of appointment is reversed, and the receivership is now here vacated.

### CITY OF HOUSTON v. SCOTTISH RITE BENEV. ASS'N. (No. 7218.)

(Court of Civil Appeals of Texas. Galveston.  
June 3, 1916. Rehearing Granted  
June 16, 1921.)

#### On Motion for Rehearing.

**Taxation** ¶241(3)—Masonic association not an institution of "purely public charity" for exemption purposes.

Incorporated Scottish Rite Benevolent Association, a Masonic order, organized, according to its charter, to provide for the relief of needy Masons, their wives, widows, mothers, and children, etc., held not an institution of "purely public charity," within Const. art. 8, § 2, so that its property was subject to taxation by the city wherein located.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Purely Public Charity.]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Suit by the City of Houston against the Scottish Rite Benevolent Association. From decree for defendant, plaintiff appeals. Reversed, and rendered in conformity to answers by the Supreme Court to certified questions (230 S. W. 978).

J. C. Hutcheson, Jr., of Houston, for appellant.

Baldwin & Baldwin, of Houston, for appellee.

LANE, J. This is a suit brought by the city of Houston against the Scottish Rite Benevolent Association, a corporation, hereinafter called Association, to recover taxes alleged to be due by said Association to said city on a building situated in Houston, known as its Cathedral, and for a foreclosure of the statutory tax lien on said property.

The cause was submitted to the court un-

der an agreed statement of the matters in controversy and of the facts applicable to matters in issue, as provided for by article 1949 of the Revised Statutes of Texas.

The agreed statement of the matters and statement of the facts applicable to the matters at issue, as certified by the trial court, is as follows:

"On the trial of the above-entitled and numbered cause the same is, and shall hereby be, submitted upon the agreed statement of facts hereinafter set forth, which said statement constitutes all the facts presented at the trial, and that the sole and only question to be determined by the trial court, as well as the Court of Civil Appeals and the Supreme Court in the event of an appeal, is as to whether or not, under the agreed statement of facts, the defendant, the Scottish Rite Benevolent Association of Houston, Texas, is liable to the payment of taxes, under the Constitution and laws of the state of Texas, or is said property exempt from taxation. If exempt, then judgment shall be rendered for the defendants. If not exempt, then judgment to be rendered for the plaintiff for the sum of \$378.11, which amount is the taxes, interest, penalties, and costs for the years 1908, 1909, 1910, 1911, and 1912, and for foreclosure for plaintiff's tax lien on the property described in paragraph 4 of this agreement, against both defendants the Magnolia Camp, No. 13, W. O. W., being made a party defendant because it is the present owner of the property.

**"Agreed Statement of Facts.**

"That on the 20th day of March, 1903, the state of Texas issued to the defendant the following charter:

"State of Texas, County of Harris.

"Know all men by these presents, that the members of the Ancient and Accepted Scottish Rite of Freemasonry, of the city of Houston, county of Harris, and state of Texas, are desirous of becoming a body corporate.

"(1) The name of said corporation shall be 'the Scottish Rite Benevolent Association, of Houston, Texas.'

"(2) The purpose for which said corporation is formed is to provide for the relief of needy Masons, their wives, widows, mothers, and children, with the right to own, sell, or mortgage real estate for the use for said corporation, and to sue and be sued by its corporate name.

"(3) This corporation shall have its place of business in the city of Houston, county of Harris, state of Texas.

"(4) That the term for which corporation shall exist shall be fifty years.

"(5) That said corporation has neither capital stock nor assets.

"(6) The trustees of said corporation shall be five in number, and for the first year the following named persons shall be trustees: W. S. Hoskins, Max Taub, J. S. Wilson, J. O. Baldwin, and A. J. Schureman, who each and all reside in the city of Houston, in Harris county, Texas.'

"II. The above charter was duly signed, acknowledged, filed, and accepted in the Secretary of State's office, and issued as required by law.

"III. That the members of the 'Ancient and

Accepted Scottish Rite of Freemasonry of the City of Houston,' referred to in the charter, include all members of the San Jacinto Lodge of Perfection, No. 6, and Houston Chapter Rose Croix, No. 3.

"IV. The corporation during the years above mentioned was the owner of lot 8 and 25x25 feet off lot 11, and 25x25 feet off lot 12, and adjoining lot 8, and facing 50 feet on La Branch street, and running back 125 feet parallel with Rusk avenue, being in the city of Houston, on S. S. B. B., Harris county, Texas, together with the improvements thereon, which consist in what is termed and styled the 'Scottish Rite Cathedral,' this being the only improvements on said property, and being a lodgeroom for the members of said association. The lot and the building situated thereon are actually used exclusively by members of the association, and no part of the same is rented or used by any other person or institution. That the association owns no property used with a view of profit. That it has no capital stock and declares no dividends.

"V. The regular meetings of San Jacinto Lodge of Perfection, No. 6, are held in said lodgeroom on the fourth Thursday of each month, and of the Houston Chapter of Rose Croix, No. 5, on the first Friday of each month. There are often held called meetings of the lodges. Each member pays annual dues of \$2.50, while persons applying for and taking degrees pay to the order \$50. The sums derived from these sources, as well as from all other sources, over and above the current necessary running expenses, are used for the purpose, and for no other purpose, except as shown in paragraph 7 hereof, than the relief of needy Masons, their wives, widows, mothers, and children; this relief not being confined to members of this local association, but to any and all needy Masons, their wives, widows, mothers, and children, when they are not able to provide for themselves. There are no salaried or paid officers. There is no rule in the ritual or by-laws relative to what disposition shall be made of its funds. The only reference thereto is found in the charter to the association.

"VI. The funds of the Scottish Rite Benevolent Association are voted to it by the San Jacinto Lodge of Perfection, No. 6, and the Rose Croix Chapter, No. 5. These two organizations are Scottish Rite Masonic Lodges, the membership consisting of Masons who have attained the 14th and 18th degree. The funds of these two bodies are derived from fees of initiation and dues of members. The fees of initiation are \$22.50 for the Lodge of Perfection, and \$25.00 for the Rose Croix Chapter, making a total of \$47.50. Dues of \$2.50 per year for both bodies. In addition to these funds, at each stated meeting of the Lodge of Perfection and Rose Croix the Box of Fraternal Assistance is passed, with the admonition to contribute to the relief of the poor and distressed such sum as the member is accustomed to spend needlessly each day. This fund derived from the Box of Fraternal Assistance is delivered into the hands of the almoner, who disposes of it to whomsoever may need it, irrespective of affiliation or condition, such as may appeal to him; no report being made of the funds to either to-day.

"The funds secured from these two bodies

have been invested in a home for those bodies to enable them to pursue their work as Masonic lodges, and at stated times, and when brought before the bodies, some of the money is appropriated for various charitable purposes; these charities being dispensed to persons whether or not they are Masons, the word 'Mason' including all members of Masonic families and dependents. There is no revenue received by the association, except some contributions from the two Masonic lodges named above. The officers draw no salaries.

"VII. This institution is conducted for the benefit of the Masonic order. All the money received from the two Masonic lodges mentioned is used for the members' benefit, except amounts voted to charities on motion made by some brother. The charities for which money is voted are not required by the rules or by-laws of the order to be institutions which are connected with Masonic orders. There is no provision in the rules or by-laws that requires how the money shall be spent, except the purpose being to provide for the organization, so that they may have a home at which they can meet at the least possible expense, in order to carry out the purposes of fraternal unity. The prime object is that the funds are to be expended for the relief of families of needy Masons or for founding or supporting homes or institutions for Masons. The larger portion of the money has been given to needy individuals; \$500 being spent during the Galveston flood, and contributions have been made to the Harris County School for Girls, the Industrial Home for Girls, and several other organizations. The order is not one that does nothing but dispense charity, but it does dispense charity. The main purpose of the order is to provide a lodge and place of meeting, and to look after and provide for individual Masons and their families. The almoner is not given any instructions requiring him to confine the donations to the family of Masons, or to give them preference in the distribution of the fund, and the contributions of the almoner constitutes a real, substantial contribution, so that he always has money for distribution."

Upon said agreed case the trial court rendered judgment for the Association, declaring that its said property was exempt from taxation, and, upon the request therefor by the city of Houston, the trial judge filed his findings of fact hereinbefore set out, and also his conclusions of law, as follows:

(1) "I find from the above facts the defendant is a purely public charity, and therefore exempt under the Constitution and the laws of the state of Texas and the charter of the city of Houston."

(2) "I therefore find that judgment shall be rendered upon said agreed facts for the defendant, and it has been so ordered."

The appellant, city of Houston, assigns but one error, which is as follows:

"It appearing from the agreed case that the plaintiff is a corporation, organized for the purpose, as stated in its charter, to provide for the relief of needy Masons, their wives, widows, mothers, and children, with the right to own, sell, or mortgage real estate for the use of said

corporation, and it further appearing from the statement of facts that sums derived from the annual dues are used for the purpose of the relief of needy Masons, their wives, widows, mothers, and children, and that the institution is conducted for the benefit of the Masonic order, the mere fact that certain incidental charities are distributed to others than Masons does not make this institution one of 'purely public charity,' but, on the contrary, the same is an institution whose beneficiaries are limited to special and particular persons or classes, so that the property of such institution is not exempt under the Constitution."

We think it may be stated that the only question in controversy is, is the appellee Association, as conducted, an "institution of purely public charity," as that term is used in article 8, § 2, of our Constitution? If it is such an institution, its property used for "purely public charity" is exempt from taxation. But if it is not so used, it is not exempt. It follows, then, that the main important, and controlling inquiry is, what class of institutions and property did the framers of our Constitution intend to include within the phrase "purely public charity"?

It is provided by article 8, § 2, of our Constitution, that institutions of "purely public charity" may be by the Legislature exempted from the payment of taxes; and, further, that all laws exempting property from taxation, other than the property mentioned in said article, shall be void. In defining the term "institutions of purely public charity," as such term is used in our Constitution, the state Legislature by section 6 of article 7507 of the Revised Statutes of 1911 used this language:

"An institution of purely public charity under this act is one which dispenses its aid to its members and others in sickness or distress, or at death, without regard to poverty or riches of the recipient, also when the funds, property and assets of such institutions are placed and bound by its laws to relieve, aid and administer in any way to the relief of its members when in want, sickness and distress, and provides homes for its helpless and dependent members and to educate and maintain the orphans of its deceased members or other persons."

It is admitted by appellant, city of Houston, that the legislative act above quoted exempts the property of such associations as appellee when the same is used in the manner in which appellee uses its cathedral. But it is insisted that such act violates article 8, § 2, of the Constitution, mentioned, and is therefore void. We think it must be, and is, conceded that if section 6 of article 7507, supra, is constitutional, then the property of said association, under the agreed facts, is exempt from taxation, and that the judgment of the trial court should be affirmed. Hence it follows that the only question for our decision is, is said legislative act constitutional or does it violate the Constitution?

From an examination of authorities we conclude that, when words and phrases used in the Constitution are of doubtful meaning, it is within the power of the Legislature to give such words and phrases such reasonable interpretation as in its opinion will meet the intention of the framers of the Constitution in the use of such words and phrases, and such interpretation is entitled to the highest respect of the courts, and they should accept the interpretation so made, unless it is made clearly to appear that the same has no reasonable basis, and is clearly erroneous. *The Texas Co. v. Stephens*, 100 Tex. 640, 103 S. W. 481; *Township v. Talcott*, 19 Wall. 666-669, 22 L. Ed. 232; *State ex rel. Road Dist. v. Burton*, 266 Mo. 711, 182 S. W. 749; 8 Cyc. 737.

In the case of *Texas Co. v. Stephens*, supra, it is said:

It is within "the power in the Legislature to classify subjects" of taxation; and "the courts \* \* \* can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the businesses classified."

In *Township v. Talcott*, supra, it is said:

"It is an axiom in American jurisprudence that a statute is not to be pronounced void upon the ground [that it is unconstitutional] unless the repugnancy to the Constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the Constitution must be specified, and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such a result is one of delicacy, and to be exercised always with caution. *Twitchell v. Blodgett*, 12 Mich. 127; *Tyler v. People*, 8 Mich. 320; *People v. Hahn*, 13 Mich. 482."

In *State ex rel. Road Dist. v. Burton*, supra, it is said:

"Broadly stated, therefore, the Legislature may enact any law which does not contravene the federal or state Constitution, and in its interpretation the courts will hold it valid unless its unconstitutionality is manifest, and exists beyond a reasonable doubt."

In 8 Cyc. 737, it is said:

"Practical construction of constitutional provisions by the legislative department, in the enactment of laws, necessarily has great weight with the judiciary, and is sometimes followed by the latter when clearly erroneous. But this is a matter of policy only, for it is emphatically the province of the judiciary to construe the Constitution; and, where the judicial and the legislative construction of a constitutional provision conflict, the judicial construction prevails. If the meaning of such provision is clear and unambiguous, legislative construction thereof is entitled to no weight; but, if the meaning is doubtful, a practical construction thereof by the Legislature will be followed by the courts if it can be done without doing violence to the fair meaning of the words used, in order to sustain the constitutionality of a statute."

What has been said presents the further question: Is the phrase "purely public charity," as used in the Constitution, of doubtful meaning? It seems that it is. The authorities are conflicting as to what is meant by institutions of "purely public charity." In a very able and exhaustive opinion the Kentucky Court of Appeals, in the case of *Widows' & Orphans' Home v. Commonwealth*, 126 Ky. 386, 103 S. W. 354, 16 L. R. A. (N. S.) 829, held:

"That the benefits of a home for the support of widows and orphans are confined to those members of a particular secret society does not deprive it of the character of a purely public charity within the meaning of a constitutional tax exemption."

The authorities cited by appellant in support of its contention are reviewed and repudiated by the opinion in the case last cited.

In 16 L. R. A. (N. S.) at pages 837 to 851, the author has digested the authorities upon the issue or question here presented pro and con, from which it is evidently true that the courts seem to be in irreconcilable conflict as to the meaning of the term "purely public charity" as used in the Constitutions and laws of the different states.

In the case last cited the court said:

"It may be admitted at the outset that the expression 'purely public charity' is one which has not been uniformly defined by the courts before which it has come for construction, either in our own Constitution or under the Constitutions of states having the same provision with reference to exemption from taxation as our own."

"A house for deaconesses of the Methodist Episcopal Church, used as a residence for women who serve without compensation in receiving, storing, and distributing food, clothing, and money to the needy poor, gratuitously instructing children, and who maintain a public library and refectory to furnish meals to working girls for less than cost, and who conduct daily public worship, nonsectarian in character, is a purely public charity, and as such entitled to exemption from taxation. *Woman's Home Missionary Society v. Taylor*, 173 Pa. 456, 34 Atl. 42. \* \* \*

"A corporation chartered to control orphans and destitute children of a particular religious denomination and such others as the managers shall receive for the purpose of supporting and educating them, and exempted by its charter from taxation, is also exempt under a constitutional provision granting exemption to institutions of purely public charity and educational institutions not employed for gain. *Norton v. Louisville*, 118 Ky. 836, 82 S. W. 621.

"The property of an asylum created by virtue of and endowed by a testamentary devise and bequest to maintain and educate white female orphan children, first, who have been baptized in the Protestant Episcopal Church in a particular city; and, second, the same class of children in the state; and, third, the orphans of clergymen of that denomination generally, with denominational restrictions upon the form of

worship and instruction afforded the inmates—is nevertheless an institution of purely public charity, and as such exempt from taxation. *Burd Orphan Asylum v. School Dist.*, 90 Pa. 21.”

From the authorities cited we think it clear that the term “purely public charity,” as used in our Constitution, is of doubtful meaning, and that our Legislature had the power to define such term as it did do by section 6 of article 7507 of our Revised Statutes, and under such circumstances the statutory definition should be followed by the courts.

We are unwilling, unless compelled so to do, to hold that the framers of our Constitution intended, by the article and section of the Constitution under discussion, to prohibit the Legislature from exempting from taxation the properties belonging to, and used by, such institutions as the defendant association, the orphan homes established and maintained by the Odd Fellows, Knights of Pythias, and kindred organizations, for the sole purpose of maintaining such institutions, on the theory that such institutions are not public institutions. We are not disposed to follow that line of decisions of other states which, in effect, would require that tax collectors of the state and incorporated cities take a portion of the limited funds so generously contributed to these charitable institutions by kind-hearted people for the sole purpose of taking care of the orphans, widows, and indigent and helpless members of the Odd Fellows, Knights of Pythias, Masonic organizations, and other kindred organizations, on the theory that they are not public institutions. That such institutions are purely charitable institutions is not questioned, but it is insisted that under technical definitions they are not purely public institutions. We find nothing in our Constitution that demands the conclusion that it intended to prohibit the Legislature from exempting the property used by such institutions exclusively for charitable purposes from taxation. We therefore prefer to follow that line of decisions which hold that such property may be exempted from taxation.

The appellee association is one of the many charities doing work of the public without the aid of public funds, but doing it more tenderly, and more thoroughly, than it would be done in charitable institutions supported by taxation. Such institutions not only provide food, clothing, and necessary medical attention to their inmates, but they go further; they seek to assuage the sorrows and cheer the last days of those to whom they minister, and surround them with the comforts of well-appointed homes. For these added liberties some courts of some of the states have declared them to be private charities, and compelled them to take part of the gifts of benevolence from those they were

intended to benefit, and use it to pay taxes upon property actually dedicated to public good and use. The position taken by the appellant, city of Houston, in its contention for the taxation of such charities, is, it seems to us, ungracious. In our opinion, nothing marks the advancement of the age in which we live so much as the growth of organized charity, and the increased care for the unfortunate and helpless. We regard further comment upon this subject unnecessary.

In view of the great conflict in the decisions of the various states on the question under discussion, and in view of the definition given to the term “purely public charity” by our Legislature, we feel constrained to accept such definition, and to hold that, under the agreed facts of this case, the property in question is exempt from taxation.

We find no error in the judgment of the trial court; therefore the same is affirmed. Affirmed.

#### On Motion for Rehearing.

At a former term of this court we held that, under the facts agreed to by the parties, the properties of the appellee, Scottish Rite Benevolent Association, were exempt under the Constitution and laws of Texas from taxation, and affirmed the judgment of the trial court.

Pending motion for rehearing by appellant, we certified to the Supreme Court the sole question presented by the appeal to this court, viz.: “Is the property of the Scottish Rite Benevolent Association, as above mentioned, subject to taxation by the city of Houston, or is it exempt from such taxation under the Constitution and laws of this state?”

The Supreme Court answered, in effect, that under the agreed facts the property in question was not exempt from taxation by the city of Houston; that to exempt it from taxation would be in violation of section 2, article 8, of the Constitution. It follows, therefore, that such property was subject to taxation by the city of Houston.

The answer of the Supreme Court requires at our hands the granting of the motion for rehearing, the setting aside of our former judgment, the reversal of the judgment of the trial court, and a rendition of judgment here for appellant for the sum of \$378.11, this being the amount agreed upon by the parties as the sum due for taxes, interest, penalties, and costs for the years 1908, 1909, 1910, 1911, and 1912, and also for a judgment of foreclosure of plaintiff's tax lien on the property described in paragraph 4 of the agreement of the parties against both defendants, the Magnolia Camp No. 13, W. O. W., and the Scottish Rite Benevolent Association. It is therefore ordered that the judgment of this court heretofore rendered affirming the judgment of the trial court be set aside, and that the judgment of the trial

court be reversed, and that judgment be here rendered for the appellant, city of Houston, for the sum of \$378.11, as agreed upon by the parties, together with 6 per cent. per annum interest thereon from the 27th day of October, 1915, until paid, and that appellant, city of Houston, have a foreclosure of its tax lien upon said property against both of said defendants.

Reversed and rendered.

**SHIPLEY v. DALLAS COUNTY LEVEE  
IMPROVEMENT DIST. NO. 6.  
(No. 8547.)**

(Court of Civil Appeals of Texas, Dallas.  
June 4, 1921. Rehearing Denied  
July 2, 1921.)

**1. Appeal and error  $\S$  759—Fundamental error considered, although brief is defective.**

Although appellant's assignments of error are not copied in his brief, the trial court's fundamental error in overruling a general demurrer will be considered, and special exceptions overruled by the trial court *held*, in effect, but general demurrers.

**2. Eminent domain  $\S$  167(1)—Condemnation by levee district must be under railway statute.**

Under provision of Acts 4th called Sess. 1918, c. 44, relating to levee improvement districts, the board of district supervisors appointed by the district and the commissioners of appraisement appointed by such supervisors have no power to condemn land for the purpose of the district without complying with Vernon's Sayles' Ann. Civ. St. 1914, art. 6505 et seq., relating to condemnation by railroads; the levee statute being merely intended to appoint commissioners of appraisement for taxation purposes, and no appeal from their finding, no means of enforcing award to landowner, and no notice except as to hearing objections to report as to benefits and damages being provided.

**3. Appeal and error  $\S$  1—Right of appeal not absolute.**

The right of appeal may not be one of absolute right unless given by express terms, and a litigant may be deprived of such right by legislative enactment.

**4. Constitutional law  $\S$  251—Eminent domain  $\S$  69—No deprivation of property except by due process and with compensation.**

It is elementary that no one shall be deprived of his property except by due process of law, and that private property shall not be taken for public use without just compensation.

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit for injunction by the Dallas County Levee Improvement District No. 6 against L. G. Shipley. Judgment for plaintiff, and de-

fendant appeals. Reversed, injunction dissolved, and case dismissed.

Ross M. Scott and Rasbury, Adams, Stennis & Harrell, all of Dallas, for appellant.

Clark & Clark and E. E. Hurt, all of Dallas, for appellee.

**TALBOT, J.** The appellee, Dallas county levee improvement district No. 6, a duly organized levee improvement district under the law of this state, instituted this suit on the 17th of June, 1920, against the appellant, L. G. Shipley, to enjoin him from interfering with, molesting and preventing the appellee from constructing its levee upon and over two tracts of land owned by the appellant and claimed to have been duly condemned for that purpose, and to restrain the appellant from interfering with or preventing the appellee from "constructing any part of its said levee district, in accordance with its lawful plan of reclamation." The appellee's petition alleged, in substance:

That it is "a governmental agency and body politic and corporate, duly organized under chapter 44 of the Fourth Called Session of the Legislature of 1918, as authorized and directed by the constitutional amendment of 1917, being section 59 of article 18 of the Constitution; that under and by virtue of said amendment and said act, known as the 'Laney Act,' appellee became a conservation and reclamation district of Texas designated and known as 'a levee improvement district' for the purpose of constructing and with the power and authority to construct and maintain levees on, along, and contiguous to rivers, creeks, and streams, with the view of reclaiming lands from overflows of such streams and for the proper drainage thereof; that the right of eminent domain is expressly conferred upon the appellee by the statute enacted under the conservation amendment to the Constitution mentioned, for the purpose of enabling the district to acquire the fee-simple title, easement, or right of way to, over, and through any and all lands, waters, etc., adjacent or opposite to the district, necessary for its purposes."

It is further alleged that the appellee, in accordance with sections 19 and 24 of the act of the Legislature in question, condemned the right of way over and through the lands of the appellant described in its petition; that the board of district supervisors of the improvement district, as provided by the law upon the subject, appointed three commissioners of appraisement, who duly qualified, to condemn any and all of the land taken by the levee district and to assess the amount of all damages and the benefits that would accrue to any land taken, damaged, or destroyed, or included within the levee district, by carrying out and putting into effect the plan of reclamation for said district; that the commissioners of appraisement performed the services and duties imposed upon them in accordance with the provisions of



said law and duly made a proper report on September 17, 1919, of their findings, as provided by said law, showing the lands and the owners of each and every piece of property pertaining to the levee district and on or concerning which all assessments would be made, together with such description of said property as to identify the same, with the amount of damages and all benefits assessed for and on account of or against the same, as well as the value of all property to be taken or acquired by right of way or other purpose, connected with the carrying out of the plan of reclamation as finally approved by the state reclamation engineer, which report they duly filed with the secretary of the board of supervisors, as provided for and required by section 21 of said chapter 44. It is alleged that the commissioners of appraisal appointed by the supervisors of the levee district fixed in their said report the time and place when and where they would hear exceptions and objections thereto by the landowners affected, and that the notice required of such hearing was given; that the commissioners of appraisal on the day set met at the appointed place and gave the landowners an opportunity to be heard; that many of them, including the appellant, filed pleadings setting forth severally their objections and exceptions to said report, and that upon the issues of fact and law arising thereon the commissioners of appraisal gave each of the parties a fair, full and impartial trial, as provided by law, after which they rendered a final decree and judgment condemning 2.01 acres of appellant's land for the right of way sought by the appellee, allowing him therefor \$201 for the land taken, and assessing his damages to 27.51 acres affected at \$660, and assessing his benefits to the remaining 15 acres within the levee reclaimed and protected from overflows at \$950. Appellee further alleged that notwithstanding this judgment of condemnation was in all things regular, fair, and legal, and under said statutes entitled appellee to the right to take possession of said right of way and build its levee on and over the same, upon paying to appellant the sum of money due him by said judgment of condemnation, and notwithstanding appellee tendered the same to him and urged him to accept it and not delay or seek to defeat its building its levee, yet the appellant refused and still does refuse to accept the same, and did wrongfully and unlawfully interfere with, molest, and prevent, by unlawful force and violence, appellee, its supervisors, contractors, employees, agents, and servants, from going on said right of way and from building said levee and the construction of said levee district, and will at once, by unlawful and wrongful force and violence and threats, stop the building of said levee and the construction of said district, for that such a gap in said levee would be caused by skipping appellee's said two tracts of land as would

destroy the entire levee district, for the building of which appellee has issued and sold \$220,000 of its bonds, as provided for by said statutes, and has the proceeds thereof in the Dallas Trust & Savings Bank, and was ready and able to build and was lawfully spending said \$220,000 in the construction of said levee district; that appellee was helpless to protect itself against appellant's wrongful and unlawful acts aforesaid, except by the use of unlawful force and violence and by breaching the peace and that, unless appellant was enjoined, his said unlawful and wrongful acts would result in immediate, great, and irreparable injury and damage to appellee and the many landowners interested in the construction of said levee district, to prevent which appellee had no adequate remedy at law.

Appellee paid into court the said amount due appellant on said judgment of condemnation, and prayed for a temporary writ of injunction pending this suit, and that the same be perpetuated on the final hearing hereof, and for costs of suit and general relief. The petition was duly verified by appellee, and the temporary injunction prayed for was granted. Appellant, by his first amended original answer, pleaded a general demurrer and special exceptions, in part, as follows: To the paragraph of the petition alleging the appointment of three commissioners of appraisal by the board of supervisors to condemn the land he excepted (1) because the law does not confer upon said commissioners of appraisal the authority or power to condemn the land; (2) because there is no law conferring any such power upon the board of supervisors to appoint commissioners of appraisal with power to condemn and take land for said levee district; (3) because the condemnation proceedings to be followed are those prescribed "by articles 6507 and 6508 of Vernon's Sayles' Civil Statutes, and not section 19 et seq., followed by appellee." To paragraphs 7 and 8 of the petition, alleging that a final report, judgment, and decree of condemnation was rendered by said commissioners of appraisal, he excepted for the reason (1) that the act authorizing the creation of levee districts did not empower or authorize the said board of appraisal to render any such judgment, or any judgment at all condemning land, and that said act only authorized said board of appraisers to assess damages and benefits accruing to the land by virtue of the establishment of levee improvement districts; (2) because "the appointment of the commissioners of appraisal by the board of supervisors was an ex parte appointment and was therefore void; (3) because the petition does not allege that the plaintiff and the defendant failed after an effort to agree, or failed to agree, upon the value of the land sought to be condemned; (4) because the petition fails to allege that plaintiff has paid or se-

cured to be paid to the defendant the value of the land sought to be condemned. The record fails to show that the appellant appeared and filed objections to the report of the commissioners of appraisement.

After the special exceptions, appellant pleaded a general denial and a special answer, which need not be stated. The case came on for trial regularly before the court without a jury, and the trial resulted in the court overruling appellant's general demurrer and special exceptions, and rendering judgment in favor of appellee, on September 24, 1920, perpetuating and making permanent the temporary injunction granted against him when the suit was filed.

[1] The record discloses that the appellant filed assignments of error in the district court, but neither of them has been copied in his brief. For this reason the appellee objects to a consideration of the brief; asserts that it should not be considered and that the judgment of the trial court should be affirmed. It may be conceded that the brief is so imperfect, for the reason stated, that it should not be considered, but we are of opinion that the court in overruling the appellant's demurrer and rendering judgment in favor of the appellee, committed fundamental error. In other words, we think the error complained of and involved in the appeal is one apparent on the face of the record and requires a review of the court's action. The overruling of a general demurrer, as was done in this case, if such action is improper, is fundamental error. In the instant case the special exceptions urged by the appellant and overruled by the court are, in effect, but general demurrers specifically pointing out the reasons why it should be held that the appellee's petition failed to show a cause of action for the relief sought.

[2] The respective contentions of the parties may be summed up as follows: The appellant contends that the right of a levee improvement district in this state to condemn land necessary for constructing and maintaining levees and other improvements to prevent overflows, under the provisions of chapter 44 of the Fourth Called Session of the Legislature of 1918, and the method to be pursued therefore, is controlled by article 6506 of Vernon's Sayles' Civil Statutes, and that if the method prescribed in that article is not followed any other method of condemnation would be void and of no effect. The appellee contends, in effect, that under the act in question the power to condemn land necessary for the purposes of the levee district is conferred upon the commissioners of appraisement appointed by the board of appraisers independently of the method directed to be followed by section 9 of the statute, and that it is unnecessary to file a statement with the county judge as is provided in article 6506 of Vernon's Sayles' Civil Statutes. These contentions suggest very clearly the

issue of law between the appellant and the appellee and to be decided on this appeal. The discussion of able counsel representing the parties has taken a wider range than we regard as necessary in determining the question presented, and we shall not undertake to follow them in such discussion. The question is: Has the board of district supervisors appointed by the levee improvement district, or the commissioners of appraisement appointed by such supervisors, acting for the district, power or authority to condemn land for the purposes of the improvement district, without complying with the statutes of this state for condemning and acquiring of right of way by railroad companies? We think the question should be answered in the negative. Section 9 of the act of the Legislature passed in 1918, providing for the creation of conservation and reclamation districts within this state to be known as "levee improvement districts," reads as follows:

"The right of eminent domain is hereby expressly conferred upon all levee improvement districts established under the provisions of this act, for the purpose of enabling such districts to acquire the fee-simple title, easement or right of way to, over and through any and all lands, waters, or lands under waters, private or public (except land and property used for cemetery purposes), within, bordering upon, adjacent or opposite to such districts, necessary for making, constructing and maintaining all levees and other improvements for the improvement of a river or rivers, creek or creeks, or streams, within or bordering upon such districts, to prevent overflows thereof. In the event of the condemnation, or the taking, damaging or destroying of any property for such purposes, the improvement district shall pay to the owner thereof adequate compensation for the property taken, damaged or destroyed. All condemnation proceedings or suits in the exercise of eminent domain under this act shall be instituted under the direction of the district supervisors, and in the name of the levee improvement district, and all suits or other proceedings for such purposes and for the assessing of damages, and all procedure with reference to condemnation, the assessment of and estimating of damages, payment, appeal, the entering upon the property pending the appeal, etc., shall be in conformity with the statutes of this state for the condemning and acquiring of right of way by railroad companies, and all such compensation and damages adjudicated in such condemnation proceedings, and all damages which may be done to the property of any person or corporation in the construction and maintenance of levees or other improvements under the provisions of this act shall be paid out of any funds or properties of said levee improvement district, except taxes necessarily applied to the payment of the sinking fund and the interest on the district bonds."

This provision of the statute plainly and unmistakably says that all procedure with reference to condemnation, the assessment of

and estimating of damages, payment thereof, and entering upon the property, etc., shall be in conformity with the statutes of this state for the condemning and acquiring of right of way by railway companies; and, looking to the provisions of the statute which declare the procedure to be observed by railway companies in condemning land for right of way or other named purposes, we find that article 6505 of Vernon's Sayles' Civil Statutes provides:

"No railroad company shall enter upon, except for a lineal survey, any real estate whatever, the same being private property, for the purpose of taking and condemning the same, \* \* \* until the said company shall agree with and pay the owner thereof all damages that may be caused to the lands and property of said owner by the condemnation of said real estate and property. \* \* \*"

Article 6506 provides:

"If such company and said owner cannot agree upon the damages, it shall be the duty of said company to state in writing the real estate and property sought to be condemned, the object for which the same is sought to be condemned, the name of the owner thereof and his residence, if known, and file the same with the county judge of the county in which such property, or a part thereof, is situated; provided, if the owner resides in either county in which a portion of the land is situated, the same shall be filed in the county of his residence."

Following this article of the statute are articles providing for the appointment of commissioners by the county judge to assess damages; providing that the commissioners shall be sworn to assess the damages fairly and impartially; requiring the commissioners to appoint a day for hearing the parties and the giving of notice of such hearing; defining the power of the commissioners, the hearing of evidence as to the value of the property sought to be condemned, and as to the damages which will be sustained by the owner by reason of such condemnation, and as to the benefits that will result to the remainder of the property by the construction and operation of such railroad. Article 6522 provides that—

"When the said commissioners shall have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due to the owner of such real estate, if any be found to be due, and shall date the same and sign it, and shall file the said assessment, together with all other papers connected with the case, with the county judge without delay."

Article 6527 provides that, in the event either party is dissatisfied with the decision of the commissioners, he may, within the time prescribed, file his opposition thereto in writing, setting forth the particular cause or causes of his objection, and thereupon the adverse party shall be cited and the cause

tried and determined as in other civil cases in the county court. If, however, no objections are filed to the decision of the commissioners within the time allowed, the county judge shall cause the decision to be recorded in the minutes of his court, and shall make the same the judgment of said court, and may issue the necessary process to enforce the same. As will be observed, section 9 of the statute, copied above, confers the right of eminent domain upon levee improvement districts for the purposes named, coupled with the condition imposed that in the exercise of such right the procedure with reference to condemnation, the assessment of and estimating of damages, payment, appeal, the entering upon the property pending the appeal, etc., shall be in conformity with, or as required by, the statutes of this state for condemning and acquiring of right of way by railroad companies. Such a procedure makes a complete method of condemnation, securing to each party a full and fair hearing in a trial court, with the right of appeal given to a higher tribunal for a review of its action, which was evidently the purpose of the Legislature in conferring the right of eminent domain upon levee improvement districts. This recognizes the rule of interpretation that the same power which confers a right must also prescribe a method by which that right may be exercised. If we ignore the provisions of the statute prescribing the manner of condemning and acquiring of land and right of way by railroad companies, and allow such condemnation, taking of property, and assessing of damages by a compliance with the provisions of section 19 et seq. of chapter 44 of the act of 1918, as the appellee claims the right to do and attempted to do, then such a full, fair, and complete method by which the right of eminent domain may be expressed is not accorded the owner of the land. If by such method the owner is deprived of no other right vouchsafed by the procedure with reference to condemnation and acquiring of right of way by railroad companies, it is thereby deprived of the very valuable right of appeal. For by one of the sections of the act under which the appellee claimed the right to condemn and take the land of the appellant, namely, section 23, it is declared that when the commissioners of appraisal appointed by the district supervisors of the levee district shall have finally acted they shall make decree confirming the report theretofore made by them, and that the findings of such commissioners as to benefits and damages to lands, railroads, and other real property within the district "shall be final and conclusive."

[3] While the right of appeal may not be one of absolute right unless given by express terms, and a litigant may be deprived of such right by legislative enactment, still the procedure marked out by the statutes of this

state for the condemning and acquiring of right of way by railroad companies and the assessment of and estimating of damages that may accrue by reason of the building of a railroad over and across a man's land gives the right of appeal; such right is denied by the method of condemnation invoked by the appellee. By several provisions of the act of 1918, authorizing the creation of levee improvement districts and conferring upon them the right of eminent domain, it is provided that when such district has been created the court creating the same shall appoint three supervisors for such district, who in turn, upon the adoption of the plan of reclamation, shall appoint three disinterested commissioners, to be known as "commissioners of appraisement"; that it shall be the duty of the commissioners to meet at a time and place specified, and each shall take and subscribe an oath that they will faithfully and impartially discharge their duties as such commissioners and make true report of the work done by them; that within 30 days after qualifying and organizing the commissioners shall begin their duties; that they shall proceed to view lands within such district which shall be affected by the plan of reclamation for such district, and all such lands without the district as may be acquired for any purpose connected with or incident to the carrying out of such plan; that they shall "assess the amounts of benefits and all damages, if any, that will accrue to any tract of land within such district as the result of carrying out and putting into effect the plan of reclamation for such district; that they shall prepare a report of their findings, which shall show the owner of each piece of property examined, with such description thereof as may identify the same, and stating the amount of damages and all benefits assessed for or against the same, as well as the value of all property to be taken or acquired for right of way or any other purpose connected with the carrying out of the plan of reclamation as approved by the state reclamation engineer; that they shall fix in such report a time and place when and where they will hear objections thereto; that when the report of the commissioners shall have been filed with the secretary of the board of supervisors he shall give notice for two consecutive weeks prior to the date fixed for such hearing of the time and place thereof, stating in substance, that the report of the commissioners to assess benefits and damages accruing to the land and other property by reason of the plan of reclamation has been filed and that all persons interested may examine the same and make objections thereto; and that any owner of land or other property affected by such report or plan of reclamation may file exceptions, and the commissioners, at the time and place specified in the notice, shall proceed to hear and pass upon all such objections, and the commissioners shall have

power to adjudge and apportion costs incurred upon the hearing. The findings of the commissioners as to benefits and damages to lands and other real property within the district shall be final and conclusive, and the final decree and judgment of the commissioners shall be entered of record in the minutes of the board of supervisors, and certified copies thereof shall be filed with the county clerk of each county in which any portion of the lands within such district are located as a permanent record of such county, and such filing shall be notice to all persons of the contents and purposes of such decree.

Without going into minute details, we have stated the provisions of the statute relied on and followed by the appellee in attempting to condemn the appellant's land and in assessing the damages awarded him and the benefits which the commissioners of appraisement adjudged would accrue to him by reason of putting into effect the reclamation plan of levee improvement district. No provision appears to have been made for the enforcement of such judgment and decree by any process of the county court, or other means, unless the power given to do the things mentioned in the sections of the statute referred to vests in the officers of the levee district authority to execute themselves its decrees. Not so in case of condemnation according to the procedure marked out by the statutes for condemning and acquiring of right of way by railroad companies. As very clearly evidencing the purpose of the provisions of the statute relied on and attempted condemnation of the appellant's land, we find that section 24 declares:

"After the action of the commissioners of appraisement, as aforesaid, their final findings, judgment and decree, until lawfully changed or modified, shall form the basis of taxation within and for the levee improvement district for which they shall have acted for all purposes for which taxes may be levied by, for or on behalf of such district, and all taxes shall be apportioned and levied on each tract of land, railroad and other real property in the district in proportion to net benefits to the property named in such final judgment or decree, as shown thereby."

Manifestly the purpose of providing for the appointment of commissioners of appraisement, prescribing the procedure to be followed by them in doing the things enjoined upon them, and requiring a report of their findings to be made and filed with the county clerk as a permanent record of the county, as declared in the above-quoted sections of the statute was to form the basis of taxation within and for the levee improvement district, and not for the purpose of providing a method for condemning lands necessary for the construction and maintenance of levees and other improvements essential to the carrying out of the object of its creation. Clearly it was not the intention of the Legislature,

it occurs to us, to confer the power of condemnation upon the commissioners of appraisal, but simply the power to ascertain and determine the value of lands to be taken under condemnation proceedings provided for in section 9, and to assess damages and benefits to be used as indicated as a proper basis of taxation for all the land comprising the improvement district. The duty imposed upon the commissioners is simply to view the lands within the district, and "assess the amounts of benefits and damages that will accrue to any tract of land within the district," etc., "from carrying out and putting into effect the plan of reclamation for such district"; and the notice required to be served on the landowner informing him that the commissioners will at the time and place fixed by them hear objections to their findings simply notifies him that the report of the commissioners "to assess benefits and damages to the land has been filed." He is not apprised thereby that the purpose of the hearing involves the condemnation or taking of his land in such way as to deprive him of its possession and use.

[4] It is elementary that no one shall be deprived of his property except by due process of law, and that private property shall not be taken for public use without just compensation. The sections of the statute under which the appellee acted in seeking to condemn the appellant's lands make no adequate provision, it seems to us, for the enforcement of the payment of such amount as may be awarded the landowner for property taken or damaged in accomplishing the objects of the levee district, and hence are imperfect and insufficient as a fair and efficient condemnation statute. On the other hand, the condemnation proceedings directed to be observed in section 9 of the statute, for condemning and acquiring of right of way by railway companies, is full, fair, and adequate for the ascertainment and protection of all the rights of either party to such a proceeding.

We conclude that the right of the appellee to condemn land and the method to be followed in so doing and in assessing of damages, etc., are controlled by the statutes relating to the condemnation of right of way by railroad companies, and that, since the appellee by its petition conclusively shows that such method was not observed by it, but that another and materially different method was followed, no right to the relief asked for and obtained by it in the district court is shown; that the appellee's petition was obnoxious to a general demurrer; and that the judgment of the court should be reversed, the injunction dissolved, and the case dismissed. It is therefore accordingly so ordered.

Judgment reversed, injunction dissolved, and case dismissed.

## AMERICAN RY. EXPRESS CO. v. BEAN. (No. 9648.)

(Court of Civil Appeals of Texas. Fort Worth.  
May 21, 1921. Rehearing Denied  
July 2, 1921.)

### 1. Carriers ⇐105(2) — Damages for loss of profits held allowable.

Where an express company wrongfully marked a shipment C. O. D., and thereby caused failure of a sale, and it knew that plaintiff was a wholesale dealer in coffee, and by reason of the indorsed value knew the selling price, it was charged with knowledge that plaintiff usually made a profit in business, and the item of profit was within the rule that a party breaking a contract is liable for damages he should reasonably expect to arise from the breach of contract.

### 2. Carriers ⇐105(2)—Damages for loss of business held not allowable.

Where an express company wrongfully marked shipment C. O. D., and in consequence plaintiff lost a customer, the defendant is not liable for loss of business, good will, and patronage, where he was not notified that shipment was to a customer and that a loss of patronage was likely to result from a mistake.

### On Motion for Rehearing.

### 3. Carriers ⇐105(2)—Damages from loss of business dependent on knowledge.

In an action against a carrier for negligently marking a shipment C. O. D., because of the loss of business, patronage, and good will, in the absence of a showing of notice to the defendant at the time of the making of the contract, or of the negligent act or omission, that the loss of business, patronage, and good will was to be expected from the negligent act, damages on this count will not be sustained.

### 4. Carriers ⇐104—Evidence held not to show damage.

In an action against a railroad company for negligently marking a shipment C. O. D., when it should have been on time, where the manager of plaintiff's customer testified that he quit trading with plaintiff because of plaintiff's competition with him in sale of goods to cafés, the evidence does not support a finding of loss of business, patronage, and good will on account of the negligence of defendant.

Appeal from Wichita County Court; Guy Rogers, Judge.

Action by B. J. Bean against the American Railway Express Company. From judgment for plaintiff, defendant appeals. Affirmed in part, and reversed in part.

Bullington, Boone, Humphrey & Hoffman and Fulton & Myers, all of Wichita Falls, for appellant.

Cook, Spencer & Bailey, of Wichita Falls, for appellee.

CONNER, C. J. Appellee instituted this suit against the American Railway Express

Company for damages occasioned, as alleged, by the failure of the defendant to properly observe the plaintiff's shipping directions. It was alleged that the plaintiff was engaged in the wholesale and retail coffee business, buying, roasting, and selling coffee at Wichita Falls and to the retail merchants in and around said city, and had been so engaged for a number of years; that the defendant was engaged in the business of a common carrier of goods, wares, and merchandise for hire in said territory, and that on or about the 22d of August, 1919, the plaintiff delivered to the defendant for shipment and delivery to the Davis Cash Grocery, at Burkburnett, Tex., a consignment of coffee, which the consignee had agreed to buy on open account, 60 days' time, and to pay therefor the sum of \$181.20, which was the market value of the said coffee at the said place at the time. It was further alleged that the defendant wrongfully marked and directed said shipment in such a manner as to show that it was a C. O. D. shipment, or shipment deliverable only upon the payment of the cash price, and that upon the tender of the shipment to the Davis Company that company refused to receive it, construing the demand for the cash as a reflection upon its credit. It was further alleged that the value of the shipment was written upon the consignment, which value, viz., \$181.20, included a profit to the plaintiffs of \$52.50, which was lost to the plaintiff; that the plaintiff necessarily expended the further sum of \$34.71 in express charges, labor, and other expenses of repacking and reselling the coffee. Plaintiff prayed to recover these items of damage and for a further sum of \$400 for loss of business, good will, and patronage of a customer, and exemplary damages in the sum of \$400; the claim for exemplary damages being based on gross carelessness, negligence, and wanton misconduct, as set out in plaintiff's petition.

The defendant answered by a general demurrer, several special exceptions, and a general denial, and specially averred that it was agreed between the plaintiff and defendant that the shipment should be sent C. O. D., and that the refusal to receive the same on the part of the consignee was through no fault or negligence of the defendant, and that said goods were redelivered to the plaintiff. The defendant further denied notice or knowledge of any special circumstances entitling the plaintiff to the special damages sued for in his petition.

The case was tried by the court without a jury, and judgment was entered for the plaintiff in the aggregate sum of \$437.21, with interest; the items being divided as follows, \$52.50, loss of profit on the particular sale in question; \$34.71, express charges, labor, and other expenses of repacking and reselling the coffee; \$350, loss of business, good will, and patronage of a customer; the court refusing to allow any amount for ex-

emplary damages. From the judgment so entered, the defendant has appealed.

[1] Appellant, by exceptions to the petition in the trial court and to the judgment, and under its assignments of error here, urges that the item of \$52.50, loss of profits, and the item of \$350, loss of business and good will and patronage of a customer, were and are not recoverable, for the reason that it does not appear that the defendant company had notice of the special circumstances which are alleged to have occasioned such losses. The plaintiff alleged such notice, and as to the \$52.50 item for the loss on profits of the particular shipment in evidence, we agree with the trial court's conclusion that the defendant company did have such notice as makes it liable for that item of loss. It appears in the evidence that the plaintiff was a wholesale dealer in coffee, and had been for some five or six years engaged in the business of selling to retailers and others, and the defendant evidently knew that the shipment was to a retail dealer and could most naturally contemplate the fact shown that the sale and shipment involved a profit. We do not think it was necessary that the carrier should have known the precise limits of the profits. If interested in that subject, it could have been ascertained by an inquiry of the plaintiff. It did know by the indorsement of the value of the shipment upon the order therefor that the total sum to be paid by the customer was \$181.20, which, as suggested, reasonably indicated that that sum included a profit. Such circumstances, we think, reasonably bring the case, as to the item of \$52.50, within the rule on that subject as stated in the celebrated English case of *Hadley v. Baxendale*, 9 Exch. 353, and quoted with approval by our Supreme Court in the case of *Pacific Express Co. v. Darnell*, 62 Tex. 639, viz:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of the contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

[2] However, as to the further item of \$350 loss of business, good will, and patronage of the customer, as awarded by the trial court, we think appellant's objections are well taken. The rule as quoted under the evidence will exclude this item. The evidence fails to indicate that appellant knew that the consignee was one of appellee's customers, or was given any intimation that a misdirection of the shipment would result in the loss of the consignee as a customer, and such a result was by no means a necessary or even a natural result of the appel-

lant's mistake; in fact, the evidence fails to show with any degree of certainty that such a result followed. We accordingly disapprove of the recovery of this item.

The further item of \$34.71 is not attacked, and we accordingly conclude that the judgment below should be affirmed as to the items of \$52.50 and \$34.71, but reversed and here rendered that appellee take nothing as to the item of \$350 allowed by the court below for loss of business, good will, etc.

Judgment affirmed in part, and reversed and here rendered in part.

#### On Motion for Rehearing.

[3, 4] The notice of the probable consequences or special damages that will arise from a breach of contract or act of negligence must be shown to exist at the time of the making of the contract or of the negligent act or omission. See *Express Co. v. Darnell*, 62 Tex. 639; *Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162. It is clear that this case was not brought within this general rule, nor yet, we think, within the *Bourland Case*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 647, which, properly considered, is no exception to the general rule. Moreover, as originally concluded, it is by no means clear that the negligent omissions complained of caused the loss of the customer. On this point we have carefully considered the testimony. Among other things, Mr. Walker, general manager and buyer for the Davis Cash Grocery Company, testified:

"I quit buying coffee from Mr. Bean late in 1919. I quit buying from him because he was selling to cafés. I did that because he was cutting me out of that business. We are entitled to the café business. That's the way I look at it."

We remain of the opinion that a judgment for the special damages sought because of the alleged loss of the customer cannot be supported under the testimony within the meaning of the decisions. The damages in this respect, as we originally held, are altogether too remote.

The motion for rehearing will accordingly be overruled.

#### SONNENBERG v. HAJEK. (No. 8071.)

(Court of Civil Appeals of Texas. Galveston. June 7, 1921.)

#### 1. Frauds, statute of §148(1)—Contract presumed valid and enforceable.

In an action by a purchaser of land against a third person, inducing the vendor to break the contract and sell to him instead, it must be presumed, in passing on the sufficiency of the

petition, that the contract was for the sale of land as alleged, and was evidenced by a written memorandum signed by the vendor, and was enforceable against him, unless it appears from other averments that some intervening cause has rendered the vendor incapable of performing.

#### 2. Torts §12—Vendor and purchaser §228

(2)—Purchaser with notice of contract to sell takes subject thereto; purchaser without right of action against subsequent purchaser with notice for inducing breach of contract.

Where defendant purchased land with knowledge that the vendor had contracted to sell to plaintiff, plaintiff's right of specific performance was not affected, and he had no right of action against defendant for inducing the vendor to break his contract and sell the land to him.

Appeal from Austin County Court; W. J. Hill, Judge.

Action by Otto Sonnenberg against Joe Hajek. From a judgment dismissing the cause, plaintiff appeals. Affirmed.

C. D. Duncan and C. G. Krueger, both of Bellville, for appellant.

LANE, J. This suit was brought by appellant, Otto Sonnenberg, against appellee, Joe Hajek, to recover the sum of \$800, and for cause of action he substantially alleged that on the 28th day of June, 1920, he and one A. C. Ernst made and entered into a contract by which the said Ernst contracted and agreed to convey to him on the 1st day of November, 1920, a certain 23 acres of land in Austin county, Tex., for a consideration of \$1,450; that on the day said contract was made plaintiff paid the said Ernst the sum of \$200, and thereafter, on the 16th day of August, 1920, he paid him \$250, both of said sums being paid and accepted as parts of the purchase money for the land; that the defendant, Joe Hajek, became informed of the contract so made and entered into between plaintiff and the said Ernst, and thereafter, but prior to the day upon which the deed was to be executed by Ernst, came to plaintiff and offered to pay him a profit of \$300 for his trade with Ernst, which offer plaintiff refused; that upon such refusal, and before the time set for the final consummation of the contract between plaintiff and Ernst, when and at which time the plaintiff was ready, willing, able, and proposing to consummate said contract, the defendant, Joe Hajek, willfully, and with a total disregard for the rights of plaintiff, induced and caused the said Ernst to breach his said contract, to repudiate the same, and to sell the land to him, the said Hajek, and that by reason of such acts and conduct of Hajek, plaintiff suffered damages in the sum of \$800, in that he lost the purchase of said land for the sum of \$1,450, as had been

agreed upon between him and said Ernst, while such land was worth fully the sum of \$2,250.

A general demurrer of the defendant, Hajek, addressed to the plaintiff's petition was by the trial court sustained, and, upon the plaintiff's declining to amend his petition, judgment was rendered dismissing the cause. From such judgment Otto Sonnenberg has appealed. Whether the petition of the plaintiff presents a cause of action is the sole question presented for our decision.

[1] In answering the question thus presented, we must assume from the averments of the plaintiff's petition that the contract between plaintiff and A. C. Ernst was one for the sale of real estate, and that it was evidenced by a written memoranda signed by A. C. Ernst, the proposed vendor (Graham v. Kessler, 192 S. W. 299), and that it was enforceable against him, unless it be apparent from other averments of the petition that some intervening cause has rendered such proposed vendor incapable of performing the contract. For if it be made to appear by the averments of the petition that the contract was not, in the first instance, enforceable, no cause of action would lie against one who by interference caused its breach.

[2] We have reached the conclusion that there was no such intervening cause alleged in the petition which would have rendered the contract unenforceable, but to the contrary it is averred therein that the defendant knew when he purchased the land from Ernst that Ernst had contracted to sell the same to the plaintiff. If that were true, his purchase would in no way affect the right of the plaintiff to enforce specific performance. We have therefore reached the further conclusion that the petition shows no cause of action against the defendant Hajek by reason of his purchase from Ernst.

It was held in Davidson v. Oakes, 60 Tex. Civ. App. 269, 128 S. W. 944, and Roberts v. Clark, 103 S. W. 417, that one who knowingly interfered, and thereby induced another to breach an unenforceable contract with a third person, is not guilty of actionable wrong. The writer thinks, however, that the holding in these cases states the rule most too broadly. In Bowen v. Speer, 166 S. W. 1183, Richardson v. Terry, 212 S. W. 525, Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914, it is held that a person who interferes with a contract for the sale of real estate is liable in damages in a proper case. The cases referred to, however, in the decisions last cited, are those in which the interference was accompanied by malice or fraud. We think the trend of recent authority is to the effect that, if one for malicious purpose of injuring another, or by means of fraud and deceit, procures or causes a breach of the

contract, and reaps benefit to himself, he is liable in an action of the party suffering injury by reason of such interference. Bowen v. Speer, 166 S. W. 1183; Richardson v. Terry, 212 S. W. 523; Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914.

In the cases of Davidson v. Oakes and Roberts v. Clark, supra, it was held, however, that the doctrine of liability for inducing a breach of contract has no application to the breach of a contract unenforceable at law; and that the breach of such a contract, even if actuated by malicious motives, does not render a third person liable to the injured party. For a collation of authorities on the subject here discussed, see Swain v. Johnson, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615. In this case it is said:

"The case of Ashley v. Dixon, supra, is in every respect similar to the one under consideration. In that case the New York court holds: 'If A. has agreed to sell property to B., C. may, at any time before the title has passed, induce A. to sell to him instead; and if not guilty of fraud or misrepresentation, he does not incur any liability; and this is so although C. may have contracted to purchase the property of B. B. cannot maintain an action upon the latter contract, as he cannot perform, and can only look to A. for a breach of the former.' This doctrine is supported by abundant authority."

We deem it unnecessary to add further discussion.

We have reached the conclusion that the weight of authority demands that the judgment of the trial court should be affirmed, and it is so ordered.

Affirmed.

#### SONNENBERG v. ERNST. (No. 8072.)

(Court of Civil Appeals of Texas. Galveston. May 31, 1921.)

#### 1. Vendor and purchaser $\S$ 349—Complaint in action for vendor's breach held to state cause of action.

A petition alleging that defendant entered into contract with plaintiff to sell him certain land, and that plaintiff paid part of purchase price, that defendant refused to convey land, that plaintiff was ready and willing to carry out his part of contract, that plaintiff was damaged \$450 by defendant's refusal to convey, and that defendant agreed to pay that amount as liquidated damages in case he failed to convey, states facts sufficient to constitute a cause of action.

#### 2. Frauds, statute of $\S$ 74(1)—Applies to alternative contract to convey land or pay liquidated damages.

A contract to convey land or pay liquidated damages is within the statute of frauds, and though part of purchase price has been paid,



the contract must be in writing, either to enforce specific performance or recover damages for its breach.

3. **Frauds, statute of**  $\S$ 150(2)—On general demurrer, a presumption arises that a contract within the statute of frauds was in writing.

In an action on a contract within the statute of frauds, on a general demurrer to the petition, a presumption arises that the contract was in writing.

4. **Vendor and purchaser**  $\S$ 349—Petition held not to be for money paid under the contract.

A petition which set out that defendant had contracted to sell certain land to plaintiff, that plaintiff had paid \$450 of the agreed price, that defendant agreed to pay \$450 liquidated damages for breach of contract, and asked \$450 damages for a refusal to convey, seeks recovery for the liquidated damage, and not for the purchase money paid.

5. **Frauds, statute of**  $\S$ 138(2)—Recovery of part of purchase price paid may be had even if contract was oral.

Where defendant agreed to convey land to plaintiff, who paid part of the purchase price, the money paid may be recovered, though the contract to convey was oral.

6. **Frauds, statute of**  $\S$ 129(5) — Part payment of purchase price does not take contract out of the statute.

Part payment of the purchase price in a contract to convey land is not such a part performance as will remove the contract from the statute of frauds.

Appeal from Austin County Court; W. I. Hill, Judge.

Action by Otto Sonnenberg against A. O. Ernst. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

C. D. Duncan and C. G. Krueger, both of Bellville, for appellant.

LANE, J. This suit was brought by appellant, Otto Sonnenberg, against appellee, A. C. Ernst, to recover the sum of \$450 as liquidated damages, which appellant alleged accrued by reason of the breach by appellee of a certain contract entered into between the parties.

[1] Appellant, in his petition in the trial court, alleged substantially that appellee had, on the 26th day of June, 1920, entered into a contract with appellant by the terms of which he agreed and obligated himself to sell and convey to appellant a certain 23 acres of land situated in Austin county, Tex., for a consideration of \$1450; that by such contract said land was to be conveyed to appellant by a deed to be executed by appellee and wife on the 1st day of November, 1920; that he had on the day the contract was entered into paid appellee \$250 as part of the purchase money for the land to bind

the trade, and that he had also paid appellee the further sum of \$200, on the 16th day of August, 1920, as part of said purchase money; that appellee accepted such payments and retained them, and that he had failed and refused, and still refuses, to convey said land to appellant. He alleged further that he was at all times ready and willing to carry out his part of the contract, and that he made arrangements to move upon the land, to use, occupy, and cultivate the same during the year 1921, and that by reason of the breach of said contract by appellee he had been damaged in the sum of \$450, and that at the time of the making of said contract appellee agreed, bound, and obligated himself that in the event he should fail or refuse to convey said land to appellant on the 1st day of November, 1920, he would pay to appellant the sum of \$450 as liquidated damages.

To this petition appellee (defendant in the lower court), addressed a general demurrer, which was sustained by the court, and a judgment of dismissal was rendered. From this judgment Otto Sonnenberg has appealed. We think the petition on its face presents a good cause of action, and that the court erred in sustaining the general demurrer addressed thereto, and therefore the judgment must be reversed and the cause remanded for trial on its merits, and it is so ordered.

[2, 3] In view of another trial we deem it advisable to state that it is not shown by the petition of the plaintiff whether the contract alleged was in writing and signed by the defendant or was only an oral contract. Whether it was a written or oral contract cannot be decided upon general demurrer. The presumption is that a contract pleaded, which would otherwise be affected by the statute of frauds, was in writing. *Graham v. Kessler*, 192 S. W. 299. If it was a written contract, and signed by the parties, that part of it by which the defendant agreed that he would pay the plaintiff \$450 as liquidated damages, in the event he failed or refused to convey the land to plaintiff on the 1st day of November, 1920, could be recovered upon. However, a parol agreement in the alternative to convey land, or in case of failure to convey to pay a certain sum of money, is within the statute of frauds, and no action, either to compel a performance or to recover damages for its breach, can be maintained upon it. *Mather v. Scoles*, 35 Ind. 1; *Patterson v. Cunningham*, 12 Me. 506.

The case last cited is one in which a conveyance had been made, by a father, of certain lands and personal property to his two sons, they orally agreeing that after their father's death they would convey the same property to a sister, or pay her \$300 in money. After the death of the father, the sons having failed to convey the land, the sister

sued for the \$300. It was held by the court that the contract was invalid, under the statute of frauds, and also that the contract, being in the alternative, to pay money or convey lands, did not exempt it from the operation of the statute.

Both of these authorities, as well as many others, seem to establish the proposition that neither of the alternative agreements of the defendant Ernst was valid and binding if they were not in writing and signed by him, and consequently that no action could be maintained either to compel the conveyance of the land or for the recovery of the sum of money which Ernst agreed to pay in the event he failed to convey said land on the 1st day of November, 1920.

[4-6] The petition of the plaintiff cannot be construed as seeking recovery of the money paid under the contract. It is well settled that such recovery could be had upon the breach of the contract, even if the contract was oral. But payment of purchase money is not such a part performance as will take the case out of the statute of frauds.

Having reached the conclusions above expressed, the judgment is reversed, and the cause is remanded for trial on its merits.

Reversed and remanded.

#### CHILDRESS OIL CO. v. WOOD. (No. 8302.)

(Court of Civil Appeals of Texas. Fort Worth.  
Feb. 5, 1916. Rehearing Denied  
May 28, 1921.)

1. Justices of the peace  $\S$ 44(2), 141(2) — County court has no jurisdiction on appeal from justice court which had no jurisdiction; in foreclosing lien on personal property value of property determines amount in controversy.

In a suit to foreclose a lien on personal property, the jurisdiction of the court in which the suit is instituted must be determined by the value of such property, and if a justice court in which the suit is instituted is without jurisdiction to entertain it, the county court acquires none when the case is appealed to that court for trial de novo.

2. Justices of the peace  $\S$ 141(2) — County court on appeal acquired no jurisdiction to render money judgment, where value of property on which lien was sought was beyond jurisdiction of justice.

Where suit was brought in justice court to foreclose a lien on personal property, and judgment was for plaintiff for foreclosure, and defendant appealed to the county court for trial de novo, the county court did not acquire jurisdiction to render a money judgment without foreclosure; it being stipulated that the value of the property was in excess of \$200.

Appeal from Wichita County Court; Harvey Harris, Judge.

Suit by O. E. Wood against the Childress Oil Company. Judgment for plaintiff before a justice, and defendant appealed, and from a similar judgment in the county court he again appealed. Reversed, and suit dismissed.

See, also, 230 S. W. 143.

Joseph Ayneworth, of Wichita Falls, for appellant.

E. W. Napier, of Wichita Falls, and Ed Yarbrough, of Electra, for appellee.

DUNKLIN, J. O. E. Wood instituted this suit in the justice court against the Childress Oil Company, to recover \$178.50 for labor performed for the defendant and for statutory attorney's fees in the sum of \$20 additional; also for foreclosure of an alleged statutory lien for the amount of his claim on certain machinery, tools, and materials owned by the defendant.

From a judgment in the justice court in favor of plaintiff, for the amount of his claim with foreclosure of lien on so much of the property as might be found necessary to satisfy the judgment, the defendant appealed to the county court. In both courts the defendant pleaded to the jurisdiction, on the ground that the property upon which the lien was claimed exceeded \$200 in value.

Upon the trial in the county court the parties agreed that the value of such property was in excess of \$200 as alleged by the defendant. The plaintiff then dismissed his claim for such foreclosure, and the county court rendered a judgment for the amount of the debt without any foreclosure.

The only question presented to this court by the defendant, who has appealed from the last judgment, is that of jurisdiction to render it; the contention being that, as the value of the property upon which a lien was asserted was in excess of \$200, the justice court had no jurisdiction of the suit, and therefore the county court on appeal had none. It is our conclusion that the assignment should be sustained.

[1] It is well settled by the decisions of our Supreme Court that in a suit to foreclose a lien on personal property the jurisdiction of the court in which the suit is instituted must be determined by the value of such property, and that if the justice court in which a suit is instituted is without jurisdiction to entertain it, the county court acquires none, when the case is appealed to that court for trial de novo. *Pecos & Northern Texas Ry. Co. v. Canyon Coal Co.*, 102 Tex. 478, 119 S. W. 294; *Cotulla v. Goggan Bros.*, 77 Tex. 32, 13 S. W. 742; *Kelley v. Stevens*, 136 S. W. 94; *T. & N. O. Ry. v. Rucker*, 38 Tex. App. 591, 88 S. W. 815; *Id.*, 99 Tex. 125, 87 S. W. 818; *Ferrell-Michael Abstract & T. Co. v. McCormac*, No.

8272, on rehearing 184 S. W. 1081; Id. (Com. App.) 215 S. W. 559.

Appellee invokes the decision of the Court of Appeals of the Fourth District in *Henry v. Benoit*, 70 S. W. 859, to sustain the judgment in the present suit. That suit was instituted in the justice court for damages for breach of a contract to furnish materials for the construction of a certain building upon which a statutory materialman's lien was claimed and sought to be foreclosed. In the justice court plaintiff was given a judgment for the amount claimed, and for a foreclosure of the lien asserted. On appeal to the district court he abandoned any claim of lien and took judgment for his damages only. In disposing of the appeal from that judgment and overruling assignment of error presenting the contention that, as the justice court had no jurisdiction of the suit, the district court acquired none, the Court of Appeals said:

"We think the district court had jurisdiction. The cause of action for damages was not dependent upon the lien, and the fact that the justice's court may have exceeded its power in undertaking to foreclose the lien would not destroy its power to dispose of that part of the case of which it had jurisdiction; and, having jurisdiction to try the question of damages, the district court properly acquired jurisdiction on appeal from the judgment on that branch of the case."

[2] It will be noted that the foreclosure sought in that suit was upon the building, which was a part of the realty, and hence clearly not within the jurisdiction of the justice court. Whether or not that fact would warrant a material distinction between that decision and the decisions cited above we deem it unnecessary for us to decide; for we are convinced that at all events the decisions first referred to are directly pertinent to the facts of this case and should be given controlling effect.

For the reasons noted the judgment of the trial court is reversed, and the suit dismissed, without prejudice to plaintiff's right to again institute it in a court of competent jurisdiction.

**HAND et al. v. ERRINGTON et al.**  
(No. 9555.)

(Court of Civil Appeals of Texas. Fort Worth.  
April 2, 1921. Rehearing Denied  
May 14, 1921.)

1. Husband and wife  $\S$ 273(9)—Existence of community debts presumed more than 30 years after surviving husband's sale.

Where a daughter, more than 30 years after her mother's death, sued her father to recover an interest in land purchased by him with the proceeds of community property sold by him

following the mother's death, it will be presumed that there were community debts existing at the time of the sale.

2. Husband and wife  $\S$ 273(9)—Existence of community debts empowers surviving husband to sell community estate.

Existence of community debts on wife's death confers upon the surviving husband the power to sell the community estate and to pass good title thereto.

3. Trusts  $\S$ 105—Land purchased by surviving husband with proceeds of sale of community estate held impressed with constructive trust in favor of minor child.

On the sale of the community estate by the surviving husband, following the wife's death, under the power to dispose of the community estate by reason of the existence of community debts, the sale passed the title of a minor child, and the proceeds of the sale and land purchased therewith became impressed with a constructive trust in favor of the child.

4. Compromise and settlement  $\S$ 19(1) — Daughter held not estopped from claiming interest in lands purchased by father with proceeds of sale of community estate.

Where surviving husband did not inform daughter that on wife's death he had sold the community estate and invested the proceeds in the purchase of land, and the daughter, without notice thereof, in consideration of advances, conveyed to her father and his second wife any interest claimed by her in the estate of her mother for the purpose of freeing the lands, held by father, of any controversy between the daughter, the father, and his second wife, and children born of the second marriage, such settlement did not estop the daughter from suing to recover her interest in lands purchased by father with proceeds of the sale of the community estate.

5. Limitation of actions  $\S$ 100(7)—Daughter held not estopped by limitations from suing father for interest in land purchased with proceeds of the sale of community estate.

Where a father did not inform his daughter of the sale by him of the community estate following the mother's death and the purchase of lands with the proceeds thereof, and the daughter had no knowledge that a constructive trust was impressed on such land in her favor until a short time prior to the institution of a suit against her father to recover such interest, she was not precluded from prosecuting such suit by limitations, since the failure of the father, in whom she reposed confidence and trust, to notify her of her interest, constituted constructive fraud arresting the statute of limitations.

6. Husband and wife  $\S$ 248½—Property purchased by husband before marriage, but conveyed after marriage, held "claimed" by husband before marriage making such property husband's separate property.

Where the husband had, prior to marriage, purchased land by parol contract and purchased from squatters improvements made thereon, the land was not a part of the com-

munity estate, as between the husband and daughter, following the wife's death, under Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, making property owned or "claimed" by husband before marriage his separate property, though the formal conveyance was not made until after the marriage; such land having been owned or "claimed" by the husband before marriage within such statutes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Claim.]

**7. Husband and wife §262(2)—Husband has burden of proving separate character of land where deed was delivered during marriage relation.**

Husband claiming land to be separate property notwithstanding delivery of deed during the marriage relation under Vernon's Sayles' Ann. Civ. St. 1914, art. 4621, making property owned or claimed by husband before the marriage his separate property, has the burden of proving the separate character of the land.

**On Motion for Rehearing.**

**8. Husband and wife §264—Evidence held to show that property purchased by husband during marriage relation was separate property.**

Evidence held to support finding that land purchased by husband after marriage with the proceeds of the sale of cattle was separate and not community property.

Appeal from District Court, Stephens County; J. R. Warren, Judge.

Suit by May Hand Errington and husband against J. J. Hand and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. J. Oxford, John Hancock, and W. B. Powell, all of Fort Worth, for appellants.

Miller & Miller, of Ft. Worth, and Frank H. Booth, of San Antonio, for appellees.

CONNER, C. J. The appellee May Hand Errington, joined by her husband, instituted this suit against her father, J. J. Hand, his present wife, Emma Hand, the Texas Pacific Coal & Oil Company, the Prairie Oil & Gas Company, and William Bell, for the recovery of an undivided one-half interest in eight separate tracts of land described in her petition. She alleged that she was the sole heir of her mother, Texana Hand, a former wife of J. J. Hand, and that the lands described either belonged to the community estate of her father and mother or had been purchased by her father with the proceeds of said community estate. She prayed for a recovery of an undivided one-half interest in the lands, or in the alternative, for a judgment against J. J. Hand in such sum as would compensate her for one-half of said property should it be found that Hand had so disposed of the same as to prevent a recovery.

The defendant Hand and wife answered by a plea of general denial and not guilty, and

specially alleged that the lands described in plaintiff's petition belonged to the separate estate of J. J. Hand, and further pleaded the statute of limitation and settlement with the appellee, as a result of which she had duly parted with whatever interest she may have ever had in the community estate of her mother.

Plaintiff dismissed her suit as against the Prairie Oil & Gas Company and William Bell, and the Texas Pacific Coal & Oil Company answered to the effect that it had secured mineral leases from J. J. Hand and wife upon certain of the lands without notice of the plaintiff's equity, if any, and also pleaded the statute of limitation.

The case was submitted to a jury upon special issues, upon which a judgment was rendered in favor of appellee against J. J. Hand for the sum of \$23,036.36, and in favor of the Texas Pacific Coal & Oil Company.

The judgment is based on findings of the jury to the effect that appellee had an undivided one twenty-second interest in three of the eight surveys of land in which she alleged she had an undivided one-half interest, and upon further findings that the value of such one twenty-second interest, which had been sold to an innocent purchaser without notice of appellee's equity, was in the amount of the judgment.

Appellant, by his assignments of error, assails appellee's right to recover anything, as will hereinafter be made to appear. But he makes no attack upon the findings of the jury fixing the extent of her right, nor of the method adopted of compensating her therefor, which seems to be in accord with the rule announced in *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799; *Silliman v. Gano*, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391. We therefore address ourselves to the inquiry of whether appellee had any right in the lands described in her petition.

Appellant denied and defended on the grounds: First, that all of the lands were at all times owned and possessed by him in his own separate right; and, second, that if appellee ever had an interest it had been already conveyed to appellant by a deed from appellee, joined by her husband, on the day of June, 1903; and, third, that her right had long since been barred by limitation. The contention that appellee at no time had an interest in any of the land in controversy is based upon evidence and findings to the effect that at the death of appellee's mother the community estate of the deceased and J. J. Hand consisted only of about 20 calves, dropped in the year 1885; that said community cattle were retained and commingled with about 250 stock cattle held and owned by J. J. Hand in his own right and prior to the date of his marriage with appellee's

mother, which was on May 25, 1884; that the deceased died intestate, and there had been no community or other administration of her estate; that appellant, after his said wife's death, continued to manage, control, and dispose of the cattle as his own, without distinction between the separate and community rights mentioned; and that the lands in which the jury found that appellee had an interest had been purchased out of the proceeds arising from sales of the cattle.

Appellant's insistence is that, inasmuch as there was no administration and no community debts shown to exist, the legal title to the community interest of appellee's mother passed to appellee at the time of the death of her mother; that in reference thereto no trust relation existed between appellant and appellee; and that hence, when appellant sold the community cattle as he did, appellee's title and right did not pass, and her remedy was against the purchaser, to recover the property, or, if sold to an innocent purchaser for value, to recover of J. J. Hand the value of the interest so sold, but that she had no interest or right to the proceeds of such sales, which, it is insisted, became the personal property of the appellant and gave to him the same character of right in the lands purchased therewith.

Appellant cites numerous authorities in support of the foregoing contentions, including article 2469, Rev. Statutes; *Dickerson v. Abnenathy*, 1 Posey, Unrep. Cas. 107; *Miller v. Miller*, 34 Tex. Civ. App. 367, 78 S. W. 1085; *Wingo v. Rudder*, 103 Tex. 150, 124 S. W. 899; *Griffin v. McKinney*, 25 Tex. Civ. App. 432, 62 S. W. 78; *Williford v. Simpson*, 217 S. W. 191; *Booth v. Clark*, 34 Tex. Civ. App. 315, 78 S. W. 398; *Arnold v. Ellis*, 20 Tex. Civ. App. 262, 48 S. W. 883; *Smalley v. Paine*, 62 Tex. Civ. App. 52, 130 S. W. 743.

[1-3] While the above authorities have been pressed upon us by able counsel and may seem to support appellant's contentions, we think they are distinguishable, in that in those cases it affirmatively appeared that there were neither community debts nor administration; and we have concluded that inasmuch as J. J. Hand assumed the authority to sell the community property after the death of his wife, which occurred on the 15th day of February, 1886, the power to do so and to pass full title should be implied. Thirty years or more had passed since the death of appellee's mother and notwithstanding the fact that the evidence fails to so show directly, we should, after such lapse of time, presume the existence of community debts, which under a long line of our decisions confers power upon the surviving husband to dispose of the community estate and pass good title thereto. *Harrison v. McMurray*, 71 Tex. 128, 8 S. W. 612; *Williams v. Conger*, 49 Tex. 582; *Johnson v. Timmons*,

50 Tex. 521; *Johnson v. Harrison*, 48 Tex. 257; *Moody v. Butler*, 68 Tex. 210; *Simpson v. Brotherton*, 62 Tex. 170. This presumption is strengthened by the fact appearing in the record that appellant testified on the trial and failed to deny the existence of community debts, although he of all persons most probably knew whether or not the fact existed. Such failure justifies an inference that there were community debts and that he therefore had the power to sell as he did. *Mitchell v. Napier*, 22 Tex. 120. If so, his sale passed the title of his minor child, and the proceeds of such sale became impressed with a constructive trust which followed such proceeds into the lands in which they were invested. *Oaks v. West*, 64 S. W. 1033; *Pearce v. Dyess*, 45 Tex. Civ. App. 406, 101 S. W. 549, writ refused; *Hutchins v. Wilson*, 141 Tenn. 297, 210 S. W. 155.

In *Oaks v. West*, it was said, quoting from the headnotes:

"Where, on the death of a wife, her husband sells the community property and uses more than one-half of the proceeds to pay his individual debt, the balance belongs to her heirs, and property purchased therewith is held in trust for them."

In *Pearce v. Dyess*, supra, the children of Mrs. Pearce, by a deceased husband, sued her and her second husband for an undivided one-half interest in three separate tracts of land. The suit was based upon the ground that these lands had been purchased by the second husband, taking the deeds in his own name with the proceeds of the community property belonging to the first marriage. It was alleged that such investment created a resulting trust in the land in favor of the plaintiffs, the children of the first marriage. This view was adopted by the court, and the judgment in favor of the plaintiffs was accordingly affirmed. The court cited a number of authorities to the effect that where property is purchased and the conveyance of the legal title is taken in the name of one person, while the purchase price was paid by another person, a trust at once results in favor of the person who paid the price, or whose funds were used in payment thereof. We think it must be held, therefore that, under the undisputed facts and unassailed findings of the jury, to the extent of the one twenty-second interest appellant held the legal title to the three surveys specified in the verdict of the jury in trust for appellee.

[4, 5] A further obstacle to appellee's recovery, however, is presented under appellant's pleas of settlement and of limitation. The facts relating to these subjects are, briefly presented, that the mother of appellee, as before stated, died on the 15th day of February, 1886, when appellee was a little over four weeks old. Appellant placed appellee with a relative, with whom she lived

until her marriage, on June 21, 1903. During these intervening years the relations between appellant and appellee, as indeed throughout the trial, appear to have been cordial; appellee frequently visited the home of her father, but there was never any communication between them relative to the extent of her mother's interest in the property held by her father. During those years appellant paid appellee yearly the sum of \$10, as interest, and at the date of her marriage \$110, as her interest in her mother's separate estate. During the year 1917 appellant, in the way of advancements to appellee, paid to her in money, mules, etc., about \$1,880, in consideration of which appellee, joined by her husband, executed and delivered to J. J. Hand and wife, Emma Hand, a general warranty deed conveying to them all of the "right, title, and interest claimed in the estate" which appellee had in and to the surveys of land involved in this suit. The evidence tends to show that in effecting this settlement the purpose of Hand was, in the event of his death, to free all of the lands held by him of any controversy between appellee, the daughter of his first wife, and his second wife and the 11 children born of the second marriage; Hand's avowed purpose being to have each of the children share alike in the property, which was then valued at \$10 per acre. Appellee had no knowledge of any other interest she had or ever would have in the lands in controversy; appellant giving her no information on the subject. Her community interest, as further found by the jury, was not disclosed by appellant and not ascertained by appellee until a short time prior to the institution of this suit, and it is insisted in behalf of appellee that the silence of appellant in respect to the existence of community property of the first marriage and of the investment of the proceeds thereof in the lands in controversy and of appellee's right thus arising amounts to such fraud as arrested the statute of limitation and authorized a court of equity to disregard the terms of the conveyance last mentioned, and we think these contentions must be sustained. It is not contended that appellant was guilty of actual fraud; the evidence indicates that he at all times supposed and acted under the belief that all of the cattle held by him at the date of the death of his first wife belonged to him, and that there was no community estate; but we think he must be held to a knowledge of the law of the undisputed fact that there was a small community estate. It must be held that appellee's interest therein was held in trust for her benefit, and he must be affected, as a matter of law, with knowledge that when the proceeds of such community property was invested in lands afterwards purchased by him appellee's equity yet remained, and that she

was entitled to her pro rata interest therein. With such knowledge, it became the duty of appellant to bring home to appellee notice of a repudiation of the trust, if he so intended, or to fully inform her of her right in the matter. Appellant was the father and natural guardian of appellee; the relations between them were necessarily confidential, and confidence and trust in her father was naturally reposed and authorized, not only by the law but by circumstances shown in the evidence. In *Hickman v. Stewart*, 69 Tex. 255, 5 S. W. 833, it is said:

Where a special relation of trust and confidence (such as parent and child) exists and one party, having knowledge of material facts, contracts with the other without disclosing such knowledge, the mere silence, under the circumstances, becomes fraudulent concealment.

In *Varner v. Carson*, 59 Tex. 303, it is said:

When a person occupying a peculiar relation of trust toward another possesses exclusive information concerning the rights of that other to property and makes a contract with him for the property without disclosing his actual knowledge, the contract may be rescinded by the other.

In *Boren v. Boren*, 38 Tex. Civ. App. 139, 85 S. W. 48, it is said:

A trustee or executor who purchases the estate from the heir must pay therefor full, fair, and adequate consideration, and if there be any concealment as to the real value of the property or a false or fraudulent representation as to the value thereof, the sale will be set aside.

See, also, *Saufley v. Jackson*, 16 Tex. 580; *Pitman v. Holmes*, 34 Tex. Civ. App. 485, 78 S. W. 961; *Elliott on Contracts*, § 123 et seq.

We accordingly conclude that appellant's assignments of error and several propositions thereunder must be overruled, and for the reasons stated the judgment in favor of appellee is affirmed.

Appellee, however, presents several cross-assignments of error, in which she assails the finding of the jury to the effect that the 640-acre survey in the name of Phillip Leaman and the 160-acre survey in the name of W. R. Stoneham were the separate property of appellant Hand. The evidence relating to the Leaman survey is substantially as follows: That in the year 1882, some two years prior to his marriage with the mother of appellee, appellant orally contracted for the Phillip Leaman survey, paying part of the consideration, and took possession thereof. At the time, he purchased several improvements made on the survey by some squatters, but formal written conveyance from the owner of the survey was not made and delivered to Hand until November 12, 1884, during the existence of the first marriage. Appellee insists that as it appears that the contract for the purchase of this survey

was by parol, and that nothing more was done than a payment of part of the consideration and a delivery made of possession, the contract was not an enforceable one under our statutes of fraud, and title in Hand, did not actually vest until the delivery of the deed in November, 1884.

Article 4622 of Vernon's Sayles' Ann. Civ. St. 1914, so far as pertinent, reads:

"All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife."

Article 4621 reads, in part, as follows:

"All property, both real and personal, of the husband owned or claimed by him before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired shall be his separate property."

[8, 7] Appellee's insistence is that the words "owned" or "claimed," as used in the statute last quoted, signified a legal or equitable ownership, or a legal or equitable right to demand the land, and she cites in support of this contention the following cases: *Dugan v. Colville*, 8 Tex. 128; *Garner v. Stubblefield*, 5 Tex. 552; *Neatherly v. Ripley*, 21 Tex. 434; *Jones v. Carver*, 59 Tex. 293; *Ward v. Stuart*, 62 Tex. 333; *Ann Berta Lodge v. Leaverton*, 42 Tex. 18; *Altgelt v. Escalera*, 51 Tex. Civ. App. 108, 110 S. W. 989; *Wooldridge v. Hancock*, 70 Tex. 18, 6 S. W. 818; *Robertson v. Simpkins*, 61 Tex. 259; *Bradley v. Owsley*, 74 Tex. 69, 11 S. W. 1052. The cases cited affirm the general rule that specific performance of a parol contract will not be enforced by a court of equity except in cases where it appears that the purchase money, or part thereof, has been paid and delivery of possession made under the contract, and substantial improvements in good faith have been made, and are, generally speaking, cases where specific performance was sought as against the vendor or his legal representatives. The case here, however, is not between J. J. Hand, the purchaser, and the vendor of the Leaman survey, and we are not inclined, as between appellant and appellee, to give the restricted meaning appellee insists upon to the words "owned" or "claimed," as used in article 4621, in defining the separate property of the husband. The proof fulfills the requirements of the case cited, even as against the vendor, except that instead of making the improvements Hand purchased them from the squatters. He only failed to affirmatively show that the squatters had some legal equitable right to the improvements, which consisted of two log houses, a well, and a cultivated field of 12 or 15 acres. While the burden was doubt-

less upon him, under the operation of article 4622, to show the separate character of the land, the deed having been delivered during the marriage relation, the vendor, in this instance, does not appear to have questioned the right of the squatters to the improvements or an equity in Hand, arising by reason of his purchase. On the contrary, the parol contract made by Hand, together with the delivery of possession and the purchase of improvements to free the land from the claim of the squatters, was recognized by the vendor by receiving the balance of the purchase money, which was out of the separate estate of J. J. Hand, as per the terms of the oral contract, and by executing a formal and sufficient conveyance of the survey. We think such a "claim" as Hand had at the date of his marriage, followed by conveyance as it was from the vendor, is fairly within the meaning of the term as used in the statute defining the husband's separate estate. *Stiles v. Hawkins*, 207 S. W. 89; *Bishop v. Williams*, 223 S. W. 512.

As we understand the record, however, we feel that we must sustain appellee's contention as to the Stoneham 160-acre survey. The jury found that this survey was separate property of appellant, but he has not undertaken to defend the finding, and, so far as we have been able to ascertain from the evidence, it is substantially undisputed that the purchase of this survey by Hand was in 1885, prior to the death of appellee's mother. It is true a later deed from the owner to the same land, dated April 6, 1886, was delivered to Hand shortly after the death of his wife, and it is upon this latter deed that appellant seems to predicate his contention that it was his separate property. A son of the vendor, however, testified, without contradiction, that the survey had been conveyed by his father in 1885. Appellee also offered in evidence the fact that in the trial by one J. E. Nix against J. J. Hand, in the district court of Eastland county, the defendant Hand offered in evidence the patent from the state of Texas to W. R. Stoneham, dated May 25, 1884, and a deed dated June 5, 1885, from W. R. Stoneham to J. J. Hand, and there was further evidence to the effect that the deed from Stoneham to Hand, delivered in 1886, was for the purpose of correcting the form of the prior deed made in 1885. Presumptively, therefore, by virtue of article 4622, supra, it was community property, and the burden was upon appellant to show that its purchase was wholly out of his separate estate. This burden was not discharged, and we therefore sustain appellee's objections to the findings of the jury relating to the W. R. Stoneham survey. We possibly would be authorized to reverse and render the judgment in appellee's favor as to this survey, but do not feel satisfied to do so, especially in view of the frequent and widely fluctuating

values of oil lands of the character here shown to be, and of the further fact that the jury's findings do not disclose the value of this particular survey. In the absence of such finding, we hesitate to now apply the measure of damages adopted by the court below, even if applicable in this character of suit, and no other measure has been suggested.

We conclude that the judgment should be in all things affirmed, except in so far as it is therein decreed that the W. R. Stoneham survey of 160 acres is the separate property of the appellant J. J. Hand. As to this, the judgment is reversed and the cause remanded.

Judgment affirmed in part and reversed and remanded in part.

#### On Motion for Rehearing.

Both appellants and appellees have presented motions for rehearing. Both motions have been considered and both motions are overruled, except in the following particular. We think we erred in sustaining appellees' cross-assignment of error attacking the finding of the jury to the effect that the W. R. Stoneham survey was the separate property of appellant J. J. Hand. As stated in our original opinion, this finding was not defended, and our ruling was based on the fact that the evidence seemed to show that Hand acquired this survey in 1885, during the marriage relation of Hand and appellee's mother, and hence presumably community property by virtue of our statutes on the subject.

[8] On rehearing, however, our attention has been called to evidence to the effect that J. J. Hand and appellee's mother were married May 21, 1884, at which time Hand owned about 300 head of cattle; that the cows of said herd dropped their calves during February, March, April, and the first of May of each year; and that the lands in controversy were purchased with the proceeds of cattle sold. The first of the community property acquired during this marriage was the calf crop of 1884. Hand's deed to the Stoneham survey, as shown in our original opinion, was dated June 5, 1885. The evidence further shows that Hand did not sell his cattle until after they were a year old and the proceeds of the calf crop of 1884 could not have entered into the purchase of the Stoneham survey. At least, this evidence tends to so show, and we think it is sufficient to support the finding of the jury to the effect that that survey was the separate property of J. J. Hand.

We accordingly set aside our judgment remanding this cause and, for the reasons stated in our original opinion and herein, overrule all assignments of error and affirm the judgment.

#### WATERS v. BYERS BROS. & CO.

(No. 1818.)

(Court of Civil Appeals of Texas. Amarillo. June 29, 1921.)

1. Mortgages  $\S$ 454(1)—Answer alleging trust deed was secured by misrepresentations held to state defense to foreclosure.

An answer alleging that the trust deed on land was secured by plaintiff's misrepresentations that he desired it merely as additional security to enable him to float defendant's note secured by chattel mortgages on cattle to perform his agreement with defendant, that the notes were to be paid only from the proceeds of the sale of the cattle and their increase, whereas plaintiff intended merely to secure the trust deed in order to make himself whole in the transaction and attempted to foreclose it and the chattel mortgage at the first opportunity, states a good defense as against general demurrer in so far as the trust deed is concerned.

2. Mortgages  $\S$ 454(3)—Answer held to allege agreement notes were to be paid only from sale of cattle.

An answer alleging that the notes in mortgage foreclosure suit were given under an agreement that defendant was to take charge of the cattle for the purchase of which the note was given and pay the notes only from the sale of the cattle and their increase alleges parol agreement specifying the fund from which the notes were to be paid, not a condition on which the notes were delivered.

3. Evidence  $\S$ 432—Proof notes were payable only from profits not admissible as evidence of failure of consideration.

Though parol evidence to show want or failure of consideration for a note is always admissible, proof that plaintiff had failed to perform a parol agreement inconsistent with the terms of the note in pursuance of which the note was given is not admissible on the theory that it shows a failure of consideration.

4. Evidence  $\S$ 442(1)—Collateral oral agreement not admissible if it contradicts instrument.

The rule that, where the writing is only a part of the agreement, and there was no intention to reduce the entire agreement to writing, parol evidence to show the entire agreement made in connection with the writing may be introduced, is coupled with the qualification that the parol agreements thus sought to be shown must be consistent with, and not contradict, the terms of the written part of the agreement.

5. Evidence  $\S$ 420(7) — Negotiable Instruments Law did not change rule in states permitting evidence of conditional delivery.

Negotiable Instruments Law,  $\S$  18, permitting proof that delivery was conditional or for a special purpose only, was intended merely to adopt the rule previously followed in the state and in the majority of other jurisdictions that delivery on condition precedent to the in-



strument taking effect as an obligation might be shown, and was not intended to change that rule.

**6. Evidence §444(6)—Permitting proof of delivery for special purpose does not permit contradiction of instrument.**

The provision of Negotiable Instruments Law, § 16, authorizing proof that a note was delivered for special purposes only, when construed with the following clause that it was not for the purpose of transferring property in the instrument, does not permit proof of delivery under collateral agreement contradicting the terms of the note.

**7. Evidence §444(6) — Parol evidence inadmissible to show delivery on condition as to time and manner of payment.**

Though it is permissible to show by parol evidence that a note was delivered on a condition precedent to its taking effect as an obligation, it is not permissible, either before or since the enactment of Negotiable Instruments Law, § 16, to admit parol evidence that the note was delivered on a condition affecting the time and manner of its payment so that such evidence is not admissible to show an agreement that it was to be paid only from the proceeds of the sale of certain cattle.

Hall, J., dissenting in part.

Appeal from District Court, Hemphill County; W. R. Ewing, Judge.

Action by Byers Bros. & Co., a livestock commission corporation, against Thomas Waters. Judgment for plaintiff on sustaining a general demurrer to the answer, and defendant appeals. Reversed and remanded.

Hoover, Hoover & Willis, of Canadian, for appellant.

Sanders & Jennings, of Canadian, for appellee.

HALL, J. Appellee, a live stock commission corporation, sued the appellant to recover upon a series of notes, payable to appellee, and to foreclose a chattel mortgage upon certain live stock and a deed of trust upon certain lands described in the instruments which were executed to secure payment of the notes. The court sustained a general demurrer to appellant's answer which, omitting the formal parts, is as follows:

"(1) Defendant says that the notes which formed the basis of the plaintiff's suit are renewal notes, of a series of notes given by the defendant to plaintiff, on or about the — day of —, 19—, and that such notes were given and a mortgage upon the cattle in controversy, according to the terms of an agreement, and as a part of the same transaction, in which it was understood and agreed that the said notes represented the agreed price of cattle covered by the chattel mortgage that day given, secured by the said cattle, which plaintiff turned over to defendant under the terms of said agreement; that at and prior

to said time plaintiff had a mortgage on the said cattle, securing notes then past due, which the maker was unable to pay, and which the cattle in their then condition were insufficient to pay and could not be further carried out without loss to the holder of the cattle and the plaintiff also; that plaintiff knew and was advised that defendant was an experienced cattleman and possessed of sufficient pasturage and means to care for and keep the said cattle so the herd could increase and grow in number and value, the cattle being largely cows, and it was therefore understood and agreed for the mutual benefit and profit of the plaintiff and the defendant that defendant should take the cattle at the price then agreed upon, for which notes were then given secured by chattel mortgage upon said cattle, same being signed by defendant; that the defendant for his profit in the care and keep of the cattle was to have the profits to be derived from the cattle after paying off out of the sale of the cattle to be made from time to time, this including the sale of the calves and increase, the said indebtedness and interest thereon, at a rate of not more than 8 per cent. per annum, and the plaintiff agreed and it was understood that the arrangements were to continue until the cattle, by growth and otherwise, were sufficient to pay said debt and defendant for the care and keep of the same, he to have all profits above said debt and interest.

"(2) Defendant further shows that it was understood and agreed as a part of the same transaction that the plaintiff would have to float the notes given, and that in order to do so it would be necessary to renew the notes each six months, and such renewals by the defendant should continue until the agreement was consummated and the object for which the same was entered into was obtained. Thus by the terms of said agreement the enterprise was entered into whereby the defendant was to take the cattle, as hereinbefore stated, and the notes so given and the mortgage securing the same were to be discharged out of the profits of the business, which agreement, although defendant has fully complied with and expended large sums of money to carry out, the plaintiff has broken, to defendant's damage as hereinafter charged. Defendant shows that he entered into said agreement in good faith, believing that plaintiff could and would carry the same out according to its purpose and intent; that he has performed his full obligations thereunder and has been delinquent in no particular, and that he is still able, willing, and ready to carry out his part of the agreement; that the cattle and the increase have been shipped and applied upon said agreement from time to time according to the terms of said agreement; that there is still on hand of said cattle and in the possession of defendant about 400 head of said cattle, which are being cared for by defendant according to the terms of said agreement and at his own expense; that he has expended in the care and keep of said cattle the sum of at least \$12,000; that he would not have entered into said agreement and expended said money or executed said notes and mortgages but for the said promise and agreement of plaintiff, which he, in good faith, relied upon

and believed plaintiff would carry out; that he has received nothing of value upon said contract and agreement, and has nothing of value except the cattle now on hand, which are subject to said agreement, the remainder of the original stock, and the increase, having been sold thereunder and applied upon said notes; that the breach of the said contract by plaintiff is vital to its existence and goes to the very root of the contract, and its failure and refusal to carry out the same has destroyed its purpose and object, and defendant now here tenders to said plaintiff the said cattle now on hand, the plaintiff having breached said contract, and here reconvenes and sues the plaintiff for his damages, in the sum of \$12,000, the amount of money he has expended in the care and keep of said cattle, and the further sum of \$2,000, the value of his time and attention actually expended, and further asks that said notes and mortgages and deed of trust be canceled and held for naught, for all of which the defendant will ever pray, etc. \* \* \*

"(4) Defendant further shows that after said contract and agreement had been entered into, and while he in good faith as hereinbefore stated, was carrying out his part of the same, and expending great sums of money, as well as time and attention thereon, as plaintiff intended he should do, and as he had agreed to do, the plaintiff informed him that the price of cattle had declined and that it was hard to float cattle paper, and that in order to be able to float said paper it would be necessary to further secure the same, which statements he relied upon and believed, and in order only to assist the plaintiff to carry out its part of said agreement, at the special instance and request of the plaintiff, and for no other purpose or consideration, and without in any wise changing or modifying said original agreement, defendant was induced to and did execute the deed of trust mentioned in said original petition, believing that the said plaintiff intended to carry out its said contract. However, defendant shows that as soon as or very soon thereafter plaintiff, feeling by reason of said additional security that it was fully secured and by reason of said additional security escape loss and cause defendant to bear all loss in said mutual agreement, said cattle not then being worth the amount of the so-called debt, repudiated said contract and demanded that defendant bear all loss, and at the maturity of said last renewal made according to the terms of said agreement said matter be closed, and that defendant sell said cattle and also his land put up as additional security to hold it harmless; that he believes, and here so charges to be true, that the representations made to induce defendant to give said deed of trust as additional security were falsely made for the sole and only purpose of holding itself harmless and with no intention of carrying out the same, but, upon the contrary, of breaching said contract as soon thereafter as possible; that by reason of said statements and representations, which he relied upon and believed, and but for which he would not have executed said deed of trust, he was induced to make the same; and that by reason of such said deed of trust is wholly void and without consideration and should be canceled and held for naught, for

which defendant also prays and for costs of suit."

The answer is duly verified by the appellant. It will be observed that the dates of the notes, mortgage, and deed of trust are not set out in the pleading, but it is a fact, as shown by the record, that the original notes, executed by appellant, as well as the renewal notes which are in suit, were all executed subsequent to the date when the Uniform Negotiable Instruments Act became effective. Acts 36th Leg. p. 190, Gen. Laws of Texas 1919. It is provided by article 1, § 16, of that act as follows:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making \* \* \* or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument."

See, also, *Id.* § 58.

The foregoing is a verbatim copy of section 16 of the Uniform Negotiable Instruments Law as originally framed by the commission which promulgated it, and in that form it has been incorporated into the statutes by a majority of the states which have adopted it.

Before it became a part of the statutes of Texas and by its provisions repealing all laws inconsistent with it, and was thereby substituted for the law merchant, our courts, in actions between the original parties and those not bona fide holders for value, had gone far toward limiting and modifying the effect of the parol evidence rule and declaring exceptions to it in its relation to negotiable instruments generally. Thus it has been held that in an action upon a note executed as part of the consideration for a conveyance the grantee may set up as an affirmative defense or counterclaim the grantor's failure to furnish him with goats in accordance with a contemporaneous parol agreement, it appearing that the grantee was without funds, and that the maker agreed to supply him with stock so that he might be enabled to pay for the land, the court saying:

"No rule of law is better settled than that which prohibits the introduction of parol evidence to vary the terms of a contract in writing; but the exceptions to the rule are equally well recognized, and perhaps emphasized by the certainty of the general principle. One of the exceptions to the rule, which is as well established as the rule itself, is that parol evidence is admissible to show the real consideration of a deed, and in actions between the par-

ties the recitals in the deed with reference to the consideration that are not conclusive. [Citing authorities.] It remains then only to determine on the questions of the general demurrer whether the matter set up in appellant's amended answer falls within this exception. We think it does." *Reid v. Ragland*, 156 S. W. 920.

The rule is announced in this state, practically without dissent, that the real consideration of a contract, where the recital of the consideration is not contractual in form, may be shown by parol, as the consideration recited therein does not form a part of the contract. *Taylor v. Merrill*, 64 Tex. 494; *Womack v. Wamble*, 7 Tex. Civ. App. 273, 27 S. W. 154. And the rule has been extended to include negotiable instruments. *Branch v. Howard*, 4 Tex. Civ. App. 271, 23 S. W. 478; *Eikel v. Randolph*, 6 Tex. Civ. App. 421, 25 S. W. 62. In the following cases parol evidence was admitted to show the real nature of the consideration understood between the parties, and not expressed, at the time the notes were executed: *Branch v. Howard*, 4 Tex. Civ. App. 271, 23 S. W. 478; *Henry v. Sansom*, 36 S. W. 123; *Watson v. Boswell*, 25 Tex. Civ. App. 379, 61 S. W. 407. In order to show the nature of the transaction, parol evidence is admissible, even though the writing is contradicted and the conversation attending the negotiation may be looked to to show the nature of the contemplated transaction. *Lemp v. Armengol*, 86 Tex. 690, 26 S. W. 941; *Glenn v. Mathews*, 44 Tex. 400, 405. The rule excluding parol evidence is declared by many decisions in this state to have no application when collateral undertakings are sought to be established by oral testimony. *Peel v. Giesen*, 21 Tex. Civ. App. 334, 51 S. W. 44; *Belcher v. Mulhall*, 57 Tex. 17, 21; *Patton v. Rucker*, 29 Tex. 402. In *Preston v. Breedlove*, 36 Tex. 96, it is held that parol evidence is admissible to prove a verbal contract collateral to and contemporaneous with a written contract, though it refer to the same subject-matter and may affect the rights of the parties as expressed in the writings, and it is also held that such evidence is admissible to show an independent agreement made as an inducement to a written contract, although the writing contains no reference to such agreement. *Downey v. Hatter*, 48 S. W. 32.

The rule is clearly established in this state by a long line of decisions that a trust which attaches to a promissory note may be established by parol evidence, and was enforced in *Thompson v. Caruthers*, 92 Tex. 530, 50 S. W. 331. That was a case in which money intended by the donor as a gift to a minor grandchild was placed by the donor in the hand of the minor's mother, with the understanding that the donor should receive the interest on the same during her life, the sum being evidenced by the mother's note. Upon the death of the grandmother,

in a suit by the heirs on the note, the minors intervened, claiming the fund, and the Supreme Court permitted the trust to be established orally. In an action on a note, given in pursuance of an oral contract between plaintiff and defendant, in virtue of which defendant acquired plaintiff's stock of goods, together with plaintiff's oral promise to assure him credit and become his partner and contribute one of the notes, defendant was permitted to prove the facts of the agreement. *Henry v. McCardell*, 15 Tex. Civ. App. 497, 40 S. W. 172. Where a check was given as part of a more comprehensive transaction, not expressed in writing, all the terms of the transaction of which the check was a part, and providing for the discharge of the check, were held to be provable by parol. *Rahe v. Yett*, 164 S. W. 30. *Allen v. Herrick Hdwe. Co.*, 55 Tex. Civ. App. 249, 118 S. W. 1157, is a suit upon a note in which it was declared that equity would allow the maker to show that the note was not intended as a full settlement between the parties, but that it was agreed at the time of its execution that there would be a further settlement in which the maker should have the benefit of credits claimed by him. In *Hansen v. Yturria*, 48 S. W. 795, it was held that parol testimony is admissible to show that contemporaneously with the execution of a note and as a part of the transaction out of which it arose the parties agreed that the payee should furnish the maker with funds to embark in a business enterprise, and that the note was to be paid out of the profits thereof, and that the payee had breached the agreement. The transferee of the vendor's lien notes with notice sought to foreclose the vendor's lien and alleged a want of consideration for the transfer from plaintiff to his sons, and that the transfer was for a specific purpose known to the defendants, alleging that the notes had been used for a different purpose. It was held that parol evidence that plaintiff's sons were not in fact owners thereof was admissible, even though the evidence contradicted the indorsement. *Givens v. Carter*, 146 S. W. 623. Where a note was given for bank stock, in a suit by the payee to recover, parol evidence was admitted to show that the note was delivered conditionally on the payee's not electing to retain his stock within 30 days, and that he had so elected. *Hawkins v. Johnson*, 181 S. W. 563. This court held in *Clayton v. Western National Paper Co.*, 146 S. W. 696, that the defendant could prove that a part of the consideration for the note sued on, which was given for the price of goods sold, consisted of a parol agreement by the payee to take back certain unsalable goods and credit their invoice price on the note. Again, in *Watson v. Rice*, 166 S. W. 106, this court held that parol evidence was admissible to show the real consideration for a contract, in virtue of

which Rice executed and delivered to Watson his notes, which were afterwards renewed and consolidated by the execution of one note for \$1,000, upon representations by the payee that in the event Rice was not satisfied with the transaction at the time the first note matured, defendant would repay plaintiff the amount of a cash payment, with interest, and return the notes. The renewal note, in the sum of \$1,000, had been negotiated by Watson and paid by Rice. The suit was to recover the amount so paid. In support of the holding 2 Elliott on Contracts, §§ 1629, 1633, and 1636 were quoted in part as follows:

"The question usually is as to whether the parol evidence sought to be introduced contradicts or alters the written contract or leaves it to stand unchanged and simply tends to establish an additional collateral agreement. It is often difficult to determine this question, and there is much conflict among the authorities. The form in which the question arises may sometimes be an important factor in determining the admissibility of the evidence, and, referring to leases, it is said that a part of the conflict in the decisions may be explained if we observe that it is one question whether such a collateral agreement may be proved for the purpose of sustaining an action for its breach and a different question whether it may be proved for the purpose of defeating an action on the written lease.' Another writer suggests the following test for determining whether a parol agreement is collaterally admissible: If it interferes with the writing it cannot be proved. If, on the other hand, it relates to a matter beyond the scope of the written contract, the writing does not affect it. In each case it must be determined from the character of the writing and from the circumstances of the case whether the parol agreement offered to be proved was in regard to a matter which it is reasonable to infer the parties thought settled by the terms of the writing and, if it was, evidence to show it should be excluded. The writing must speak just so far as it is fair to conclude that the parties, acting as reasonable men, and using intelligible language, intended it should speak, and no further. \* \* \*

"There is also a class of cases in which it is held that parol evidence of a collateral contemporaneous agreement, which assumes the contract as indicated by the writing, and undertakes to deal with some contingency or new relation of the parties in the future that may arise under the written agreement, is admissible.' \* \* \*

"The general rule which excludes parol evidence when offered to contradict or vary the terms, provisions, or legal effects of a written instrument is subject to many qualifications. Among these qualifications is one to the effect that conditions relating to conditions precedent may be shown by extrinsic evidence. A party who concedes that the instrument evidencing the contract was placed in possession of the party seeking relief, but claims that the latter took it with the understanding that it was not to go into effect until the happening of some other or further event, and that such event has not transpired, is not considered as one seek-

ing to vary or contradict a written contract, but is one endeavoring to show that no contract between the parties ever in fact came into existence. For this reason evidence of such conditions precedent is held admissible. The cases which so hold merely give recognition to the well-settled rule that an instrument may be delivered by one party to another to take effect on the happening of a contingency, and that, by such collateral agreement, the legal operation of the writing is merely postponed until the happening of the contingency."

The holding is sustained by further citation of the following authorities: *Merchants' Nat. Bank v. McAnulty*, 81 S. W. 1091; *Downey v. Hatter*, supra; *Pope v. Taliaferro*, 51 Tex. Civ. App. 217, 115 S. W. 309; *Mfg. Co. v. Powell*, 78 Tex. 53, 14 S. W. 245; *L. & G. N. Ry. Co. v. Dawson*, 62 Tex. 262.

*Merchants' National Bank v. McAnulty*, supra, is a case in which it was held that parol evidence was admissible to show that a note, though in possession of the payee, was delivered with the understanding that it would not be binding upon the makers unless signed by other persons, and the doctrine there announced has since been reaffirmed in several cases by the courts of this state.

This court held in *Texas Life Insurance Co. et al. v. Huntsman et al.*, 193 S. W. 455, 457, that in an indorsee's action upon a note from premium due on an insurance policy, testimony that the payee insurance agent agreed not to negotiate the note until the policy was delivered could be proven by parol, where the defendant, the maker, sought to recover over against the payees. *Baines v. Kohler & Campbell*, 201 S. W. 735, was a suit upon promissory notes, in which the defendants alleged that the parties orally agreed that the notes should not become effective unless plaintiff advanced certain credit to one of the defendants. Parol proof of this agreement and that the credit had not been advanced was held to be a good defense, since it did not seek to vary the written notes but only to postpone their effective date. *J. I. Case Threshing Machine Co. v. Street et al.*, 216 S. W. 426, is one of a number of cases in this state in which notes given for the purchase price of machinery delivered to the defendant buyer, upon condition that the notes should not become effective until it had been demonstrated that the machine would work to the defendant's satisfaction, or would comply with the warranty, could not be recovered upon until the verbal conditions and contingencies had been met. In reversing this case upon the first appeal (188 S. W. 725), this court said:

"We gather from the pleadings and the evidence offered it was the contention that the purchase and sale of the engine was not consummated and should not be until after trial, and, if as represented, Street should accept

the engine in writing; and the orders and notes were left with appellee upon that condition. The order, therefore, did not become a binding contract between the parties until the engine was so accepted, and the notes were not obligations binding upon appellants. If the allegations of appellants are true, the contract of sale, as evidenced by the order and notes, never went into effect, and therefore was not the contract of the parties"—citing *Wigmore on Evidence*, §§ 2408, 2410; *Watson v. Rice*, supra; *Parker v. Naylor*, 151 S. W. 1096; *National Novelty Importing Co. v. Duncan*, 182 S. W. 888.

An indorser of a note, it was held, could prove by parol that the note in effect belonged to a university of which he was the secretary, but was made payable to him, and that his indorsement was merely a transferred title. *Texas Baptist University v. Patton*, 145 S. W. 1063. To the same effect is *Erwin v. E. I. Dupont de Nemours Powder Co.*, 156 S. W. 1097. See, also, *Williams v. Walter A. Wood, M. & R. M. Co.*, 154 S. W. 366.

In an action on a note by an assignee, who acquired it after maturity, it was held that a witness could testify that he signed the note under an agreement with the payee that he should not be liable, and that the latter would indemnify him against loss. *Citizens' National Bank v. Cammer*, 86 S. W. 625. And in an action on a note against a surety an answer alleging that for a consideration the plaintiff had agreed with the person for whose benefit the note was made that such person might pay it in work, and that it had been so paid, was not objectionable as contradicting the terms of the note. *Chapman v. Witherspoon*, 192 S. W. 281, is a case in which the parol evidence rule was invoked to prevent proof by parol of an agreement whereby a broker should have commissions out of a certain note executed to the owner, and where it was alleged that his commissions should be paid when the note given for the land was satisfied. After quoting the rule from 5 *Chamberlayne*, *Modern Law Ev.* 4930, § 3553, *Rasbury*, Justice, said:

"The question then is: Is the agreement claimed by appellee inconsistent with the writing (the notes), and is it apparent that the writing (the notes) was not intended as a complete embodiment of the undertaking? We believe the parol agreement to be entirely consistent with the written agreement. Appellant testified that the charge of \$500 made for commissions or for financing the trade between appellee and Witherspoon was based largely on the fact that the notes which he had agreed to carry would be hard to negotiate, due to the fact that they covered a period of eight or ten years, and as a consequence a one-way commission would not be satisfactory. He also testified that he would refund \$100 of the \$500 if appellee would 'cash' the notes. It thus appears practically without dispute that the sum to be paid was based largely upon the fact that

appellant would be compelled to carry the notes for so long a period, and appellant's funds would accordingly be beyond his control for other purposes. Such being true, it was, it occurs to us, entirely consistent for the parties to agree collaterally and independently that in the event appellee paid off the notes in a reasonable time a portion of the charge for commissions and financing the trade should be refunded. We also conclude that it is apparent from the writing that it is not a complete embodiment of the agreement, or, stated in another way, that it does not presuppose an exclusion of the collateral or independent agreement. The writing is but a formal promissory note, and because of its character and brevity essentially fails to import that all stipulations between the parties with reference to the subject-matter were intended to be expressed by the note, and because, further, the omission to express in the note the other agreement does not indicate that the agreement was not made, particularly so in view of the fact that the right to receive the \$350 was dependent upon the payment of the note in a reasonable time."

Where a note and deed of trust made no provision concerning the sale of certain land in its entirety, or the payment of the note before expiration of the five-year term, parol testimony was admissible to prove an agreement whereby a portion of the principal represented interest, and that upon payment thereof before expiration of such period the payee would refund the interest that had not been exhausted, and was admitted upon the ground that such testimony was within the exception to the parol evidence rule that where the writing was not intended as a complete embodiment of the undertaking the understanding could be shown. *Davidson v. Guaranty Life Insurance Co.*, 220 S. W. 582.

In the case of *Miller v. Murphy*, 206 S. W. 968, O. A. Murphy gave his negotiable note to Miller, and as a plea of failure of consideration alleged that it was given for five shares of capital stock in a mercantile company; that the corporation was insolvent and the stock worthless at the time of the execution and delivery of the note. He further pleaded a contemporaneous parol agreement to the effect that, if the corporation should afterwards prove to be insolvent, plaintiff would cancel the note and never demand payment thereof. He further alleged insolvency of the corporation, and the court held that proof of the contemporaneous parol agreement was admissible.

*Davis v. Sisk*, 49 Tex. Civ. App. 193, 108 S. W. 472, is one of several cases in this state declaring the rule that, where the original contract was verbal and entire, and a part only has been reduced to writing, that the unwritten part may be shown by parol. The transaction was one involving a transfer of real estate, and the parol proof that the transfer of a stock of goods was also em-

braced in the contract was permitted. Amongst other cases supporting the holding the court cites *Thomas v. Hammond*, 47 Tex. 42, in which it was held that a parol agreement by which certain purchase-money notes were to be deposited with an attorney, and from the proceeds of such notes outstanding liens against the land conveyed to the maker would be taken up and discharged, could be shown in defense of an action upon the notes.

In the first count of the answer copied above it is shown that the cattle taken by appellant were formerly owned by a third party, who was indebted to appellee for them; that on account of the decline in the price of cattle their value was not equal to the debt which the appellees held against the then owner of them, and at the request of appellees appellant took the cattle over from the former owner at an agreed price and executed a mortgage upon them to secure the notes given for the agreed price. According to the statements in this count, the appellee desired that appellant should take them on account of the latter's experience and the further fact that he possessed sufficient pasturage and means to keep and care for them. Indulging every reasonable presumption in favor of the sufficiency of the answer, as against a general demurrer, we think it appears from the first count that defendant should furnish pasturage and give his time and attention in managing the herd, and should continue to do so until the cattle, by growth and increase in numbers and in price, were sufficient to pay the debt with 8 per cent. interest per annum, and that appellant should have as his compensation all of the original herd and the increase over and above the amount of the debt and interest. It will be seen that the arrangements, according to the allegations of the first count, were to continue for an indefinite time; that is, until the increase of the herd and in the value and price of cattle upon the market would enable the appellant to pay the debt and interest. It is alleged in the second count that it was understood that plaintiff would have to "float the notes" mentioned in the first count. The meaning of the term "float" as here used is not clear, but from the further allegation that it was understood that it would be necessary to renew the notes each six months, and that such renewal should continue until the agreement was consummated and the object for which it was entered into was obtained, the writer presumes that by the word "float" is meant that appellee would have to use the notes as collateral security in borrowing money, since to hold that the word "float" means to negotiate would, of course, cut off the right of the parties to renew them every six months, as agreed. In the third count it is shown that the appellant complied with the agreement by shipping and selling some of the cattle and

the increase and applied the proceeds to the payment of the debt; that he has expended in care and money \$12,000 under the agreement. No fraud or mistake is alleged in the formation of the original contract. In the fourth count of the answer it is alleged that subsequently to the formation of the contract the appellees fraudulently informed appellant that the price of cattle had declined, that it was hard to float cattle paper, and that in order to float the paper it would be necessary to further secure the same, and at the request of appellee appellant executed the deed of trust mentioned in the original petition, as further security for the notes sued upon, and that the representations were falsely made, for the sole and only purpose of holding the appellee harmless and with no intention of carrying out the agreement.

It requires no citation of authorities to support the proposition that, if the deed of trust upon appellant's land was secured under the subsequent agreement by fraud or deceit, parol evidence is admissible under such allegation to establish the fraud, and when proven would entitle appellant at least to the cancellation of the lien upon his land. The difficulty lies in the attack made by the pleading upon the contract as originally executed and as to which there is no allegation of fraud, accident or mistake. In nearly all of the cases hereinbefore cited it will be found that a negotiable note or notes constituted an integral part of the transaction out of which the suit arose. While no effort has been made to collate the cases in which the parol evidence rule has been discussed in its relation to contracts generally (and the writer does not claim that the cases above reviewed are all of the decisions in this state in which the courts have applied the rule, as given) they present all of the exceptions and qualifications announced by our courts under the rule. Since the judgment must be reversed because, as heretofore stated, the entire court thinks the answer in the fourth count shows facts entitling appellant to at least cancel the deed of trust, admitting his allegation of fraud to be true, the writer desires to express his views upon the other phase of the case. Construing the pleading in accordance with district court Rule No. 17 (142 S. W. xviii), I think the allegations of the first three counts are sufficient to show that part of the consideration for the execution of the notes and chattel mortgage was the agreement on the part of appellee that appellant should have for his services and expenses in managing the cattle the profits resulting from carrying out the contract. This consideration, of course, would be defeated if appellee were permitted to collect the notes at maturity, as stipulated in them. Since the notes and chattel mortgage are only a part of the contract under which appellant acquired the cattle, and since the notes

were delivered with the mutual intent of the parties that they should not be negotiated, but should be redeemed by appellant and renewed each six months, I believe the case, as alleged, falls within several of the exceptions illustrated by the Texas cases hereinbefore reviewed. Of course, if the notes had been transferred to a bona fide purchaser for value, a different question would have been presented. We may presume from the allegations that appellees had floated the original notes, and that when they were renewed it was in accordance with the original agreement and they had been redeemed for that purpose. This would show a practical construction of the contract. If, however, I am in error, in holding that appellant was entitled to prove the allegations in his answer, under the law as it existed in this state, prior to the enactment of the Uniform Negotiable Instruments Law, the sixteenth section of which is quoted above, I think it is clear that the contemporaneous parol agreement is provable under that act. *Dan. Neg. Inst.* (6th Ed.) § 68a, discusses the effect of the Negotiable Instruments Law as it relates to the delivery to the payee of a negotiable note upon condition as follows:

"The conflict of authority on the question whether a bill or note can be shown to have been delivered upon a condition precedent is settled in those states which have adopted the statute, whereunder the rule is recognized that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation in present of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper as between the parties will have no validity as a binding contract till the condition shall have been satisfied."

The rule is further stated in *L. R. A. 1917C, 314*, as follows:

"That a bill or note may be shown to have been delivered upon condition is settled in the Negotiable Instruments Law. This act provides that 'as between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. It is accordingly held that parol evidence is admissible to show that a bill or note, regular in form, was manually delivered to the payee upon the condition that it was to become an enforceable obligation only upon the happening of a certain event, or was to be paid only upon the happening of a certain event. Parol evidence has been held admissible where a note was given in payment of stock to show an agreement that it was to be carried and renewed by the payee for a stated time, and if at the end of that time the stock

had not realized enough to pay the purchase price, and the maker did not want it, the payee was to take it off his hands and cancel the note."

*Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841, is the case last referred to in the above note, and in it the court concludes as follows:

"That it was not intended and agreed by them that the note should be a present binding agreement, but that it was delivered to [the payee] upon the condition that if [the maker] paid interest on the sum for [the stated time the payee] was to renew the notes as agreed and if at the expiration of that time the maker did not want the stock the agreement to purchase was to be terminated at [the maker's] election, and the note cancelled."

Quoting further from *L. R. A. 1917C, 315*, note:

"A surety signing a note on condition that others shall sign it as sureties before delivery by the principal obligor may show this to defeat an action on the note, under the Negotiable Instruments Law. As shown in the preceding paragraphs, parol evidence is held admissible to show a conditional delivery under the Negotiable Instruments Law. It has been expressly held that there is nothing in the law that requires a contract of conditional delivery to be in writing.

"Evidence that the instrument was delivered conditionally does not contradict the writing within the meaning of the parol evidence rule; that rule presupposes the existence of a valid contract. The evidence in question is for the purpose of showing that there is no valid contract between the parties because there is no finality of utterance. It has been stated that 'the delivery of an instrument is an essential element to complete the contract written thereon, and of necessity this essential element cannot appear on the face of the instrument.' This general statement is made in a case involving a conditional delivery. It is further stated that the apparent contract written on the instrument is not complete until the delivery thereon is or becomes unconditional. Under the Negotiable Instruments Law a presumption of delivery is stated to arise, but, as between immediate parties, this presumption may be overcome by showing that the delivery was conditional; and, when that is shown, the apparent contract written on the instrument is shown, not to be a complete contract, but one which will be completed if the condition is fulfilled, and which cannot be completed if the condition becomes impossible of fulfillment. Again, it has been stated that such evidence merely postpones the legal operation of the instrument, and does not contradict the writing. In some cases it is stated that the condition goes to the consideration of the instrument."

This note, from which I have quoted so liberally, is supported by a number of authorities, some of which, together with later cases decided in jurisdictions where the Negotiable Instruments Law has been adopted and which I think are analogous to the in-

stant case, will be reviewed later on. Of course, if it be held that the oral agreement alleged by appellant is collateral to the contract, as evidenced by the notes and chattel mortgage, then the authorities are agreed, practically without dissent, that the case is not within the parol evidence rule, but we are not called upon to decide that question and I will not discuss it.

So, if I am mistaken in my conclusion that the notes were executed and delivered upon the contemporaneous parol understanding that appellee was merely to "float," and not transfer them in due course, that they were not to be due at a time certain and at all events according to their recitals, but, as alleged, if not paid at maturity they should be renewed for another term of six months, that they were to be paid only out of the funds arising from the profits of the business, that they alone do not evidence and are not the entire contract, but only a part of it, the remainder resting in parol, that the oral undertaking of appellee to comply with the conditions was a part of the consideration for them, governing the accrual of appellant's liability, and defining the nature and extent thereof, and that these conditions have been broken or have not been met, and that the contingencies expressed in the agreement have not arisen, which matured them all, and that the consideration has failed in whole or in part, are any or all provable in defense under the general law, as announced in the foregoing cases, then I am convinced that the Uniform Negotiable Instruments Law is applicable, and by its express provisions would permit the appellant to prove the "special purpose only" for which they were delivered, and that their delivery to appellee was "not for the purpose of transferring the property in the instrument," which result would necessarily be implied without such proof. In brief, I believe that the statute means what it says. I gather from Brannan's Negotiable Instruments Law (3d Ed.) that the act has been incorporated in the following states and territories, where the numbering of the sections is the same as that of the commissioner's draft: Alabama Laws 1907, p. 680; chapter 115, Code 1907; Laws 1909, No. 146. The act as originally adopted was numbered in the statute as articles 4958 to 5143, inclusive. However, the act of 1909 corrected some errors in the act of 1907, in which last act the sections are numbered as in the commissioner's draft of the law. In Alaska it is cited Laws 1913, c. 64; in Iowa, Laws 1902, c. 130 (Code Supp. 1913, §§ 3060a1-3060a198); Maine, Laws 1917, c. 257; Mississippi, Laws 1916, c. 244 (also Hemingway's Annotated Code 1917, pp. 1355-1385); New Jersey, Laws 1902, c. 184 (Comp. St. 1911, vol. 3, p. 3732); New Mexico, Laws 1907, c. 83; Pennsylvania, Laws 1901, No. 162 (Laws of 1909, No. 169); South Carolina, Laws 1914, c. 396; Vermont,

Laws 1912, No. 99; Virginia, Laws 1898, c. 866 (Laws 1906, c. 219; Code 1904, c. 133a, § 2841a). In the following states section 16, quoted above, appears in the statutes of said states under the following article numbers: Arizona, 4161; Arkansas, 6956; California, 3697; Colorado, 5068; Connecticut, 4374; Delaware, 2660; District of Columbia, 1320; Florida, 2950; Idaho, 3473; Illinois, 34; Indiana, 9089p; Kansas, 6543; Kentucky, 16; Louisiana, 455; Maryland, 35; Massachusetts 83; Michigan, 18; Minnesota, 5828; Missouri, 9987; Montana, 5864; Nebraska, 5334; Nevada, 2563; New Hampshire, 16; New York, 35; North Carolina, 2166; North Dakota, 6901; Ohio, 8121; Oklahoma, 4066; Oregon, 5849; Rhode Island, 22; South Dakota, 16; Tennessee, 3516a24; Utah, 1568; Washington, 3407; West Virginia, 4187; Wisconsin, 1675-16; Wyoming, 8174. It will be seen that a considerable majority of the states in the Union have adopted the law. A few of them, however, have made some slight changes in the wording of the original draft, but we have not found that any such changes are made in the language of section 16 in so far as it relates to the issue here involved. Investigation shows that a few of the states, notwithstanding the plain and unequivocal verbiage of the section, have, in extreme cases, applied the parol evidence rule as it formerly existed, but in a great majority of the jurisdictions the statute has been given the effect indicated in the foregoing note from L. R. A. 1917C, and as announced by Mr. Daniel in the section quoted. In construing this section I am constrained to adhere to the construction and interpretation heretofore given it in states which have adopted it and to follow that application of it which is sustained by the great weight of authority. I will now review briefly a few of the cases which I find to have been decided in those jurisdictions where the Negotiable Instruments Law has been adopted.

The case of *Jenkins v. National Bank of Baltimore*, 134 Md. 85, 106 Atl. 174, is a suit by a bank against the appellant as indorser of certain notes after default in payment at their maturity, and the defense sought to be interposed by proffers of parol proof which the trial court rejected was that the appellant, who was president of the Jenkins Provision Company, became an indorser individually upon certain notes of the company, of which these sued on are renewals, and furnished a collateral guaranty thereof by his wife under an agreement with the bank that before accepting the notes for any renewals thereof it would procure also the individual indorsement thereon of J. H. Cromwell, who was interested in the borrowing company, and served as its treasurer, but that, while the first two notes discounted after the agreement were indorsed by both J. H. Cromwell



and the appellant, the bank failed to obtain the indorsement of Mr. Cromwell on subsequent renewal notes, thereby violating the condition upon which the appellant indorsed the notes and agreed to their delivery, and that he did not know of the failure of the bank to have Mr. Cromwell indorse the latter renewals until after the company was placed in the hands of receivers, the renewal notes having in every instance been taken by Mr. Cromwell himself to the bank. This theory of conditional delivery was likewise set forth in a special plea, to which a demurrer was filed and sustained, and by a prayer it was necessarily refused in view of the exclusion of the evidence by which it might have been supported. Judgment was recovered by the bank. The court said:

"The Negotiable Instruments Act provides that as between the immediate parties, or against one not holding in due course, the delivery of a negotiable instrument may be shown to have been conditional. Code, art. 13, § 35."

The Supreme Court of Alabama, in *Norwood v. Stinnett*, 202 Ala. 349, 80 South. 431, applied the Negotiable Instruments Law, declaring that it permitted parol proof of the conditional delivery of a note. The defendant pleaded that the note upon which the suit was based was delivered to the plaintiff conditionally, with distinct understanding that it was for a special purpose, viz.:

"The plaintiff delivered to defendant two insurance policies for him (defendant) to examine, and determine whether or not he (defendant) would purchase same, and the note upon which this suit is based was delivered as aforesaid, to become effective if defendant, after examining the insurance policy, decided to take or accept said policy, and the defendant avers that before the note became due, and in a reasonable time, he notified the plaintiff that he did not care to purchase or accept the insurance. \* \* \*

"That the note upon which this suit is based was delivered to the plaintiff conditionally and for a special purpose only, viz.: At the time the note was delivered to the plaintiff, he, the plaintiff, delivered to the defendant two insurance policies with the understanding that the defendant examine said policies, and if he decided to take the insurance, the note was to be paid in a certain time, and the defendant avers that, after examining said policies, he decided not to accept said insurance, and so notified the plaintiff within a reasonable time."

He testified in substance:

That he made application for the policy with the agreement that if it was satisfactory he would keep it; that when Norwood came to him to deliver it "he had two policies, one for \$1,000 and the other for \$2,000, which also had a sick and benefit clause in it. I told him I was not able to take them and pay for them, and he says, 'I will make you able,' and I finally agreed to sign the note and take the policies home and examine them, and after reading them over it was understood and agreed, and I

told Mr. Norwood, if the policies were satisfactory, and if I decided to keep the policies, I would pay the note, but, if not, I would return the policies. \* \* \* I saw Mr. Norwood in Bessemer a month or more after I signed the note, and told him I would not take the insurance and wanted my note. The policies were afterwards thrown around the house, and the children played with them until they were lost."

The court sustained the demurrers to the pleading. The note sued on showed an unconditional promise to pay, but, as alleged by defendant, was delivered conditionally. Upon this point the court said:

"The plaintiff was, of course, entitled to recover the amount evidenced by the notes, unless the defendant established the facts of special defense set up in one of his special pleas.

"A note may be delivered to the payee with the conditional reservation of liability, which, as between the parties, is effective. Code, § 4973; *Bank of Tallassee v. Jordan*, 75 South. 930. \* \* \* If there was error in sustaining the demurrer to plaintiff's special replications, it was without prejudice, since he actually had the benefit of proof of them under the general issue. In this regard it will suffice to say that a replication setting up defendant's obligation to return the policies to plaintiff if they were rejected, and his failure to do so, or to offer to do so, contemporaneously therewith, would be a good answer to the special pleas."

The defendant's answer in *Martineau v. Hanson*, 47 Utah, 549, 155 Pac. 432, is in part:

"That the promissory note sued on 'was delivered to plaintiff upon the express condition and understanding between the said defendant and the plaintiff that the said note was not to be paid until the said J. H. Earle should pay to the defendant the aforesaid sum of \$5,500; that the plaintiff received the said note from said defendant, and at the time of its receipt agreed to the condition upon which the same was delivered as stated, and agreed with the defendant that the said note should not become due until the said John Earle should make the payment of \$5,500, which was due on or before the 1st day of November, A. D. 1911, and that said plaintiff further agreed that said note \* \* \* was never to be paid by the defendant unless the said John H. Earle should pay the sum of \$5,500; that said Earle never paid the \$5,500, or any part thereof."

In disposing of the issue raised by this part of the answer the court said:

"The first assignment relates to the ruling of the court by which it excluded defendant's parol evidence offered by him for the purpose of proving the agreement between the parties set forth in the answer, namely, that the note was delivered upon the condition therein stated. Counsel for the defendant very forcibly insists that the court erred in excluding the proffered parol evidence. The plea in the answer and the evidence offered in support thereof were based upon Comp. Laws 1907, § 1568, which, so far

as material here, reads as follows: 'Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between the immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, for a special purpose only, and not for the purpose of transferring the property in the instrument.' \* \* \*

"The section in question is part of the act relating to negotiable instruments, and is found, with some slight changes, in the statutes of the various states which have adopted said act. The statute adopted by the state of Wisconsin is, word for word, like our own, and the Supreme Court of that state, in passing upon a similar question to that presented here, in the case of *Hodge v. Smith*, 130 Wis. 333, 110 N. W. 195, says: 'It is familiar law, notwithstanding some conflict in the authorities, that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation in presenti of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper as between the parties will have no validity as a binding contract until the condition shall have been satisfied, and that proof of such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous parol agreement; that such evidence only goes to show that the instrument never had vitality as a contract.' To the same effect are the following cases: *Hill v. Hall*, 191 Mass. 265, 77 N. E. 831; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Howell v. Ware*, 175 Fed. 742, 99 C. C. A. 318; 1 *Daniel*, *Negotiable Inst.*, § 68a; *Brannan's Negotiable Inst. Law*, § 16, and notes.

"Counsel for plaintiff contends, however, and it seems the court agreed with him, that the effect of the proffered evidence merely went 'to show that the note in suit was to be paid out of the particular fund,' and that parol evidence was not admissible to establish that fact. To sustain that contention, the following cases are cited: *Gorrell v. Home Life, etc., Co.*, 63 Fed. 371, 11 C. C. A. 240; *National Bank v. Foote*, 12 Utah, 157, 42 Pac. 205; *Underwood v. Simonds*, 12 Metc. (Mass.) 275; *Clanin v. Easterly, etc., Co.*, 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; *Stewart v. Anderson*, 59 Ind. 375; and *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433. A mere cursory reading of the foregoing cases will disclose that the decisions cited by plaintiff's counsel, with possibly two exceptions, have no controlling influence upon the question raised by defendant's counsel; and, if we were to follow literally the two cases to which we have referred, we would have to repeal section 1563, supra, by judicial edict, and would be required to overrule all the cases we have before cited.

"While the fact that the note in question was delivered only upon the condition that it should not become a completed or enforceable contract unless the purchaser of the lands in question paid the sum stated is not as directly pleaded as it might have been, yet it seems clear to us that the condition is sufficiently set forth, and that, as pleaded, it constituted a condition precedent to the right of recovery on the note, and one which the parties could legally agree upon.

"An agent who is authorized by his principal to sell the latter's lands certainly may agree that the payment of his commission, or any part of it, shall be dependent upon the condition that the purchaser shall pay to the principal either a specific part or all of the purchase price, and that in case the purchaser shall fail or refuse to do so without the fault or connivance of the principal, the agent's commission shall be forfeited. Such an agreement is certainly not against any positive law nor contrary to public policy.

"If, therefore, the principal executes his promissory note evidencing the agent's commission, they may undoubtedly agree that the same is delivered upon the condition that it shall not be an enforceable contract unless and until the condition is fulfilled. That such a condition may be proved by parol as between the parties to the instrument the decisions we have referred to leave no room for doubt, and it seems to us that our statute, to which we have referred, expressly so provides."

It is held in *Re Marine*, 78 Misc. Rep. 707, 140 N. Y. Supp. 231, that a certificate of deposit in a bank is a promissory note with all its attributes and is of the class of instruments of which *Negotiable Instruments Law* declares that the delivery, either by the party making or indorsing them, may be shown to have been conditional, or for a special purpose, and not for the purpose of transferring the property therein. That was a case in which the certificate was indorsed by one to a savings bank and received by it with the mutual understanding that the paper was put into possession of the bank for the special purpose of collection, and not for the purpose of transferring the property in the instrument. Afterward the party depositing the certificate died, and in her will she provided as follows:

"I give and bequeath to Charles H. Schambacher the sum of five hundred dollars, payable exclusively out of any funds I may have on deposit in any bank in Friendship, N. Y."

The savings bank indorsed the certificate and delivered it to another bank, and, upon being notified that it had been paid, opened an account in the name of Mary Cruikshank, in trust for Eva Maude Marine, citing the case of *Bank of America v. Waydell*, 187 N. Y. 115, 79 N. E. 857. The court, by order, enforced the mutual understanding of the parties.

In the case of *Sayre v. Leonard*, 57 Colo. 716, 140 Pac. 196, the defendant admitted the execution of the note sued upon, but alleged

that it was delivered to the plaintiff conditionally and was to become binding only upon the happening of a certain possible future event, which did not occur; the condition being that, if one Wingo, a silent owner, with Leonard in a certain leasing partnership, in which Sayre also had an interest, should repudiate the transfer of their holdings therein, which Leonard undertook to make to Sayre without consulting Wingo, then the note should become obligatory as representing Leonard's share of the expense of operating the lease, but that, if Wingo should ratify and prove the transfer, then the note should be canceled and returned. The defendant alleged that Wingo did in fact ratify and approve the transfer before the note matured, that defendant notified Sayre of that fact, and that the note should thereupon have been returned for cancellation as a void instrument, but that Sayre, in violation of the agreement, thereafter took advantage of his possession of the instrument and brought suit to enforce it. The Supreme Court of Colorado said:

"The contention is that the defendant has not pleaded or proved a conditional delivery good in law. The rule of conditional delivery of commercial paper is generally acknowledged. 7 Cyc. 688, and cases cited; *Westman v. Krumweide*, 30 Minn. 313, 15 N. W. 255; *McFarland v. Sikes*, 54 Conn. 250. 7 Atl. 408, 1 Am. St. Rep. 111; *Benton v. Martin*, 52 N. Y. 570; *Ewell et al. v. Turney*, 39 Wash. 615, 81 Pac. 1047; *Watkins v. Bowers*, 119 Mass. 383. Moreover, section 16 of the Negotiable Instrument Law (section 4479, R. S. 1908) contains a specific provision on conditional delivery in the following language: [Here section 16 of the law as it is adopted in this state is copied.]

"In a recent case decided by this court, *Norman v. McCarthy*, 138 Pac. 28, we had under consideration a question closely analogous to the present one, involving the conditional delivery of a check, and upon that proposition, among other things, this was said: 'Now the action on the check in the present instance was between the immediate parties, the payee and the drawer, and the further answer alleged that the check was delivered to the payee upon the condition that it was to be paid only in the event that it was determined that the drawer was not entitled to hold the property as against the attachment, which property he kept in his possession, and it was further alleged in effect that the course of events in the attachment suit was such that the drawer was entitled to retain the property, and that the condition upon which the delivery of the check was to become absolute was not fulfilled and could not be. This conditional delivery alleged was certainly, within the contemplation of the statute, one which may be shown as between immediate parties, and the further allegations showed that the delivery required by the statute to complete the contract expressed on the check was never made, and on that account the check was not a completed contract. The further answer, therefore, was sufficient to constitute a defense.'

"So here the action on the note is between the immediate parties, the payee and drawer, and the further answer alleges that the note was delivered upon the condition that it was to become effective only if Wingo declined to ratify the transfer of his interest in the leasing partnership, which Leonard had undertaken to make to Sayre. The sole matter then is whether the delivery of the note was attended by a condition which, if fulfilled, would defeat its enforcement. That the allegations of the further answer, if established by competent proof, constituted a complete defense, such as the statute contemplates, seems certain. Whether the note was so conditionally delivered became purely a question of fact. There was abundant testimony to support the allegation of this defense, and, although there was contrary evidence, the specific finding of the court that such was the character of the delivery is controlling upon review."

It appears that in the case of *First National Bank v. Miller et al.* (N. D.) 179 N. W. 997, the plaintiff brought suit upon a \$800 promissory note against Herbert Miller as maker and Ella Miller, Earl H. Miller, and Geo. Thompson as guarantors. It appears that Earl H. Miller was confined in the county jail upon a criminal charge, and it was agreed that when bail was exonerated the note would be released and returned to the indorsers. The guarantors alleged the conditional delivery of the note and also that it was agreed by plaintiff and them and Allen Miller and William Miller, when said note was indorsed, that the plaintiff would make no loans to defendant Herbert Miller on account of said note, or advance to him any money or pay any money to any of his creditors, or to itself on account of the note, that none of the indorsers would assume any liability for any of the debts or obligations of Herbert Miller by indorsing the note, and that the only liability they would assume was to reimburse plaintiff in case it should be required to pay the amount of the bail. The bail was fixed at \$2,000 on condition that it be furnished in cash. Part of the cash was furnished by other parties. Herbert Miller gave his check, certified to the bank, for \$800, making the total sum of \$2,000, the amount of the cash bail fixed. Hunt, as state's attorney, presented the \$800 certified check to plaintiff bank for payment, receiving the amount in a cashier's check, payable to him, which was deposited with the clerk of the court until after the trial of Earl H. Miller, who was acquitted and discharged, and his bail, by order of the court, exonerated. Immediately after, while the cashier's check was yet unindorsed by Hunt, the sheriff levied upon it under execution issued on a judgment against Herbert Miller. After quoting the Negotiable Instruments Law, as first above set out, the court said:

"In this case no question of a holder in due course arises, and hence no consideration of that subject is necessary. The defendants have pleaded, in substance, that the note was delivered conditionally, and for a special purpose. That special purpose was the furnishing of cash bail for Earl Miller, and for that purpose, and upon the condition that the note would be returned when the bail was exonerated, the note was delivered to the plaintiff bank.

"It was also a condition that the note or its proceeds were not to be used to pay any of the private debts of Herbert Miller. It was not delivered for that purpose. It was delivered to the bank for the special purpose of procuring the balance of the bail money, which was to be returned, if the bail were exonerated, and the note returned to the maker and the indorsers. This was the true and only purpose of executing and delivering the note.

"It appears the plaintiff bank, being a national bank, was under restrictions of law, relative to its powers and duties, in regard to signing bonds. Perhaps, it may have determined that that restriction would extend to a cash bail bond. Whatever may be the facts in this regard, we think, from the history of the whole case, as presented here under the evidence and circumstances shown by it, that the drawing of the check upon the bank by Herbert Miller for an amount equaling the note was simply a means adopted to procure the balance of the cash bail.

"The character of the transaction was not changed in the least by the state's attorney cashing the certified check which Herbert Miller gave him, and receiving instead thereof a cashier's check from the plaintiff bank. \* \* \*

"The note did not become the property of the bank for any other purpose than the special one, nor was it delivered to and received by it, except under the conditions and special purpose conclusively shown. If money were advanced by it upon the note, it was done for and in accordance with the special purpose to accomplish which the note was delivered. \* \* \*

"The special purpose of giving the note was completed, and there should be no further or different liability on the promissory note than was intended and covered by the special purpose and conditions upon which it was delivered, and we are of the opinion, and it is held, there is none.

"At the very moment the court signed the order defendant's bail was exonerated. The levy of the execution, of the sheriff upon the check payable to the state's attorney was of no effect. It was not the property of Herbert Miller, and hence not subject to levy. The promissory note had become of no value as soon as the defendant's bail was exonerated. The money should have been returned to the bank, as it was intended it should be; and the note returned to the maker and indorsers, thus carrying out the special purpose for which the note was delivered. \* \* \* The statute we have above cited with reference to the right to allege and show that the instrument in question was delivered conditionally and for a special purpose is plain, and the principle is supported in *Grebe v. Swords*, 28 N. D. 330, 149 N. W. 126, and in *First State Bank of Eckman v. Kelly*, 30 N. D. 84, 152 N. W. 125, Ann.

Cas. 1917D, 1044. There is no merit in respondent's contention that certain evidence offered by the defendants tendered to vary or contradict the terms of a written instrument. It is clear that the introduction of that evidence was not for the purpose of varying or contradicting the terms, but to show the conditions under which, and the special purpose for which, it was delivered, and that otherwise it never became operative nor of any legal existence as a contract.

"Under the statute we have set forth, the condition and special purpose may be alleged and shown, and that is all the evidence claimed to be inadmissible would tend to show."

In *Selma Savings Bank v. Harlan et al.*, 167 Iowa, 673, 149 N. W. 883, Ann. Cas. 1917A, 1216, the bank sued Harlan as principal, and Hinkle as surety, on a note given in renewal of three others. Hinkle pleaded that the note never took effect and testified that Harlan and wife were to give him an assignment of their interest in an estate if he would become a surety for them on the note; that when he signed it and gave it to the cashier it was with the understanding that it was to become effective when Harlan and wife executed their note to him for the same amount and delivered the assignment agreed upon; that the condition was not complied with, and the court said:

"That a promissory note may be delivered on condition, the observations of which is essential to its validity between the original parties thereto is recognized by section 3060a16, Code Supplement, providing that in such case 'the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring property in the instrument,' and is in harmony with the decisions of this and other courts. *Ware v. Smith*, 62 Iowa, 159, 17 N. W. 459; *Johnston v. Cole*, 102 Iowa, 109, 71 N. W. 195; *Niblock v. Sprague*, 200 N. Y. 890, 93 N. E. 1105. If the agreement was as testified by Hinkle, there was never any authorized delivery of the note, and it never became binding on the defendant. He is not contending that the contract which the note expressed was changed; his claim is that such contract was never entered into at all, for that the contingencies upon which the note was to be deemed delivered never occurred. Parol evidence of the condition was admissible; for it was not an attempt to vary or contradict the written instrument. *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32."

The contemporaneous oral agreement set up as a defense in *Smith v. Brown*, 50 Utah, 27, 165 Pac. 468, is that long prior to the making of the note the plaintiff had induced the defendant to become a stockholder in a certain corporation which was organized for plaintiff's benefit; that the plaintiff was a subscriber and paid for a certain amount of the capital stock of said corporation, one-half of which was to be issued in the name of the defendant, and the defendant was to manage and conduct the business affairs of

said corporation; that the plaintiff was to be repaid the amount he had advanced for the stock issued to the defendant out of the first profits derived from the business of said corporation, and not otherwise; that the plaintiff had also agreed to advance all further sums of money that might be necessary to carry on said business, if any was necessary; that he afterwards refused to do so unless the note in question was made; that the note was made and delivered to plaintiff as evidence of the amount of money he had advanced for the capital stock issued in the name of the defendant and partly because the plaintiff had refused to advance the money he had promised to advance to carry on the business, and which money the plaintiff continued to refuse to advance unless the note was executed by the defendant, and that after the note was executed plaintiff nevertheless refused to advance any money, to defendant's damage. The court said:

"Under the Negotiable Instruments Act (Laws 1899, c. 83), which is in force in this state, it is settled beyond controversy that as between the original parties it may always be shown that a promissory note was delivered upon condition, or that it was made without consideration, or that the consideration has failed in whole or in part. In 1 Daniel, Neg. Inst. § 68a, the prevailing rule under the Negotiable Instruments Act is stated thus: \* \* \*

"The foregoing doctrine has been followed by this court in the very recent case of Martineau v. Hanson, 155 Pac. 432, and cases there cited. In addition to the cases cited in the foregoing opinion, we especially refer to the following as directly in point under the issues presented in defendant's answer: *Oakland Cemetery v. Lakins*, 126 Iowa, 121, 101 N. W. 778, 3 Ann. Cas. 559; *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841. In both of the cases last cited defenses in their nature similar to those set up in defendant's answer were held good as between the parties to the notes there in question. See, also, *Julius Kessler & Co. v. Perellius*, 107 Minn. 224, 119 N. W. 1069, 13 Am. St. Rep. 459, and *Union Inv. Co. v. Epley*, 164 Wis. 438, 160 N. W. 175."

In *Wauke Savings Bank v. Jones*, 179 Iowa, 261, 159 N. W. 691, the defendant answered, claiming that the contract between himself and the land company was evidenced partly in writing and partly by a contemporaneous oral contract, and that the parol part of the contract was substantially that the note was delivered upon condition that the defendant would be able to raise money by September 1, 1913, and that he was unable to obtain the money; that the land company negotiated a note to plaintiff in fraud of defendant's rights. After discussing the authorities pro and con bearing upon the right of the defendant to prove the contemporaneous parol agreement, the court said:

"There is nothing in section 3060a16, Code Supp., to sustain appellant's contention that

the evidence is incompetent. On the contrary, it provides in part as follows: [Quoting section 16, supra.] It is true, of course, that appellant would be protected if it is an innocent holder in due course without notice. We are of the opinion that the evidence was competent and properly admitted and is a complete defense, unless it be shown that plaintiff is an innocent holder."

The finding of the jury in *Harder v. Reinhardt*, 162 Wis. 558, 156 N. W. 959, is:

"(1) That it was understood between the parties at the time plaintiff gave the \$800 check to defendant that plaintiff was advancing the money on the Bloor contract, and that plaintiff was to look to Bloor and not to defendant for reimbursement; (2) that it was agreed between the parties that the defendant, for the benefit of the plaintiff, should include the \$800 claim of plaintiff against Bloor's estate in his mechanic's lien foreclosure suit brought to enforce against the premises his claim for money due for constructing the building for Bloor; (3) that the note in suit was given for the purpose of using it to further recovery of the \$800, together with defendant's claim of \$1,201, in the mechanic's lien foreclosure suit, and with the understanding between the parties that the note would not be used against the defendant nor the amount thereof demanded from him unless the plaintiff should recover the full \$2,001 in the foreclosure suit."

Judgment was rendered for the defendant. The court said:

"Plaintiff objected to any evidence of the facts found by the special verdict, on the ground that it was incompetent, irrelevant, and immaterial and in conflict with the contract, that it was not in writing, and that it tended to contradict the written contract of the parties. The objection made at the beginning of the trial was renewed throughout its course, and the question preserved by appropriate motions and exceptions, and the sole question to be determined on this appeal is whether or not the evidence of the oral agreement made between the parties at the time of the making and delivery of the note was properly received by the trial court."

After quoting section 16 of the Negotiable Instruments Law, and further quoting from *Paulson v. Boyd*, and *Hodge v. Smith*, supra, the court said:

"The trial court was clearly right in admitting the evidence concerning the making of the contemporaneous oral contract and within the rule above set forth. The evidence admitted by the trial court did not tend to vary or contradict the written contract, but tended to establish the fact that the note was delivered conditionally and for a special purpose only."

*Wilmington Trust Co. v. Morgan*, 5 Boyce (Del.) 261, 92 Atl. 988, was a suit upon a note. In defense the allegations were in part as follows:

"That the note sued upon in the above-stated action was issued to evidence the amount of certain advances made by the said the Interna-

tional Radiator Company to the said Henry W. Morgan, prior to the date of the said note, while the said Henry W. Morgan was engaged in the business of said company, and the said note was not delivered by the said Morgan for the purpose of transferring the property in the said note to the said International Radiator Company; that the said advances as evidenced by the said note were expended in furtherance of and on behalf of the company, and that the said note was not delivered for the purpose of giving the effect thereto."

In disposing of the motion to strike out the answer, the court said:

"The affidavit of defense filed in this case is manifestly made within the purview of section 16, c. 191, vol. 26, Laws of Delaware, 404 (the Uniform Act of Negotiable Instruments), respecting the character and purpose of the delivery of a negotiable instrument. The defense relied upon by the affidavit is to the effect that the note sued upon was, in the language of the statute, delivered for a special purpose only, and not for the purpose of transferring the property in the instrument."

The defense was held to be good.

In *Rubel v. Honig*, 178 App. Div. 53, 164 N. Y. Supp. 219, it is held that under the Negotiable Instruments Law in a suit between the original parties it could be shown by parol evidence that the note was not intended as a binding obligation, but that the father of the payees, being a member of a firm indebted to defendant, delivered to the latter two certificates of deposit in the name of payees, but which the father claimed were his own property, to be held until the debt was paid, and that the note was thereafter given under an agreement that it was not to take effect as a binding obligation until the payment of the indebtedness. *Bank of Cartersville v. Gunter*, 4 Ala. App. 539, 58 South. 757; *Starr Piano Co. v. Edgar*, 31 Ohio Cir. Ct. R. 295; *Shive v. Merville*, 1 Ohio App. 33; *Id.*, 34 Ohio Cir. Ct. R. 193.

From a review of the foregoing authorities and of the cases cited in Brannan's Negotiable Instruments Law, supra, following section 16 therein, pp. 57-64, inclusive, to which I refer without further discussion, I am of the opinion that the answer in the first three counts presented a good defense, and that Negotiable Instruments Law, § 16, applies to this case and abrogates the parol evidence rule as to the defenses urged herein.

The judgment is reversed, and the cause remanded.

BOYCE, J. [1] I agree to a reversal of the case on the ground that the allegations of the fourth subdivision of the answer set up a good defense to the foreclosure of the deed of trust referred to therein, but I cannot agree that the allegations of the first, second and third subdivisions of the answer are sufficient. A preliminary statement of my understanding of the effect of the state-

ments made in the defendant's pleading will be useful in the discussion of the legal principles applicable to the case, as I view it.

[2] It will be noted that it is not expressly stated in the answer that the agreement between the parties other than that evidenced by the notes and mortgage were in parol. However, appellant's counsel, in oral presentation of the case, admitted that the notes and mortgage were the only writings evidencing their agreement, and requested that the case be decided on this theory. So that our opinions are written on this assumption as to the facts. Under the allegations of the answer the notes and chattel mortgage were delivered as a part of the agreement between the plaintiff and defendant, or rather in partial consummation of that agreement. It was their understanding that these very notes, or renewals thereof, were to be paid, and they were thus delivered obligations. The only other part of the agreement that was not consummated by the delivery of the cattle to the defendant and the notes and mortgage to the plaintiff was in reference to the manner and time of the discharge of the obligation, evidenced by the notes, it being the understanding that the defendant was to pay the notes out of the proceeds of the sale of the cattle from time to time, and that the plaintiff, in order to enable the defendant to do this, was to renew the notes every six months until they were so paid. It is not stated that any agreement was made as to the defendant's liability in the event the cattle never paid out the notes, though it may possibly be inferred that the effect of the agreement was that the notes were to be paid only out of proceeds from the sale of the cattle, and that there was otherwise no personal liability on the part of the defendant. I refer to a few of the allegations of the answer. It is stated that it was agreed:

"That the defendant should take the cattle at the price then agreed upon for which notes were then given, secured by a chattel mortgage upon said cattle, the same being signed by the defendant; that the defendant, for his profit in the care and keep of the cattle, was to have the profit to be derived from the cattle after paying off, out of the sales of the cattle to be made from time to time, \* \* \* the said indebtedness and interest thereon."

The pleader, in the second subdivision of the answer, states his own conclusion as to the effect of the agreement.

"Thus, by the terms of said agreement the enterprise was entered into, whereby the defendant was to take the cattle as hereinbefore stated, and the notes so given and the mortgage securing the same were to be discharged out of the profits of the business."

It was further stated that it was understood that the plaintiff would have to "float" (which I understand to mean negotiate) the notes. This latter agreement itself implies

an understanding that the notes represented an agreement or obligation. The whole effect of the allegations as I construe them is to show that it was understood that the notes were delivered obligations, evidencing a part of the agreement between the plaintiff and the defendant; that the other part of the agreement was to the effect that these notes were to be extended from time to time and paid out of the proceeds of the sale of the cattle.

If such be the effect of the allegations of the answer, I cannot escape the conclusion that the oral agreement, with respect to the manner of the payment of the notes, is a contradiction and variance of the terms of the written part of the agreement, as evidenced by the notes and the chattel mortgage given to secure their payment, and does not come within any of the recognized exceptions to the parol evidence rule discussed by Judge HALL. The exceptions to the rule so discussed relate to (1) want or failure of consideration; (2) contemporaneous parol agreements; (3) conditional delivery. I will take up the discussion of the case in its relation to the stated exceptions in the above order.

[3] Of course, it has always been competent to defend the enforcement of a note or any other written contract on the ground that it was given without consideration, or that there has been a failure, in whole or in part, of the consideration. If my conclusion as to the effect of the allegations is correct, it follows necessarily that there was an original consideration for the execution of the notes. Do the allegations as to the refusal of the plaintiff to keep his oral agreements as to the payment of the notes state such a failure of consideration as will avail the defendant in this suit? If it were true that a failure to perform a verbal promise that varied or contradicted the terms of the written contract could be proven as a failure of consideration, then the parol evidence rule would amount to nothing. In the case of *Hendrick v. Chase Furniture Co.*, 186 S. W. 278, where the defendant sought to prove a parol agreement for the renewal of notes, made at the time of their execution, it was said:

"It cannot be said \* \* \* that a contemporaneous oral agreement to extend payment at maturity is a failure of consideration, within the common meaning of that term so as to bring the parol agreement to postpone payment within the statute, and thereby avoid the general rule with reference to contradicting the provisions of written contracts by parol evidence."

To the same effect, see *Crooker v. National Phonograph Co.*, 135 S. W. 647, 650 (writ of error denied); *Nixon v. First State Bank*, 127 S. W. 882; *Reid v. Ragland*, 156 S. W. 921; *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825; *Jones on Evidence*, § 468.

For the same reasons, a breach of such an

oral agreement will not support an action for damages or afford ground for any character of equitable relief. *Commonwealth Trust Co. v. Coveney*, 200 Mass. 379, 86 N. E. 895; *Hall v. First National Bank*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255. In the case first cited it was held that an oral agreement to renew notes from time to time and to require payment only "of such sums as the maker will realize as profits from the sales of his real estate" was inadmissible, either as a defense to a suit on the notes or in support of an action for damages for breach of the oral agreement. I am of the opinion, therefore, that there is no such want or failure of consideration alleged as will avail the defendant in this case.

[4] It is the law that in some cases where the writing is only a part of the agreement, and there was no intention to reduce the entire agreement to writing, then parol evidence to show the entire agreement or collateral contemporaneous agreements made in connection with the writing may be introduced; but the statement of the rule itself is usually coupled with the express qualification that the parol agreements thus sought to be shown must be consistent with, and not contradict, the terms of the written part of the agreement, and where such qualification is not expressly stated it is impliedly recognized. *Hendrick v. Chase Furniture Co.*, 186 S. W. 277, and authorities; *Crooker v. National Phonograph Co.*, 135 S. W. 647; *Belcher v. Mulhall*, 57 Tex. 21; note 43 L. R. A. 456; 10 R. C. L. p. 1068, § 230. This statement of the rule, found in the reference to R. C. L., is well sustained by the authorities:

"The rule that, where a written contract is made as only a part execution of an entire verbal contract, that portion not embodied in the paper may be shown by parol applies only where such portion is in itself a distinct, complete contract, not to mere stipulations in regard to and varying the terms of the written contract. What is sought to be shown as a collateral agreement must not in any way conflict with or contradict what is contained in the written contract. Extrinsic evidence is not admissible to show that a contract was partly written and partly oral, if the matter proposed to be made part of the contract by such evidence is inconsistent with the terms of the writing."

A number of decisions cited by Judge HALL expressly state this qualification (*Reid v. Ragland*, 156 S. W. 920; *Henry v. McCardell*, 15 Tex. Civ. App. 497, 40 S. W. 172; *Stuart v. Meyer*, 196 S. W. 618), and the other cases referred to in this connection permitted the showing of the contemporaneous parol agreements, on the ground that such agreements, which were held to be admissible, did not vary or contradict the terms of the writing in the case. Since all the authori-

ties admit the principle, it would not be profitable to enter into a discussion of the facts of the many cases that apply it. Now it seems to be well settled that an agreement to renew a note, or that it shall be paid only out of a particular fund, or that the maker thereof is not to be bound thereby, is in contradiction of the terms of a note payable absolutely at a stated time. *Hendrick v. Chase Furniture Co.*, 186 S. W. 277; *Crooker v. National Phonograph Co.*, 135 S. W. 647; *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321; *Long v. Riley*, 139 S. W. 79; *Nixon v. First State Bank*, 60 Tex. Civ. App. 7, 127 S. W. 882; *Daniel on Neg. Inst.* §§ 80, 81a; note 43 L. R. A. 449 et seq. No contemporaneous parol agreement is set up in the answer that is not in contradiction of the terms of the note, and the allegations do not, in my opinion, bring the case within this exception to the parol evidence rule.

[5] The question as to conditional delivery of the notes is discussed in two aspects: First, as to the law prior to the adoption of the Negotiable Instruments Act; and, second, in relation to such act. Before the adoption of the act referred to it was the recognized law in this state that parol evidence was admissible to show that manual delivery of a note to the payee was made subject to conditions precedent to the taking effect of the instrument as an obligation, and upon such showing the note in the hands of the original payee was inoperative until the happening of the contingency. This was the rule of the common law and was followed by the Supreme Court of the United States and the courts of most of the states of the Union. According to the reasoning of the authorities, evidence as to such conditions did not vary or contradict the terms of the note itself, but such evidence simply showed that the instrument never became operative as an obligation at all. The following language, used in the opinion, in an English case (*Pym v. Campbell*, 6 El. & Bl. 370, 373), has been quoted many times with approval by the courts of this country:

"The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

The question was exhaustively considered by the Supreme Court of the United States in the case of *Burk v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698, from which decision extensive quotations are made by Judge Key, in his opinion in the case of *Hawkins v. Johnson*, 181 S. W. 563. An elaborate note on the subject will be found in L. R. A. 1917C, 306-321. The writer of the note states this conclusion on the subject:

"To restate the governing principles: Evidence which shows that the writing was never delivered with the intention that it was to be-

come a binding contract is admissible. But if the writing has been finally delivered as a contract, evidence which contradicts or varies its terms is not admissible."

So, if the allegations of the answer show a delivery of the defendant's note as a part of the contract made between the plaintiff and the defendant, parol evidence that its payment was to be extended or the note renewed from time to time, and paid in a particular way, would be inadmissible; such evidence would vary the obligation evidenced by the writing rather than show that no obligation at all existed by virtue of the note and mortgage. What is the effect of section 16 of the Negotiable Instruments Act as to the admissibility of such evidence? This section and the preceding one deal with the subject of "delivery." Section 16 reads:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only and not for the purpose of transferring the property in the instrument."

I do not think that it was intended by the Legislature to make any material change in the law as it already existed in this state in the matter of a conditional delivery of notes, as declared by such decisions as *Burk v. Dulaney* and *Hawkins v. Johnson*, supra. The term "conditional delivery," as applied to the delivery of negotiable instruments, had an established meaning—that is, a delivery on condition precedent to the taking effect of the instrument as an obligation in any sense—and there is nothing to show that this was not the meaning in which the term was used in this act.

[6] What is meant by delivery for "a special purpose only," which might be shown in denial of liability on a regularly executed note, is made clear by the addition to the clause "and not for the purpose of transferring the property in the instrument"; an instance of this would be a delivery for the purpose of examination and the like. In my opinion, it was not the purpose of the act to let down the bars to the introduction of parol evidence to vary the terms of the note after it was once delivered as an obligation. I know of no authority that maintains that the adoption of section 16 of this act made any change in the law on this particular subject, except in the cases referred to by Mr. Daniel in section 68a of his work, quoted by Judge HALL, as follows:

"The conflict of authority on the question whether a bill or note can be shown to have



been delivered upon a condition precedent is settled in those states which have adopted the statute [the Negotiable Instruments statute] where the rule is recognized that a person may manually deliver an instrument though it be in the form of commercial paper, to another, on its face containing a binding obligation in presenti of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper as between the parties will have no validity as a binding contract until the condition shall have been satisfied."

A consideration of what precedes this statement will make clear what the author meant by the above language. It was shown in section 68 and the first paragraph of section 68a that some authorities had held that a manual delivery of a note to the payee could not be shown by parol to be on condition precedent to its taking effect; and it was stated in such connection that such holding was against the weight of authority, and it was concluded that "it is now generally held that a note may be delivered to the payee to take effect only upon a condition precedent." This discussion is followed by the second paragraph of section 68a, which constitutes the language first above-quoted. So, it seems clear that the author did not intend to say that the Negotiable Instruments Law made any change as to the law in those states which had already held that parol evidence might be offered to show delivery of a negotiable instrument upon a condition precedent. Mr. Brannan, on page 62 of his work on the Negotiable Instruments Law, has this to say in reference to said section 16:

"The language of the section that the delivery may be shown to have been conditional or for a special purpose, and not for the purpose of transferring the property in the instrument, is somewhat ambiguous. If the last clause qualifies both a conditional delivery and a delivery for a special purpose, it would seem that where the delivery is conditional, and no property in the instrument passes, we have a case of the first kind and not of the second. Moreover, in any case, the statute not speaking on the question as to the kind of evidence by which delivery may be shown to be conditional, recourse must be had to the common law, where the distinction is made between the two classes of cases, which may be generally described as those in which the condition is a condition precedent to the existence of the contract and those in which it is a condition to liability as an existing obligation."

Most of the authorities cited by Judge HALL are typical cases of true conditional deliveries; that is, the instruments by reason of the nonfulfillment of the condition under which they were manually delivered, never took effect at all, and the decisions were placed on such grounds, though in some cases it might be questioned whether the particular facts brought the case with-

in the rule. The case of *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841, is perhaps more nearly in point in its facts than any of the cases cited. Three of the judges dissented from the holding in that case. The conclusion as to the facts is questioned by Brannan (page 61), and is criticized by the author of the note in L. R. A. 1917C, 312, 313. The question of the decision is not as to the statement of the law, but as to its application to the facts of the case. The court states the law of the case, quoting from *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192, as follows:

"It is familiar law, notwithstanding some conflicting authorities, that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation in presenti of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper, as between the parties, will have no validity as a binding contract till the condition shall have been satisfied, and that proof of such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous agreement; that such evidence only goes to show that the instrument never had vitality as a contract"—

and immediately states that—

"It is there also held that this principle is recognized in the Negotiable Instruments Law, \* \* \* by providing that [quoting section 16 of such law]."

The case of *Burk v. Dulaney*, supra, is also quoted as authority for the conclusion of the court. So that it is apparent that, notwithstanding the Negotiable Instruments Law was then in force in Wisconsin, it was not considered by the court that such law made any change in the law of conditional delivery as it had been announced by the Supreme Court of the United States in *Burk v. Dulaney* and other authorities following the common law.

[7] So I conclude that these notes were delivered and the condition was only as to the time and manner of their payment, and that parol evidence as to such conditions would not be admissible, and allegations setting up such facts would be subject to demurrer.

It was suggested on oral argument that the effect of the allegations is to allege a partnership or joint undertaking between the plaintiff and defendant, the plaintiff furnishing the cattle, and the defendant their pasturage, care, and keep; that the note was delivered as the liability of the joint undertaking to the plaintiff, and not as an obligation of the defendant, and was executed for plaintiff's accommodation, so that he might secure money for his own purposes while the partnership, or whatever it might be called, was paying out the debt, and that under this view of the allegations the notes deliver-

ed were not a contract between the plaintiff and the defendant at all, and as between them is to be regarded as accommodation paper, so that there was no consideration for the execution of the note as an individual liability of the defendant; and also that the partnership arrangements is such an independent agreement as might be shown and its breach constitute either a failure of consideration or warrant a suit for damages. As I understand it, Chief Justice HUFF is inclined to take this view of the transaction, and places his concurrence in the holding that the allegations of the first three subdivisions of the answer are sufficient on this ground. But, for the reasons already stated, I do not think that the facts alleged in the answer will bear the construction that the notes were not delivered as an obligation. If they were delivered as a part of the contract, then all the other allegations merely go to vary their terms and are conditions of payment and not conditions of effective delivery.

I have not attempted a discussion of the facts of the many cases cited, or that might be cited, on this subject, my purpose being to determine the controlling principles of law from recognized authorities. In addition to the authorities cited, the following may be referred to as being more or less similar in the particular facts on which the decisions were based: *Gwinn v. Ford*, 85 Wash. 571, 148 Pac. 891; *Stevens v. Inch*, 98 Kan. 306, 158 Pac. 43; *Smith v. McLaughlin*, 120 Ark. 366, 179 S. W. 496.

HUFF, C. J. I agree to a reversal of this case on the grounds stated by Judge BOYCE, and also, as against a general exception, I am inclined to think, indulging every reasonable intendment in favor of the allegations, the answer shows no individual obligation or debt owing by appellant to appellee, but that the notes were executed as an accommodation to the joint enterprise and for the joint obligors owing the debt. I concur with Judge BOYCE in his construction of section 16 of the Negotiable Instruments Act. In my judgment, this section does not materially change the rule in this state with reference to delivery in order to constitute an executed contract.

**HURLEY et al. v. BUCHANAN et al.**  
(No. 736.)

(Court of Civil Appeals of Texas. Beaumont.  
June 2, 1921. Rehearing Denied  
June 29, 1921.)

**1. Counties 4155—Commissioners' court, and not county treasurer, custodian of funds.**

Under Rev. St. 1911, arts. 2440, 2453, the commissioners' court, and not the county treasurer, is the custodian of county funds.

**2. Counties 4196(3)—Injunction not granted in taxpayer's suit involving selection of bank for deposit of funds.**

When a superior court is asked by taxpayer to review an exercise of discretion by commissioners' court in selecting a depository of county funds under Rev. St. 1911, art. 2445, and to enjoin such court from selecting a bank for deposit, it should be made to appear that such court has the power to correct the wrong complained of, and to leave the affairs of the county in a worse condition than when it interfered would not be a proper exercise of such equitable power, and it would be improper to grant such an injunction where the result is to leave the funds in part without bond protection and in the hands of a bank that is not a party to the suit and is relieved of the obligation of paying interest, even though there was an illegal exercise of discretion.

**3. Injunction 4114(2) — Not maintained by private citizen to enjoin public injury.**

A suit cannot be maintained by a private citizen to enjoin an injury which affects the public generally, but which inflicts no special wrong on him individually.

**4. Appeal and error 4456—Commissioners' court may be enjoined from interfering with jurisdiction.**

Where bank has been granted injunction restraining commissioners' court from designating another bank as county depository under R. S. 1911, art. 2445, and an appeal has been taken, the appellate court has authority to enjoin any action by the commissioners' court in entering into contracts concerning the subject-matter of the appeal which would interfere with the jurisdiction of the appellate court over such subject-matter, but such relief must be on the petition of a party to the litigation.

Appeal from District Court, Hardin County; J. L. Manry, Judge.

Suit by S. R. Buchanan and others against L. G. Hurley and others. Order granting plaintiffs a temporary writ of injunction, and defendants appeal. Reversed.

See, also, 229 S. W. 663.

A. D. Lipscomb and O. S. Parker, both of Beaumont, for appellants.

W. W. Cruse, of Beaumont, and E. B. Pickett, Jr., of Liberty, for appellees.

WALKER, J. On the 30th ult. S. R. Buchanan, P. H. Sterling, E. C. Pope, and M. Smith, residents of Hardin county, Tex., as relators, presented their petition to Hon. J. L. Manry, judge of the Ninth judicial district of Texas, in vacation, praying for a writ of injunction against L. G. Hurley, Hardy Chance, Albert Cook, and the commissioners' court of Hardin county, Tex., the said court being composed of L. G. Hurley, county judge of Hardin county, Albert Cook, commissioner of precinct No. 1 of said county, Hardy Chance, commissioner of precinct No. 2 of said county, Archie Wil-

kins, commissioner of precinct No. 3 of said county, and J. J. Jordan, commissioner of precinct No. 4 of said county, and also of Charles McKim, who is county auditor of said county, and J. W. Chalfant, county treasurer of said county. The substance of this petition is as follows:

1. That the plaintiffs are taxpayers in Hardin county, and qualified voters, and this suit is brought not only in their own behalf, but in behalf of other citizen voters and taxpayers of said county similarly situated and interested as are these plaintiffs.

2. "That prior to the 14th day of February, 1921, the said commissioners' court duly advertised for bids or proposals from any banking corporation, association, or individual banker in said county that desired to be selected as depository of the funds of said county, and thereafter, to wit, on the 14th day of February, 1921, said commissioners' court duly convened at 10 o'clock a. m. on that day, same being the first day of such term, and in the afternoon publicly opened the three bids which had been received by them in response to said notice and advertisement, and then and there duly entered such bids so received by them upon the minutes of said court, the three bids being as follows:

"(1) A bid from and by Citizens' National Bank of Sour Lake, located at Sour Lake, in said county, offering to pay  $6\frac{1}{2}$  per cent. upon and for such funds.

"(2) A bid from and by Sour Lake State Bank, located at Sour Lake, in said county, offering to pay  $4\frac{1}{2}$  per cent. upon and for such funds.

"(3) A bid from and by Hardin County State Bank, located at Kountze, in said county, offering to pay 4 per cent. upon and for such funds."

3. That all three bids were in due form and accompanied by proper checks; that a majority of the court voted to accept the bid of the Hardin County State Bank; that they declined to accept the bid of the Citizens' National Bank, which offered to pay interest at the rate of  $6\frac{1}{2}$  per cent., and, had its bid been accepted, it was able, ready, and willing to give the bond required by law.

4. "That heretofore, to wit, on the — day of March, 1921, H. G. Camp and others filed in this court suit No. 3981, styled H. G. Camp et al. v. L. G. Hurley et al., wherein this honorable court on the 17th day of March, 1921, granted a temporary writ of injunction to the extent and in terms as follows: Enjoining and restraining the defendants in said suit from accepting or approving any bond which might be tendered to them by said Hardin County State Bank as depository for said county and further from proceeding in any manner whatsoever to select said Hardin County State Bank as depository for said county, and also from in any manner whatsoever attempting to treat with, consider, regard, or recognize said Hardin County State Bank as the depository for said Hardin county, the defendants in said suit No. 3981 being L. G. Hurley, Albert Cook, Hardy Chance, Archie Wilkins, J. J. Jordan, and the commissioners' court of said Hardin county, and after the original filing of said suit the county

of Hardin appeared as a defendant therein, and said Hardin County State Bank intervened therein, and, said cause No. 3981 coming on for trial upon its merits, this honorable court on the 13th day of April, 1921, rendered a final judgment perpetuating said temporary injunction which had been granted on March 17, 1921, as above alleged, and to that judgment the defendants in said cause excepted and gave notice of appeal to the court of Civil Appeals for the Ninth Supreme Judicial District of Texas, and the said suit yet remains on file in this court undisposed of, and the issues involved therein have not been finally determined or terminated, and the defendants herein, L. G. Hurley, Hardy Chance, and Albert Cook, are, as defendants in said cause No. 3981, prosecuting an appeal to said court of Civil Appeals from the final judgment of this court so rendered in said cause No. 3981 on April 13, 1921, and their defense in said suit was, and such defense still now being urged by them is, and still it is their contention, that they properly and lawfully accepted the said bid of the Hardin County State Bank submitted to them of February 14, 1921, as above alleged and that they then and there properly and lawfully selected said Hardin County State Bank as depository for said county."

5. "That, notwithstanding the defendants Hurley, Chance, and Cook have made and are making such a defense and contention in said suit No. 3981, and that litigation and the disputed issues therein remain undisposed of, said defendants Hurley, Chance, and Cook, contrary to law and wholly without power or authority, on the 25th day of April, 1921, acting in their capacity as county judge and county commissioners, respectively, convened said commissioners' court of Hardin county in special session, and proceeded to make and enter an order requiring and directing that the funds of said Hardin county be deposited in two banks located in said county, viz., the Silsbee State Bank, at Silsbee and the Sour Lake State Bank, at Sour Lake, for a period of 90 days at 4 per cent. interest to be computed upon daily balances, and further the said county judge and two commissioners, Chance and Cook, on the 28th day of April, 1921, made and entered an order accepting and approving bonds which were offered to them by said two banks above named in which said defendants have unlawfully ordered that the funds of said Hardin county be deposited, that by the terms of article 2445, R. S., it is provided that when the matter of selecting a depository is being considered by the commissioners' court, 'if for any reason there shall be submitted no proposals by any banking corporation, association, or individual banker to act as county depository, or in case no bid for the entire amount of county funds shall be made, or in case all proposals made shall be declined, then in any such case the commissioners' court shall have the power, and it shall be their duty, to deposit the funds of the county with any one or more banking corporation, association, or individual in the county or in adjoining counties, in such sums and amounts and for such periods of time as may be deemed advisable by the court, and at such rate of interest, not less than  $1\frac{1}{2}$  per centum per annum, as may be agreed upon by the commissioners' court

and the banker or banking concern receiving the deposit, interest to be computed upon daily balances due the county treasurer'; that until the said suit No. 3981 is finally disposed of it has not been determined and cannot be determined, and it is at this time not a determined fact that all bids or proposals submitted to said commissioners' court on February 14, 1921, as above alleged, were by said court declined, and therefore the facts do not exist which would authorize or empower said commissioners' court to make and enter the order which said three defendants, Hurley, Chance, and Cook, made on April 25, 1921, endeavoring and undertaking to have the funds of said Hardin county deposited in the two banks above named at 4 per cent. interest upon daily balances."

6. That the said S. R. Buchanan, one of the plaintiffs herein, was present in said commissioners' court on April 28, 1921, and before the above-described order was made protested against such action by the court, and "having authority so to do from said Citizens' National Bank of Sour Lake, he submitted to said court a binding offer and proposal to still have its bid submitted on February 14, 1921, accepted and said bank selected as depository for said county," and offered to deposit with the commissioners' court his personal check for \$5,000 so as to guarantee that the said Citizens' National Bank would make a proper and sufficient bond as depository for said county; that said Citizens' National Bank was in every way a suitable bank for such depository, and, being the depository for the county funds for the two preceding years, had faithfully discharged its duty as such. They adopt as an allegation of fact in their petition a finding of fact made by the court in cause No. 8981, as follows:

"That the county judge, L. G. Hurley, and the two county commissioners, Cook and Chance, who voted in favor of accepting the said bid of Hardin County State Bank offering to pay only 4 per cent. interest upon said county funds, acted arbitrarily and transcended the authority and grossly abused the discretion which under the law they were expected to fairly exercise in considering said three bids; and further I find that said county judge and two county commissioners who so voted in favor of accepting said bid of Hardin County State Bank were grossly negligent in so voting, and they voted without considering the question with sufficient care, and their said votes in favor of said lowest bid were prompted and induced by a personal desire and preference to have the county depository located at the county seat, and to such a personal preference and desire they gave undue and improper importance, while they failed and neglected to give any consideration to or make any investigation of the matters and facts which would have enabled them to properly discharge their duty in regard to selecting the county depository.

"Further I find that before the commissioners' court convened on February 14, 1921, the said county judge and two county commissioners, Cook and Chance, conferred and discussed among themselves their preference for having the county depository located at the county seat, and each of the three expressed himself as being of the opinion that it would be more convenient for the Hardin County State Bank, at

Kountze, to act as depository, and each of them showed a disposition to favor said Hardin County State Bank without reference to the real merits and reliability and responsibility of the three bids which were submitted to them for consideration on February 14th, 1921, and when on that day they did vote to accept the bid of the Hardin County State Bank they were actuated to an undue degree and improper extent by such favoritism for and towards the Hardin County State Bank and their purely personal inclination and desire to award the depository to said bank and to prevent the funds from being kept in some bank away from the county seat."

6. "That the deliberate, unlawful, and arbitrary action and conduct on the part of said L. G. Hurley and said two county commissioners, Chance and Cook, and their action in so grievously transcending their authority and grossly abusing the discretion which under the law they were expected to fairly exercise in the matter of selecting a depository for said county, all of which is fully and particularly shown by the findings of fact made by this honorable court on the trial of said cause No. 3981, if said defendants had carried out their personal desire and intention to select said Hardin County State Bank as depository for said county, and now that said county judge and two county commissioners have again unlawfully and without any warrant or authority as above alleged undertaken to deposit the funds of said county in the two banks above named at a rate of only 4 per cent. interest, when said Citizens' National Bank of Sour Lake had offered and is yet offering to pay 6½ per cent. upon and for such funds, will, unless such action and purpose on the part of said three defendants is restrained, result in serious loss and damage to plaintiffs and all other taxpayers of said Hardin county and will cause them to suffer a total and irreparable loss, waste, and injury, and all of this will be brought about and result from the acts of said county judge and two county commissioners in transcending their authority and in grossly abusing their discretion in arbitrarily, unlawfully, and fraudulently endeavoring and undertaking to deposit the funds of said county in said two banks, one at Silsbee, in said county, and the other at Sour Lake, in said county, as said three defendants have ordered that said funds be so deposited by the order which they made on April 25, 1921, as above alleged, and in making such order said three defendants have not only again grossly abused their discretion and acted arbitrarily and transcended their authority, but in making such order their willful and deliberate purpose and design still is to unlawfully deprive said Citizens' National Bank of Sour Lake of said depository and to prevent the taxpayers of said county from receiving the higher rate of interest which said Citizens' National Bank has proposed to pay and is still ready, able, and willing to pay and to obligate itself by bond in the manner and form required by statute as depository for said county and the amount of such loss to the taxpayers of Hardin county because of the difference in the rate of interest will be according to the sworn testimony of the county treasurer of said county upon the trial of said cause No. 3981 approximately

the sum of \$14,000 for the ensuing period of two years."

7. "Wherefore plaintiffs pray the court to grant them a most gracious writ of injunction restraining all of the defendants herein from attempting to in any manner whatsoever carry out, comply with, conform to, or to obey said order of the commissioners' court made on April 25, 1921, directing that the funds of said county be deposited in the Silsbee State Bank and in the Sour Lake Bank, and further enjoining and restraining all of the defendants herein from respecting, observing, or abiding by or regarding as valid the said order in any manner whatsoever and further enjoining and restraining all of the defendants herein from withdrawing or attempting to withdraw any of the funds now or hereafter held on deposit by said Citizens' National Bank of Sour Lake as depository for said county for the purpose of depositing such funds in said Silsbee State Bank or said Sour Lake State Bank in accordance with said order of the commissioners' court of said county made on April 25, 1921, and further plaintiffs pray that defendants be duly cited to appear and answer this petition, and that on final hearing such temporary writ of injunction above prayed for be perpetuated, and that they have judgment against defendants for their costs, and for all other and further relief, both legal and equitable, general and special, to which they may be justly entitled."

This petition was duly verified. On this petition Judge Manry indorsed his fiat as follows:

"In Chambers, This 30th day of April, 1921. The foregoing petition for injunction having been carefully considered by me, it is ordered that the clerk of the district court of Hardin county, Tex., issue a temporary writ of injunction in all things as prayed for in the within petition, upon the petitioners executing to the adverse parties a bond, with two or more good and sufficient sureties, in the sum of five thousand (\$5,000.00) dollars, conditioned as the law requires. J. L. Manry, Judge Ninth Judicial District of Texas."

The petition was then filed in the district court, and the defendants at once perfected this appeal from such order, without filing answer, or motion to dissolve.

#### Opinion.

[1] Under our present laws, the commissioners' court, and not the county treasurer, is made the custodian of the county funds. Its duty, in relation to safeguarding the county funds, is set forth under articles 2440-2453, R. S. 1911, prescribing the time and manner of selecting county depositories. In making the contract enjoined, the court undertook to act under article 2445, which is as follows:

"If for any reason there shall be submitted no proposals by any banking corporation, association, or individual banker, to act as county depository, or in case no bid for the entire amount of the county funds shall be made, or in case all proposals made shall be declined,

then in any such case the commissioners' court shall have the power, and it shall be their duty, to deposit the funds of the county with any one or more banking corporations, associations, or individual bankers, in the county or in adjoining counties, in such sums and amounts and for such periods of time as may be deemed advisable by the court, and at such rate of interest, not less than one and one-half per cent. per annum, as may be agreed upon by the commissioners' court and the banker or banking concern receiving the deposit, interest to be computed upon daily balances due the county treasurer; and any banker or banking concern receiving deposits under this section (article) shall execute a bond in the manner and form provided for depositories of all the funds of the county, with all the conditions provided for same, the penalty of said bonds to be not less than the total amount of county funds to be deposited with such banker or banking concern."

In discussing the discretion vested in the commissioners' court, under authority of the articles above cited, we said in *Hurley v. Citizens' National Bank*, 229 S. W. 663:

"We have arrived at the conclusion, however, that it was not the intention of the Legislature to compel the commissioners' court of a county to select as the depository of county funds the banking corporation, association, or individual banker 'offering to pay the largest rate of interest per annum for said funds.' On the contrary, it is our opinion that it was the intention of the Legislature to vest in the commissioners' court a discretion in making such selection for county funds, and that unless the commissioners' court, in making such selection for county funds, should abuse that discretion by acting fraudulently or arbitrarily, or with some other improper motive, its action in selecting a depository for county funds cannot be reviewed or controlled by any other court."

[2] When a superior court is asked to review an exercise of such discretion by the commissioners' court, it should be made to appear that such court has the power to correct the wrong complained of. To leave the affairs of the county in a worse condition than when it interfered would not be a proper exercise of such equitable powers. That result has followed from the granting of this injunction. Under the contract enjoined, on the ground that it was an arbitrary and unlawful exercise of discretion, the funds of the county were protected by a good and sufficient bond, and were to draw interest at the rate of 4 per cent. per annum. This injunction leaves the funds of the county, in part, without bond protection, and in the hands of a bank that is not a party to this suit and is relieved of the obligation of paying interest. The commissioners' court is thus enjoined from the performance of a sacred duty imposed upon it by law—that of safeguarding the funds of the county, under conditions that will provide for the payment of interest. If we concede that the alleged facts exclude the authority of the

commissioners' court to contract under article 2445, and show an illegal exercise of discretion in refusing to accept the bid of the Citizens' National Bank, on the allegations of this petition, the district judge was without authority to grant this injunction, because in doing so he left the county in worse condition than it was before he interfered. When by correcting one injury it inflicts a greater, a court of equity is without authority to act.

To review the discretion of the commissioners' court, the suit must be by one with authority to maintain the action. It is not sufficient to show that he is a taxpayer, and that the court, by refusing the bid of the Citizens' National Bank, has injured and damaged the county revenue to the extent of \$14,000 a year. If he would maintain the suit, he must pray for a relief that will be to the advantage of himself and the other taxpayers of the county. These plaintiffs have prayed for and been granted a relief that is to the great injury of themselves and all other taxpayers of the county. They have deprived the county of all interest on its deposits, and have left a portion of its funds unprotected. They have enjoined their county officers from the performance of their sacred duty of safeguarding the county funds and of providing for a portion of the county revenue by receiving interest on this fund.

[3] It seems to us that *Brumby v. Boyd*, 28 Tex. Civ. App. 164, 66 S. W. 878, is authority against the right of the plaintiff to maintain this cause of action. In that case the court said:

"A suit cannot be maintained by a private citizen to enjoin an injury which affects the public generally, but which inflicts no special wrong on him individually. *City of San Antonio v. Strumberg*, 70 Tex. 366, 7 S. W. 754; *Caruthers v. Harnett*, 67 Tex. 131, 2 S. W. 523."

The wrong complained of did not inflict any special injury on plaintiffs, but the writ granted does inflict a great injury on the public generally. See, also, *Polly v. Hopkins*, 74 Tex. 147, 11 S. W. 1084.

[4] It is made to appear by the allegations of plaintiffs' petition, as given above, that cause No. 3981, wherein the Citizens' National Bank has been granted an injunction restraining the commissioners' court from designating the Hardin County State Bank as county depository, is now on our docket on appeal from such order. If the commissioners' court is attempting to enter into another contract that will interfere with our jurisdiction over the subject-matter of that appeal, we have the authority to enjoin any action by that court which could have that effect. But such relief, if granted, must be on the petition of a party to that litigation.

It follows that this cause must be reversed, and the injunction dissolved, and it is accordingly so ordered.

### LIPSITZ v. RICE et al. (No. 9383.)

(Court of Civil Appeals of Texas. Fort Worth. April 18, 1921.)

1. Husband and wife  $\S$ 273(9) — Community survivor may not use deceased wife's estate except to pay community debts.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 3598-3601, a husband, as community survivor, is not authorized to use his deceased wife's estate for the payment of any but community debts, but must manage the estate in good faith for its best interest.

2. Husband and wife  $\S$ 273(10) — Husband's creditors who received community property and credited valuation on debts not purchasers for value without notice; "innocent purchaser."

Where no independent consideration was paid to a community survivor by his creditors for conveyance to them of property of the community estate, but his creditors merely credited on their accounts against him the 55 per cent. thereof represented by the agreed valuation of the lands conveyed to them, none of the creditors can be held to be purchasers for value without notice; for, to constitute an innocent purchaser, there must be a purchase without notice, actual or constructive, of the outstanding claims urged against the thing purchased, and there must have been payment of a valuable consideration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Innocent Purchaser.]

3. Husband and wife  $\S$ 273(12) — Evidence held to justify finding of fraud on part of grantor surviving husband and grantee creditors.

Evidence held sufficient to sustain jury's verdict that deeds by the surviving husband of a community conveying community lands to his creditors were procured by fraud or coercion of the creditors, grantees in the deed, to the injury of the rights of the minor children of the grantor husband and his deceased wife in the tracts of land conveyed, though no actual fraudulent intent inspired either the grantor husband or the grantee creditors; the husband and the creditors having attempted to use the community estate for the payment of separate debts of the husband.

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Action by Lee Rice and others against Louis Lipsitz. From judgment for plaintiffs, defendant appeals. Affirmed.

Spence, Haven & Smithdeal, of Dallas, for appellant.

James B. & Charles J. Stubbs, and F. Spencer Stubbs, all of Galveston, Penix, Miller, Perkins & Dean, of Mineral Wells, and J. J. Eckford, of Dallas, for appellees.

BUCK, J. This is the second appeal of this case. For a statement of the pleadings and the evidence on the former appeal, see 211 S. W. 293. The pleadings and evidence are largely the same on this appeal.

Plaintiffs recovered below a one-half undivided interest in 19 tracts of land alleged and admitted to be of the community estate of J. R. Rice and his deceased wife, Lois E. Rice, the mother of plaintiffs. From this judgment Louis Lipsitz has appealed.

There are several main questions in this appeal, which must be decided by us in this consideration.

(1) Has a community survivor, who has qualified as such under the statute, the right to sell, incumber, or otherwise dispose of the community estate, without reference as to whether such transactions are for the benefit of the community estate or not?

(2) Can the heirs of the deceased spouse recover their pro rata of such estate from the survivor, or from one to whom it has been conveyed under circumstances that would not make him a purchaser for value without notice and where fraud, either actual or legal, has been shown in the management of the estate?

(3) Does the evidence in this case support the verdict of the jury that such fraud existed?

Article 3598, V. S. Tex. Civ. Stats., provides:

"The surviving husband shall, at the same time he returns the inventory, appraisement and list of claims, present to the court his bond with two or more good and sufficient sureties, payable to and to be approved by the county judge, in a sum equal to the whole of the value of such community estate as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one-half of the surplus thereof after the payment of the debts with which the whole of such property is properly chargeable, to such person or persons as shall be entitled to receive the same."

Article 3599 reads as follows:

"When any such inventory, appraisement, list of claims and bond are returned to the county judge, he shall, either in term time or in vacation, examine the same and approve or disapprove them by an order to that effect entered upon the minutes of the court, and, when approved, the same shall be recorded upon the minutes of the court, and the order approving the same shall also authorize such survivor to control, manage and dispose of such community property in accordance with the provisions of this chapter."

Article 3600 is as follows:

"When the order mentioned in the preceding article has been entered, such survivor,

without any further action in the county court shall have the right to control, manage and dispose of such community property, real or personal, in such manner as may seem best for the interest of the estate, and of suing and being sued with regard to the same, in the same manner as during the lifetime of the deceased; and a certified copy of the order of the court mentioned in the preceding article shall be evidence of the qualification and right of such survivor."

Article 3601 provides that the survivor shall keep a fair and full account of all community debts and expenses paid by him, and of the disposition made of such community property, and upon final partition of said estate shall account to the legal heirs of the deceased for their interest in such estate, etc.

[1] Therefore it is evident that the statutes do not contemplate and authorize the community survivor to use his deceased wife's estate for the payment of any but community debts, but that he must manage said estate in good faith for the best interest of such estate.

Mrs. Lois Rice died March 22, 1909, leaving surviving her her husband and three children, who are plaintiffs in this suit. J. R. Rice qualified as community survivor on March 24, 1911. He gave a community survivor bond, with B. B. Oden, Thomas Dyer, and A. M. Barrett as sureties, in the sum of \$20,000. The evidence sustains the conclusion that these sureties did not have property subject to execution of the amount of the bond at the time it was made, nor at any time thereafter, and that at the time of the trial the bond could not be made out of either the principal or the sureties. The evidence shows: That one of the sureties failed in business about 1911, or perhaps 1912, and has not been financially solvent since. That another one of the sureties did not own any property subject to execution in 1911, and that the third surety owned nothing but his homestead. That at the time the bond was made the plaintiff knew of the financial condition of the sureties, that they were not worth the amount of the bond, but considered the giving of the bond as a mere matter of formality. The evidence further shows: That the community estate at the time of the filing of the inventory and appraisement was valued at \$20,800, consisting of lands in Palo Pinto county, Tarrant county, Eastland county, the home place at Gordon, and the warehouse and storehouse there, Mr. Rice being engaged in the general merchandise business at Gordon. It really was worth probably a good deal more. For instance, the merchandise on hand was listed in the inventory at \$4,000, while Mr. Rice testified that on January 1, 1909, it was worth over \$13,000. The notes and accounts were listed at \$8,000, while their face value on January

1, 1909, was something over \$17,500. The only debts due by the community estate at the time of the death of Mrs. Rice amounted to \$3,870. That the financial condition of J. R. Rice was worse in 1911, when he qualified as community survivor, than it was at the time of the death of his wife, and that in 1915 he was owing some \$25,000 to various creditors, who were pressing him for settlement. That in 1913 he had a meeting with creditors in Fort Worth, and agreed to give a trust deed to A. M. Barrett, as trustee, for the protection of his creditors. That he made this conveyance on December 1, 1913, conveying to Barrett, as trustee for his creditors, the 19 tracts of land described in plaintiffs' petition, also all of the grantor's personal property, notes, and accounts, and also his stock of merchandise, authorizing the said trustee to sell so much of said property as might be salable for the best price reasonably obtainable therefor, at public or private sale, as the trustee might deem most advantageous, and apply the net proceeds of such sales to the payment of the claims of all of Rice's creditors. That in April, 1915, his creditors insisted that, as they had not been paid anything by Barrett since he had become trustee, he convey to Louis Lipsitz the 19 tracts of land in controversy, at an agreed valuation of \$15,000, and that he be allowed this amount to apply to the payment of his debts, his creditors receiving 53 per cent. of their debts. Louis Lipsitz held this property until April 14, 1917, when this suit was filed. Mr. Rice thought that he had the right to use all of the community estate for the payment of his personal debts. He testified that by this last-mentioned arrangement he did pay 53 per cent. of his debts and also was able to continue his business and support his second wife and minor children. He testified that he did not have any intention of defrauding his children. On one of the tracts conveyed to Lipsitz there was a vendor's lien of \$448.10, which Lipsitz paid, and in the judgment rendered this amount, with interest, was credited to Lipsitz, and constituted a lien on the nineteen tracts mentioned.

In *Morse v. Nibbs*, 150 S. W. 766, 767, it is said:

"It is now well settled in this state that the survivor of a marital relation has authority, without administration on the estate of the deceased spouse in any of the statutory modes, to sell community property to pay community debts. The purchaser of community property under such circumstances is not bound to see that the purchase money is applied to the payment of the community debts. It is essential, however, to the protection of the purchaser that the consideration paid be not grossly inadequate, that there be no collusion or fraud to which he is a party, and that he have no knowledge of any intention of the survivor to misapply the proceeds. *Sanger v. Heirs*, of *Moody*, 60 Tex.

86; *Walker v. Abercrombie*, 61 Tex. 69; *Moody v. Butler*, 63 Tex. 210; *Ashe v. Yungst*, 65 Tex. 631."

[2] It is admitted in the instant case that the creditors knew at the time of the deed to Lipsitz that the land conveyed was part of the community estate of J. R. Rice and his deceased wife, and that the plaintiffs were the heirs of their mother, Mrs. Lois E. Rice. Of course, J. R. Rice knew these facts. It is further admitted that no independent consideration was paid to J. R. Rice for the conveyance, but that his creditors merely credited on their accounts against him the 53 per cent. thereof represented by the agreed valuation of the lands conveyed. Hence neither Lipsitz nor the other creditors can be held to be purchasers for value without notice.

In *Hales v. Peters*, 162 S. W. 386, 389, the following is said:

"Upon the death of Mrs. Lindsey a one-half interest in the community property of herself and her husband, A. Lindsey, vested absolutely in their children, subject, of course, to the payment of community debts. Such interest did not cease to exist by the qualification of A. Lindsey as survivor, and he did not thereby become the unqualified owner of the same. By qualifying as survivor, A. Lindsey acquired the right to manage and control the community estate; 'but the title of the children was not thereby divested.' *Faris v. Simpson*, 30 Tex. Civ. App. 103, 69 S. W. 1029. As held in *Faris v. Simpson*, supra, after the lapse of one year they were entitled, under the statutes, to have the estate partitioned and distributed, and this could not be done if the property belonged to their father, A. Lindsey. If Lindsey, by qualifying as survivor, became the owner, in his own right, of all the community property of himself and deceased wife, then as a matter of course there could be no community property to be distributed between him and his children."

In *Faris v. Simpson*, 30 Tex. Civ. App. 103, 104, 69 S. W. 1029, 1030, writ of error denied, the following is said:

"Appellants contend that when Mrs. Simpson qualified as survivor she became the owner in her own right of all the community property; that the children thereupon ceased to have any interest whatever in the property belonging to the estate, and became creditors of their mother to the extent of the value of their interests in the estate, their claims against her being secured by the survivorship bond. The contention is not tenable. On the death of Simpson, one-half of the community property belonging to himself and wife descended to and vested in his children. Rev. St. art. 1696. As there were no debts, the title of the children was subject only to the right of the wife to administer the estate under the statute. By qualifying as survivor she acquired the right to manage and control the estate, but the title of the children was not thereby divested. \* \* \* The right of Mrs. Simpson to manage,



control, and dispose of the property belonging to the estate was a right she possessed as surviving partner and community administrator, and not as unqualified owner."

One who purchases at a voluntary sale from his debtor, and pays no money, but credits the amount of the consideration on a pre-existing debt, is not a bona fide purchaser for value. *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248. See, also, *Moody v. Martin*, 117 S. W. 1015; *McKamey v. Thorp*, 61 Tex. 648. One who claims to be a purchaser in good faith must prove that claim, and, if there be any fact or circumstance tending to show that he is not a purchaser in good faith, the question is one of fact for the jury, and cannot be assumed by the court. To constitute an innocent purchaser, there must be a purchase without notice, actual or constructive, of the outstanding claim urged against the thing purchased, and there must have been the payment of a valuable consideration. *Johnson v. Newman*, 43 Tex. 628; *Hume v. Ware*, 87 Tex. 380, 28 S. W. 935; *Nichols v. Crosby*, 87 Tex. 443, 29 S. W. 380; *Downs v. Stevenson*, 56 Tex. Civ. App. 211, 119 S. W. 315.

[3] The jury found that the deed executed by J. R. Rice to Louis Lipsitz on April 5, 1915, was not executed in good faith by Rice, nor for the best interest of plaintiffs in the community estate, nor was the instrument executed by Rice to Barrett made in good faith for the best interest of the plaintiff. The jury further found that the execution of the instruments by Rice to Barrett and to Lipsitz were procured by fraud or coercion of the beneficiaries in said deed to the injury of the rights of plaintiffs in the tracts of land described in said conveyances; that the beneficiaries in these two instruments induced, by undue influence or fraud, J. R. Rice to execute the same; that the beneficiaries in said two instruments conspired with J. R. Rice to defraud the plaintiffs of their interest in the tracts of land described for the purpose of benefiting themselves and said J. R. Rice.

These findings, we think, are supported by the evidence. While it may be admitted that no actual fraudulent intent inspired either J. R. Rice or the beneficiaries in the execution and delivery of these two instruments, yet, in so doing, with full knowledge of the facts, they were attempting to use the community estate, in which these plaintiffs had a half interest, for the payment of separate debts of J. R. Rice, and we think that this is sufficient to show legal fraud. We see no reason for disturbing the judgment rendered in the trial court, and, for the reasons given, the judgment is affirmed.

Affirmed.

# AYRES v. MacDONALD. (No. 693.)

(Court of Civil Appeals of Texas. Beaumont.  
June 9, 1921. Rehearing Denied  
June 22, 1921.)

1. Evidence §265(18)—Defendant's uncontradicted admission of collection of note held sufficient evidence.

Where suit was to enforce former judgment that plaintiff owned a one-half interest in a note, the admission of defendant to plaintiff's attorney that he had received payment of the note, when corroborated by silence on the part of defendant at the trial, at which defendant's attorney announced ready, although defendant was absent, was sufficient evidence of collection of the note.

2. Evidence §213(4)—Admission held not inadmissible as made in effort to compromise.

Where a half interest in a note had been adjudged to plaintiff in a former suit, and in a conversation with plaintiff's attorney concerning compromise of several claims against defendant owned by plaintiff defendant admitted that he had been paid the amount of the note, the admission of liability is proper evidence, since the note could not be the subject of compromise, and the admission was an admission of a fact.

3. Judgment §853(1)—Judgment held dormant 12 months after date though appealed from.

Where a judgment in a former suit was appealed from, and later was affirmed by the appellate court, the limitation of 12 months for the judgment to become dormant under Rev. St. 1911, arts. 3714, 3715, begins to run on the date of judgment, and not on the date of issuance of the mandate by the appellate court.

4. Judgment §875—Judgment held extinguished when judgment creditor received property exceeding amount of judgment.

Where a judgment adjudged that defendant was the owner of a judgment against plaintiff, and that plaintiff owned a one-half interest in a note, and defendant subsequently collected the note, and refused to settle with plaintiff, though holding for his account an amount in excess of the judgment, the judgment was extinguished, and interest thereafter was not recoverable.

5. Estoppel §68(2)—Defendant held estopped to deny validity of orders on him for money pleaded as defense in former suit.

Where, in a former action for an accounting between plaintiff and defendant, defendant had set up orders for money in favor of third parties drawn on him by plaintiff, who after judgment purchased these orders and brought suit, since defendant used these as a defense in former action, he is now estopped from denying their validity.

6. Limitation of actions §121(1)—Filing of suit on claims held by others as collateral security prevents running of statute.

Where, in a former action for an accounting, defendant set up as a defense orders drawn

by plaintiff on defendant in favor of third parties who held them as collateral security for debts due them by plaintiff, the filing of suit barred the running of limitations against the orders; the order holders being only proper, and not necessary, parties.

**7. Parties — 84(2)—Nonjoinder should be pleaded in abatement.**

The nonjoinder of proper parties, to be available, should be pleaded in abatement and presented within the time prescribed for such pleas.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by J. K. Ayres against R. D. MacDonald. From judgment denying recovery on two items of plaintiff's claim, plaintiff appeals. Affirmed in part, and reversed in part and rendered.

See, also, 207 S. W. 686.

Woods, King & John, of Houston, for appellant.

L. B. Moody, of Houston, for appellee.

WALKER, J. This suit was brought by appellant against appellee to enforce the provisions of a judgment rendered in cause No. 67317, Ayres v. MacDonald, in the Eightieth judicial district court of Harris county. The parties to this suit were the same as the parties to the old suit, No. 67317. That suit involved a long, detailed accounting between appellee and appellant, and the judgment entered in that case was based on the following facts found by the court and set out in the judgment:

And it appearing to the court from the evidence as shown by the statement of said account above made that, except for certain orders given by the plaintiff to certain parties hereinafter named, drawn upon the defendant, authorizing the defendant to pay to said parties certain amounts of money therein named, on behalf of and for the account of the plaintiff, the defendant was and would have been indebted to the defendant on open account on January 29, 1915, in the sum of \$7,353.17, but it appearing to the court that upon the dates hereinafter shown the plaintiff gave to the following named parties, for the account of the plaintiff, the amounts as follows, to wit: May 22, 1913. Order in favor of J. P. Ross for \$751.77. May 29, 1913. Order in favor of John B. Peyton, for \$925.41, with interest at the rate of 8 per cent. per annum from date of said order. March 7, 1914. Draft in favor of J. P. Ross for \$801. March 8, 1914. Order in favor of Peyton & Pegoda, in the sum of \$575—the giving of which orders are adjudged by this court to have been an equitable assignment upon the part of the said plaintiff to the parties in said orders, in favor of who the same were given, of such amounts as the defendant was then, or might thereafter be, due and owing to the plaintiff, to the extent of the amounts named in said orders, said orders having priority in accordance with the dates

thereof, and that the giving of said orders and notice thereof to the defendant, which it is found by the court was given on the date of each order, made the defendant liable to pay to the person named in or holding said orders the respective amounts therein out of any money which he then or thereafter had in his hands owing or belonging to the plaintiff, and it appearing to the court that upon January 29, 1914, the defendant was indebted to the plaintiff in an amount larger than the aggregate amount covered by said orders given prior to that date, which included the order given to John B. Peyton above referred to, and that said order in favor of said Peyton should have been paid by the said MacDonald upon said date for the account of said Ayres, including interest from the date thereof, May 29, 1913, until said last-named date, January 29, 1914, at the rate of 8 per cent. per annum, aggregating \$49.35 interest, it is therefore adjudged by the court that the aggregate amount of said orders, to wit, the sum of \$3,053.18, together with the interest upon the order in favor of said Peyton from May 29, 1913, to January 29, 1914, in the sum of \$49.35, should be taken account of and deducted from the amount which the defendant should otherwise be adjudged as owing to the plaintiff as of January 29, 1915, so that it should be, and is here now, adjudged that the defendant was upon said last-named date indebted to the plaintiff on open account in the sum of \$4,250.64, after taking into account and deducting the amount of the orders and interest above mentioned, and that upon said balance the plaintiff should, and is hereby, adjudged to be entitled to interest at the rate of 6 per cent. per annum from said last-mentioned date to the date of this judgment, which added to said balance brings the same up to a total of \$4,803.22 as of the date of this judgment."

The judgment further recited the fact that MacDonald had purchased a judgment against Ayres in cause No. 5681, Rogers v. Ayres, which, with interest and costs, amounted to \$7,338.04, on the said 31st day of March, 1913, and ordered that the balance due by MacDonald to Ayres in the sum of \$4,803.32 be credited on said judgment as of that date. John B. Peyton, the holder of the above-described order in the sum of \$925.41, intervened in said cause No. 67317, and judgment was entered in his favor against MacDonald for the amount thereof. In said cause No. 67317 the drafts as described and set out in that portion of the judgment quoted above were put in issue by MacDonald by the following plea:

"Fifteenth. Defendant further shows to the court that on May 22, 1913, a draft or order on defendant was given by plaintiff to Capt. J. P. Ross for \$751.77, to be paid out of any money which might come into defendant's possession over and above the amount owing by plaintiff to defendant, which draft was on said date accepted in writing by defendant, and, although said draft has not been paid, it constitutes an equitable assignment pro tanto of any sums of money which might be owing

by defendant to plaintiff, and defendant is liable therefor to said Ross, and said Ross has filed suit against defendant upon said accepted draft, which suit is now pending in the county court of Harris county, Tex.

"Sixteenth. Defendant further shows to the court that on or about the 7th day of March, 1914, a draft or order on this defendant was given by plaintiff to one J. P. Ross for the sum of \$801, which draft has not been paid by defendant, but same constitutes an equitable assignment pro tanto of any sum of money which might be due from defendant to plaintiff, and one of the banks of the city of Houston is now the owner and holder thereof as collateral.

"Seventeenth. Defendant further shows to the court that on or about the 8th day of March, 1914, a draft or order upon defendant was given plaintiff to one Peyton for the sum of \$945, which draft has not been paid by defendant, but the same constitutes an equitable assignment pro tanto of any sum of money which might be due from defendant to plaintiff.

"Eighteenth. Defendant further shows to the court that on or about the 8th day of March, 1914, a draft or order on defendant was given plaintiff to Peyton & Pegoda for the sum of \$575, which draft has not been paid by defendant, but the same constitutes an equitable assignment pro tanto of any money which might be due from defendant to plaintiff."

Ayres was also adjudged to be the owner of a half interest in a note against the Keystone Mills Company, described as follows:

"It further appearing to the court that as a part of the consideration paid by the Keystone Mills Company to the defendant for the lands conveyed to it by him on January 29, 1913, said Keystone Mills Company executed and delivered to the defendant, R. D. MacDonald, its negotiable promissory note of said date, payable to the order of said defendant, in the sum of \$11,861.24, due and payable — years after its date, with interest at the rate of 8 per cent. per annum, payable semiannually, which said note is secured by a vendor's lien upon said lands retained in said deed, and upon which said note the interest has been paid and credited up to January 29, 1915; and it appearing to the court that the plaintiff is the owner of and entitled to a half interest in and to said note and the amount due thereon.

"It is therefore so ordered, adjudged, and decreed that the plaintiff, J. K. Ayres, is the owner of an undivided one-half interest in and to said note, which, though heretofore impounded and placed in the registry of this court, under an interlocutory order, has heretofore, under another interlocutory order, been delivered back to the defendant by the clerk of this court."

After the rendition of judgment in cause No. 67317, all the parties to whom Ayres had given the orders, as described in said judgment, assigned him their interest therein.

Peyton also transferred him the judgment he had recovered as an intervener in that cause. Ayres brought this suit against MacDonald, alleging that he was the owner and holder of all the orders above described, and the judgment rendered in favor of Pey-

ton as an intervener, and that MacDonald had collected the note in which he had been adjudged to own a half interest. By answer appellee denied that he had collected the note, pleaded limitation against the three orders not reduced to judgment, that the Peyton judgment was not dormant, and for that reason could not be the basis of a recovery, and that the order for \$751.77 was included in the order for \$801, and that the order for \$575 never had been issued by Ayres. The trial court instructed a verdict for appellant for one-half of the note, for the amount of the Peyton judgment, and the \$801 order, and denied him recovery on the \$751.77 order and \$575 order. Ayres appealed, assigning error against the judgment of the court denying him recovery on the two orders for \$751.77 and \$575, and by cross-assignments appellee attacks the judgment against him for the half interest in the note, the Peyton judgment, and the \$801 order. The following issues were raised by the assignments and cross-assignments thus presented:

[1] (1) We sustain the action of the court in instructing a judgment for appellant for one-half of the note. On this issue A. M. John, counsel for appellant, testified:

"Relating to paragraph 7 of our original petition which states as to the note executed by the Keystone Mills Company January 29, 1913, and delivered to the defendant and payable to his order for the sum of \$11,861.24, I had a conversation with the defendant, Mr. R. D. MacDonald, in this case, and he stated to me he had collected that note, my recollection being that his statement was that he collected it July 26, 1917. That's my recollection of Mr. MacDonald's statement to me, but I am very emphatic that he told me he had collected that note. This conversation was up in Mr. MacDonald's office when I had up with him the matter as to how the debt should be paid, and was about five days before suit was filed. As to whether or not there was under discussion at that time the matter of a compromise between myself and Mr. MacDonald, I will say there was under discussion the matter of payment, not the amount, whether or not it would be paid at once or in installments. Yes; it is true that there was under discussion a settlement whereby the filing of the suit would be avoided; it was an effort to avoid filing the suit; that was the basis of the discussion I had with Mr. MacDonald."

By citation duly served on him, appellee had been fully advised of the nature of plaintiff's cause of action. He knew that plaintiff would offer proof that this note had been collected. With knowledge of this fact, if he desired to contest plaintiff's cause of action, the duty rested on him to offer proof on the issue thus made by his pleadings. Having remained silent, he brought himself within the rule announced by the Supreme Court of the United States in Kirby v. Talmadge, 180 U. S. 383, 16 Sup. Ct. 350, 40 L. Ed. 465:

"All evidence," said Lord Mansfield in *Blatch v. Archer*, Cowp. 63-65, "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand and given their version of the facts. *McDonough v. O'Neil*, 113 Mass. 92; *Com. v. Webster*, 5 Cush. 295, 316, 52 Am. Dec. 711. It is said by Mr. Starkie, in his work on Evidence (volume 1, p. 54): "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

The silence of MacDonald was a sufficient corroboration of John's testimony. *Hankins v. Flint*, 136 S. W. 1171; *Beene v. Rotan Gro. Co.*, 50 Tex. Civ. App. 448, 110 S. W. 162; *Kirk v. Middlebrook*, 201 Mo. Sup. 245, 100 S. W. 450.

Appellee contends that the record shows that he was not in attendance on the trial. If this point be conceded, it cannot avail him. His attorney announced him as being ready for trial. Having proceeded to trial willingly, we think he comes within the rule above announced.

[2] (2) The testimony of A. M. John, above quoted, was not subject to the objection that it was "part of an attempt to compromise and settle between the parties and therefore inadmissible." It was a statement of absolute liability, the admission by MacDonald of a fact not involved in any effort to compromise. A half interest in this note had been adjudged to Ayres, and it was the duty of appellee to pay him his interest in the proceeds of such collection. The amount of this note could not have been the subject of a compromise offer between them. 16 Cyc. 950; *Jones' Commentaries on Evidence*, vol. 2, p. 291; *Wigmore on Evidence*, vol. 2, § 1061, p. 1232.

[3] (3) The Peyton judgment was dormant on the 12th day of January, 1920, when this suit was filed. The judgment was rendered on the 31st day of March, 1917. Appellee duly perfected his appeal from that judgment. Mandate issued from this court on the 18th day of October, 1919, showing that the judgment had been affirmed on May 22, 1918. Though execution might have issued on that judgment, under articles 3714, 3715, R. S. 1911, appellee contends that it was not necessary that such execution issue, and that the time within which execution must have issued to save the judgment from becoming dormant did not begin to run until the mandate issued from this court. This is not our construction of our statute regulating the issuance of executions and providing

that a judgment shall become dormant "if no execution is issued within twelve months after the rendition." Rev. St. art. 3717. These articles constitute a law of limitation and must be construed as if they "had declared a judgment dormant, if executions were not issued in 12 months, from and after the time the same are issuable. The act is, in fact, an act of limitation." *Phillips v. Lesser*, 32 Tex. 742.

[4] (4) Appellee contends that the court should have allowed him interest at the rate of 10 per cent. per annum to the date of judgment herein on the old *Rogers v. Ayres* judgment held by him against appellant, as set out in the judgment in cause No. 67317. We cannot sustain him in this contention. When he collected the *Keystone Mills Company* note, in which appellant owned a half interest, he then held for the account of appellant a large sum of money in excess of the balance due on the *Rogers-Ayres* judgment. As he refused to settle with appellant, the court correctly extinguished the old judgment as of date the note was collected.

[5] (5) Appellee was estopped to deny the validity and existence of the \$751.77 order and the \$575. He had pleaded these orders as outstanding liabilities against him, and as being assignments to the alleged holders of funds held by him for the account of Ayres. This issue was made by him, and by it he defeated Ayres' recovery to the extent of the amount of these orders. As between these parties, Ayres was not held to inquire as to the validity of these orders, beyond the pleadings of the appellee and the recitals of the judgment. Though there was an adjudication that MacDonald was due Ayres the amount of these drafts, Ayres was denied his execution on the facts pleaded by MacDonald. Between them the existence of these drafts was res adjudicata, and appellant's objection should have been sustained to the testimony tending to show that one of them was covered by the \$801 order and that the other had no existence. *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 328; *Railway Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *Aurora v. West*, 7 Wall. 82, 19 L. Ed. 42.

[6, 7] (6) The court did not err in instructing against MacDonald's plea of limitation. The order holders, being prior creditors of Ayres, held these orders as collateral security for their old debts. Ayres was still the real owner of all sums due him by MacDonald, and he had the right to bring suit to recover the same. Of course, the order holders were proper parties to that litigation, but not necessary parties. The failure of Ayres to make them parties when he instituted cause No. 67317 was only a nonjoinder of proper parties, "which, to be available, should have been pleaded in abatement, and presented within the time prescribed by statute for such pleas." *Liner v. Watkins*

Land & Mortgage Co., 29 Tex. Civ. App. 192, 68 S. W. 314. The filing of that suit was a bar to the further running of the statute of limitation. The only bar to an execution in Ayres' favor in that suit was the outstanding equity in favor of the order holders. When Ayres extinguished that equity—whether by paying his debts or otherwise was no concern of MacDonald—his title to the balance of the fund due by MacDonald was clear. And, when MacDonald refused to pay that balance, a cause of action therefore arose in Ayres' favor, and the judgment in that cause, based upon MacDonald's pleading, was an effective estoppel against all defenses to that demand.

It follows from what we have said that the judgment of the trial court instructing against appellant on the \$751.77 draft and the \$575 draft must be reversed, and judgment here rendered for appellant. In all other respects the judgment of the trial court is affirmed.

#### FRED HARVEY v. COMEGYS. (No. 9541.)

(Court of Civil Appeals of Texas. Fort Worth. March 26, 1921. Rehearing Denied June 4, 1921. Second Rehearing Denied July 2, 1921.)

#### 1. Appeal and error ⇨1033(5)—Instruction in action for injuries against restaurant proprietor harmless to him.

In an action against a restaurant proprietor for injuries received by plaintiff in a fight with the manager of the restaurant, an instruction that if the difficulty occurred as the result of a mutual agreement between plaintiff and the manager to fight, defendant restaurant proprietor would not be liable, was favorable to defendant proprietor, and, if erroneous, was harmless to it.

#### 2. Assault and battery ⇨12, 34—Verbal provocation does not justify; fact may be considered in mitigation.

Verbal provocation does not justify an assault, though it may be considered by the jury in mitigating the damages sought to be recovered.

#### 3. Trial ⇨240—Instruction in action for injuries against restaurant proprietor argumentative and calculated to mislead.

In an action against a restaurant proprietor for injuries to plaintiff in a fight with the manager, instruction that the fact that the manager was an employee of the proprietor did not deprive him of the right of any other person to resent abuses and defend himself, etc., was properly refused, as argumentative and calculated to mislead the jury.

#### 4. Master and servant ⇨332(4)—Instruction on assault by servant unsupported by evidence.

In an action against a restaurant proprietor for injuries to plaintiff in a fight with the manager of the restaurant, instruction that if any other person aided the manager in the

assault on plaintiff, if there was an assault, at the instigation or consent of the manager, defendant restaurant proprietor would be liable for his act, etc., held erroneous, the evidence failing to show that the bystander who took part in the difficulty by striking plaintiff did so with the consent and at the instigation of the manager; in lieu of such instruction the court should have charged, as requested by defendant proprietor, that it was not responsible for any injuries inflicted by the bystander.

#### 5. Trial ⇨251(8)—Instruction in action for assault by restaurant manager properly refused as abstract.

In an action against a restaurant proprietor for injuries sustained by plaintiff when assaulted by the manager, defendant proprietor's requested instruction that it was the duty of the manager of the restaurant and its patrons while in the restaurant to treat each other with courtesy, etc., was properly refused as abstract.

#### 6. Assault and battery ⇨27—Evidence of condition of wife of employee charged with assault held immaterial.

In an action against a restaurant proprietor for injuries to plaintiff in a fight with the manager of the restaurant, the trial court properly excluded the testimony offered by defendant restaurant proprietor to the effect that the wife of its manager, who was in the office with her husband when the controversy began, was in a delicate condition.

#### 7. Trial ⇨105(2)—Hearsay, unobjected to, may support judgment.

Hearsay testimony, when admitted without proper objection, may support a judgment.

#### 8. Assault and battery ⇨43(2) — Instruction on assault improperly refused.

In an action against a restaurant proprietor for injuries to plaintiff in a fight with the manager of the restaurant, defendant restaurant proprietor offering testimony tending to show that plaintiff started the fight by seizing the manager and pulling him out of the door of the restaurant, defendant's requested instruction that, if such evidence was true, verdict should be returned for defendant, was improperly refused.

#### On Motion for Rehearing.

#### 9. Assault and battery ⇨31—Evidence of bystander's remarks to person assaulted held immaterial.

Testimony of defendant restaurant proprietor's witness that during the difficulty its manager was backing away from plaintiff, and that a woman who was present ran to plaintiff and begged him to stop fighting the manager, telling him that it was a shame for him to fight a man so much under his size, was objectionable as immaterial.

Appeal from District Court, Cook County; C. R. Pearman, Judge.

Action by E. F. Comegys' against Fred Harvey, a corporation. From judgment for

plaintiff, defendant appeals. Judgment reversed, and cause remanded.

Davis & Davis, of Gainesville, and Robert Carswell, of Dallas, for appellant.

Stuart, Bell & Moon, of Gainesville, for appellee.

DUNKLIN, J. Fred Harvey, a private corporation, which is engaged in the business of maintaining and conducting a restaurant for the service of food to the public in the town of Gainesville, has appealed from a judgment rendered against it in favor of E. F. Conegys, plaintiff, for damages resulting from personal injuries alleged to have been inflicted by two of the defendant's servants while plaintiff was a guest in its restaurant.

Briefly stated, the facts established upon the trial, without controversy, were as follows: A passenger train upon which plaintiff was riding stopped at Gainesville, and plaintiff, together with other passengers, went into defendant's restaurant for lunch. Plaintiff took a seat at the lunch counter, and gave to the waitress an order, which included oyster soup, having first looked over the bill of fare and ascertained the price list therefor, as well the prices of the other articles ordered. Through mistake, the waitress, who had recently been employed by defendant, and who lacked the experience of better trained employees in her position, served the plaintiff with oyster stew instead of oyster soup. Plaintiff ate the stew, believing it to be oyster soup. After he had finished his lunch, the waitress gave him a ticket, showing the amount he owed for the lunch ticket to be 60 cents instead of 35 cents, which latter was the aggregate charge of all the articles he had ordered as shown by the price list. But according to the same price list, with the oyster stew substituted for oyster soup, the bill he owed was 60 cents instead of 35 cents. After plaintiff had inspected the ticket, he called the attention of the waitress to the mistake in filling his order, and asked for another ticket, showing that he only owed 35 cents instead of 60 cents. The waitress admitted that it was her mistake, took up the ticket that she had already given the plaintiff and gave him another, showing that he owed only 35 cents. Thereupon O. D. Doms, defendant's manager in charge of the restaurant, appeared on the scene and instructed the waitress that she had no authority to correct such a mistake, and directed her to take up the last ticket given plaintiff and substitute therefor another, showing that he owed 60 cents for his lunch instead of 35 cents. Plaintiff then went to the desk where Doms was collecting from the patrons for meals, and offered him 35 cents in full settlement of the bill, and refused to pay the 60 cents charged. After a rather heated verbal conversation between the two men over the matter in dispute, Doms agreed to accept the

35 cents offered by plaintiff in full settlement of the bill, which plaintiff then paid. After thus settling the bill, plaintiff started out of the door, and a fight ensued between him and Doms, who was standing at the door from which the passengers emerged from the restaurant to the railroad platform, where the difficulty ended. Plaintiff was a larger and stouter man than Doms, and during the fight some bystander attempted to assist Doms, and, according to the testimony offered by plaintiff, this bystander struck plaintiff twice on the back of his head, inflicting painful injuries. A friend of plaintiff caught hold of this bystander, and thus prevented him from taking any further part in the difficulty. In his petition, plaintiff alleged, in effect, that both Doms and the other person who struck him were agents and servants of the defendant, acting within the apparent scope of their authority as such servants, and he sought damages for the assault he alleged was made upon him by them in the presence of a great crowd of people, which resulted in the humiliation of his feelings, as well as great bodily injuries and suffering.

[1] Complaint is made of an instruction by the court to the effect that if the difficulty occurred as a result of a mutual agreement between the plaintiff and Doms to fight, the defendant would not be liable; the contention being that there was no evidence of any such agreement. A sufficient answer to this assignment is the fact that it was favorable to the defendant, and hence the giving of the instruction, if error at all, could not have harmed the appellant. *Abilene Light & Water Co. v. Robinson*, 146 S. W. 1052.

[2] Error has been assigned to the refusal of appellant's requested instruction, to the effect that, if plaintiff, by insulting words or conduct, or by bantering O. D. Doms to fight, provoked or brought about the difficulty, although the jury did not believe plaintiff did not strike the first blow, then the verdict should be for the defendant. There was evidence introduced tending to show that Doms began the fight, while the testimony of other witnesses was to the effect that plaintiff started it. The requested instruction was properly refused, since it seems to be well settled that in such a case a verbal provocation does not justify an assault, although it may be considered by the jury in mitigating the damages sought to be recovered, and the court so charged the jury. *G., H. & S. A. Ry. Co. v. La Prie*, 27 Tex. Civ. App. 496, 65 S. W. 488; *Parham v. Langford*, 43 Tex. Civ. App. 31, 93 S. W. 525; 5 *Corpus Juris*, 644, and decisions there cited.

[3] The instruction requested by appellant, to the effect that the fact that O. D. Doms was an employee of the defendant, did not deprive him of the right that a human being ordinarily has, and that he had the same right as any other person to resent abuses

and defend himself against the unlawful attack, and use such force necessary for that purpose, was properly refused, because it was argumentative and calculated to mislead the jury.

[4] The following is one of the paragraphs in the court's charge:

"If any other person aided and assisted said Dooms in the assault, if there was an assault at the instigation or consent of said Dooms, the defendant would be liable for his act; also, if you find the defendant liable on account of the act of Dooms, but if said other person, of his own volition and without the instigation or consent of Dooms, took part in the fight between the plaintiff and Dooms, if there was a fight, then and in that event Fred Harvey would in no wise be responsible for the acts of such other person."

[5] The giving of that charge, we think, was error, for which the judgment must be reversed, because we are of the opinion that the evidence failed to show that the bystander who took part in the difficulty and assisted Dooms by striking plaintiff did so with the consent and at the instigation of Dooms, and the giving of that charge, we believe, was calculated to, and probably did, result in harm to the appellant. In lieu of that instruction, in view of what appears to be the uncontradicted evidence that the bystander who took part in the difficulty did so without the knowledge or consent of Dooms, we think the court should have given the instruction requested by the defendant, to the effect that defendant was in no manner responsible for any injuries inflicted by such bystander. There was no error in the refusal of defendant's requested instruction to the effect that it was the duty of Dooms and patrons of defendant while in the restaurant to treat each other with courtesy, since such an instruction was an abstract proposition of law, with no attempt to apply it to the facts of the case.

[6] There was no error in the exclusion of the testimony offered by defendant to the effect that Mrs. Dooms, the wife of O. D. Dooms, who was in the office with her husband at the time the controversy began, was in a delicate condition, since the same was immaterial and irrelevant to any issue in the case.

[7] The defendant offered to show by the testimony of one of its witnesses that during the difficulty Dooms was backing away from the plaintiff, and that a woman who was present and who witnessed the difficulty ran to plaintiff and begged him to stop fighting Dooms, and telling him, in effect, that it was a shame for him to fight a man so much under his size. That testimony was excluded upon plaintiff's objection that it was immaterial and irrelevant, and a conclusion and a repetition. We are of the opinion that the testimony should have been admitted as against that objection. It was not objected

to on the ground that it was hearsay. In the absence of such an objection, we are not called on to determine whether it was admissible because it was a part of the *res gestae*, as insisted by appellant. Although the testimony was as to hearsay declarations, it cannot be said that for that reason it was irrelevant and immaterial to any issue in the case. Hearsay testimony, when admitted without proper objection thereto, may support a judgment. *Gray v. Fussell*, 48 Tex. Civ. App. 261, 106 S. W. 454.

[8] The defendant offered testimony tending to show that plaintiff started the fight by seizing Dooms and pulling him out of the door of the restaurant to the platform, where the principal part of the difficulty occurred, and requested an instruction to the effect that if such evidence was true, then the verdict should be returned for the defendant. We believe it was error to refuse that instruction.

For the errors pointed out, the judgment is reversed, and the cause remanded.

#### On Motion for Rehearing.

[9] Upon further consideration, we have reached the conclusion that there was no error in the exclusion by the trial court of the proffered testimony of one of defendant's witnesses, to the effect that during the difficulty a woman who was present ran to the plaintiff and begged him to stop fighting Dooms, and telling him that it was a shame for him to fight a man so much under his size. That testimony did not tend to show whether the fight was begun by Dooms or by the plaintiff, which was the material issue. Hence the contrary conclusion expressed in the opinion on original hearing is withdrawn.

The only other assignment of error which we sustained was the one addressed to that portion of the charge which is copied in the original opinion, wherein the jury was told that the defendant would be liable for the assault made by another person if such other person aided and assisted Dooms in the assault at the instigation of Dooms. We held that the evidence was insufficient to show that such other person was instigated by Dooms to aid him in the fight, and we adhere to that conclusion. The evidence showed that the principal injury done to the plaintiff was inflicted by the bystander, Graham, who was a friend of Dooms, and in the argument upon the motion for rehearing appellee conceded that the jury allowed damages for the injury done by Graham. Hence it cannot be said that the error in the charge was harmless, but appellee earnestly insists that the error, if any, in giving the charge was invited by the appellant, and therefore he is in no position to complain of it. That contention is predicated upon an instruction requested by appellant, reading as follows:

"If any other person, of his volition, took part in the fight between the plaintiff and Dooms, then Fred Harvey is in no manner responsible for the acts or doing of such other person."

It will be noted that in a portion of the charge copied in the original opinion substantially that instruction was given in connection with the further converse instruction, to the effect that the defendant would be liable for the assault by such other person if such other person acted at the instigation of Dooms. The instruction so requested by the defendant was special instruction No. 7, while special instruction No. 1, requested by the defendant, reads as follows:

"There is no proof that any other employee of the defendant participated in the fight between plaintiff, E. F. Comegys, and O. D. Dooms, and you will disregard the allegations in the petition, claiming that any one besides said Dooms took part in said fight."

The proof showed that Dooms was the manager in charge of the defendant's eating house where the controversy between plaintiff and Dooms originated, and presumably had general authority to employ others to assist in the conduct of the defendant's business. Evidently the testimony offered by the plaintiff to show that during the fight Graham struck him on the back of his head and inflicted a serious injury upon him was offered upon the theory that Graham was, in law, a servant or agent of the defendant, in accordance with allegations contained in plaintiff's petition that the injury of which he complained was inflicted by "two of the agents and servants of the defendant, acting within the apparent scope of their authority."

Defendant's requested instruction No. 1 clearly presented the contention, in effect, that there was no sufficient evidence to show that Graham, the bystander, in striking the plaintiff did so at the instigation of Dooms, or any one else authorized by the defendant to employ him to do so. That instruction having been requested and refused, and apparently having been presented before the requested instruction No. 7 was presented, we hardly perceive how it can be said that the defendant is deprived of the right to complain of the erroneous instruction upon the theory that the error in giving it was invited by the defendant, especially when it is conceded by the appellee and shown by the evidence that the injury inflicted by Graham, the bystander, was one of the injuries for which damages were allowed.

Appellee urgently insists that there were sufficient facts and circumstances to warrant a finding by the jury that Dooms did request Graham to aid him in the event of a probable difficulty with the plaintiff. It is true that the evidence showed conclusively that Gra-

ham and Dooms were close friends, and that he (Graham), was present during the quarrel which occurred between the two men before the fight began. There were other circumstances tending to show that possibly Dooms may have said to Graham that he (Dooms) desired his assistance in the event a fight started, but all of those circumstances taken together go no further than to arouse a suspicion that the participation in the fight by Graham was possibly at the instigation of Dooms. In order to conclude that that amounted to proof of that fact, it would be necessary to build one inference upon another, which cannot be done. In the case of *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059, circumstances even more cogent than those recited above were shown to prove that an arrest of the plaintiff was made by the direction of defendant, against whom damages were sought for the arrest, but it was held that they amounted to no more than a mere scintilla of evidence, which was insufficient to sustain a verdict and judgment against the defendant.

With the correction above made, the motion for rehearing is overruled.

#### NEBLETT v. R. S. STERLING INV. CO. (No. 684.)

(Court of Civil Appeals of Texas, Beaumont,  
June 22, 1921. Rehearing Denied June  
29, 1921.)

1. Easements  $\S$ 61(8) — Petition held not to support an easement by implication or necessity.

Petition alleging plaintiff's lot abuts on a street and alley and seeking injunction against obstruction of ingress and egress does not support an easement by implication or necessity.

2. Easements  $\S$ 18(4) — Way of necessity arises only between grantor and grantee.

A way of necessity arises only between grantor and grantee; necessity alone, without such relation, as where one buys a lot supposing it abutted on a street, whereas between it and the street was a strip owned by a stranger to the title to the lot, is not enough.

3. Nuisance  $\S$ 3(12) — Fence not a nuisance per se.

One who uses his property in a lawful and proper manner is not guilty of a nuisance merely because the use may cause inconvenience or annoyance to his neighbor, and so a fence between a lot and a street on a narrow strip between them owned by another than the lot owner is not a nuisance per se.

4. Dedication  $\S$ 19(1) — Streets not dedicated where so-called addition is not near city.

An attempted dedication of streets by a plat of a so-called addition to a city is ineffectual, the land not being contiguous or adjoining to the



city, as is necessary for an "addition," nor any part of a municipality, nor the beginning of a new town, especially in the absence of any acceptance.

5. Adverse possession  $\Rightarrow$  8(2)—Prior to statute title to street could be acquired against city.

Prior to taking effect July 4, 1887, of the statute (Acts 20th Leg. c. 40), now Vernon's Sayles' Ann. Civ. St. 1914, art. 5883, title to a street could be acquired against a city by adverse possession.

Error from District Court, Harris County; J. D. Harvey, Judge.

Action by W. P. Neblett against the R. S. Sterling Investment Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. P. Neblett, of Houston, for plaintiff in error.

Ross & Wood, of Houston, for defendant in error.

O'QUINN, J. In this opinion we shall refer to plaintiff in error as plaintiff, and defendant in error as defendant.

Plaintiff brought this suit against defendant for a mandatory injunction to require defendant to remove a certain fence and hedge, which plaintiff alleged obstructed his right of ingress and egress to and from his property, which was alleged to front and abut 92.25 feet on Mt. Vernon street on the east and 150 feet on an alley on the north in the Rossmoyne addition to the city of Houston.

Defendant answered by general demurrer, general denial, pleas of two, three, four, five and ten year statutes of limitation, and other special pleas.

The case was tried before the court without a jury, who rendered judgment for defendant, from which plaintiff has appealed by writ of error.

The court in his decree of judgment found the following facts:

"This being a suit brought by plaintiff, claiming to be the owner of a tract of 95.25x150 feet situated southwest of the Rossmoyne addition to the city of Houston, and described by him in his petition as lots numbered 2 and 3 and the adjoining 5x100 feet of lot No. 4, all of lot No. 11 and 30x50 feet in lot No. 12 in block No. 42 of the N. P. Turner addition to the city of Houston, in Harris county, Tex., plaintiff further alleging said premises to be a part of lot No. 10 of the Obedience Smith survey, and that the same fronted 95.25 feet on the west side of Mt. Vernon street and extended westwards between parallel lines a distance of 150 feet for depth, plaintiff further claiming that the said premises not only fronted upon Mt. Vernon street, but also upon the south side of the alley which runs westwardly from said Mt. Vernon street along the south side of block No. 5 of Rossmoyne addition to the city of

Houston, and that a right and easement existed in favor of said premises claimed by him and as appurtenant thereto of ingress and egress to and from said premises claimed by him over said Mt. Vernon street and said alley, and that the said premises claimed by him had all of the rights, easements, and privileges resulting from same abutting on said street and alley. Plaintiff further alleged that defendant was wrongfully and unlawfully maintaining a hedge and fence along the east side of said premises claimed by plaintiff and between said premises and the west line of Mt. Vernon street and along the north line of said premises claimed by plaintiff and between which said premises and the south line of said alley, and that said fence and hedge constituted a nuisance, and the court, having heard the pleadings, evidence, and arguments of counsel, finds that the said fence and hedge complained of by said plaintiff are constructed in a lawful and proper manner, and that the same are situated wholly upon the premises of said defendant, and that the same are not and do not constitute a nuisance, and that the defendant is entitled to maintain the same, and the court further finds that the said premises claimed by said plaintiff do not front on Mt. Vernon street or upon said alley or any part of said street or said alley, and that plaintiff has no premises fronting or abutting either upon said street or upon said alley, or any part thereof, and further that, regardless of whether the said premises claimed by said plaintiff are correctly described by him in his said petition or not, the same premises so claimed by plaintiff as same actually lie on the ground are bounded on the east by an old fence line and on the north by an old fence line, a few of the old posts in said fence line still remaining to evidence the location thereof, and which old fence line has existed for more than 40 years, and the court further finds that between the west line of Mt. Vernon street and the east line of said premises claimed by plaintiff there is a strip of land one foot wide or more at all points owned by defendant running along the west line of Mt. Vernon street the full distance or length of the east line of the premises claimed by plaintiff, and that likewise there is a strip of land one foot wide or more at all points owned by defendant running along the south line of said alley and between the said south line of said alley and the north line of said premises claimed by said plaintiff for the full distance and length of the north line of the premises claimed by plaintiff, so that the premises claimed by plaintiff at no point approached nearer than one foot to the said west line of said Mt. Vernon street on the south line of said alley, and the court finds and decrees that the said premises claimed by said plaintiff do not abut upon either said Mt. Vernon street or said alley or upon any part of said street or alley, and that no right, privilege, or easement exists in favor of said premises claimed by plaintiff or any part of same in or to the said Mt. Vernon street or said alley, and that no right, privilege, or easement exists in favor of said plaintiff or of said premises claimed by him in or to said Mt. Vernon street or said alley or any other streets or alleys of said

Rossmoyne addition, and the court further finds that plaintiff is not entitled to any of the relief prayed for by him, and therefore denies plaintiff's application for an injunction, and renders judgment against him."

On motion of plaintiff, the court filed his findings of fact and conclusions of law, which are as follows:

"Some time during or prior to A. D. 1876 the owners of a tract of — acres of land, known as lot No. 10 of the Obedience Smith survey in Harris county, Tex., platted same into lots, blocks, and streets, giving it the name of the Turner addition, as shown by the map of the Turner addition appearing in the map of the city of Houston, introduced in evidence, designated as the 'Macatee map.' At the time of so platting such land the streets shown on such map were dedicated by the owners of said lot No. 10 as public streets, but said Turner addition, as then dedicated, was not within the territorial limits of any municipal corporation, and did not become so until the year A. D. 1913, when it became embraced within the corporate limits of the city of Houston.

"During the year 1877, and prior to May 1st of that year, one Wiley Smith acquired by various purchases and thereby became the owner of a part of said lot No. 10 embracing approximately 43% acres thereof, all of which now forms the greater part of the Rossmoyne addition. The line found and set out in the judgment of court here rendered as being a part of the true boundary of the Rossmoyne addition is identical with part of the boundary line of said lands acquired by Wiley Smith, as above stated. At some time prior to June 1, 1877, said Wiley Smith went into actual possession of all of said land in lot 10 so acquired by him, having before that date erected a fence entirely around all said land, and placed dwelling houses, outhouses, etc., thereon, and he and those holding under him continued thereafter to hold peaceable and adverse possession of all such land (including all streets and parts of streets lying thereon), using, occupying, cultivating, and enjoying the same without interruption and under claims of right for more than 30 years. The fence so erected by Wiley Smith and maintained by him and those holding under him for 30 years or more, as above stated, inclosed the parts of all streets and alleys of the Turner addition which lay upon said 43% acres of land acquired by Wiley Smith as aforesaid, and part of said fence ran along the line now marked by old fence posts and trees as specified in the judgment herein rendered, same being part of the boundary of said 43% acres. Before the fencing of such land by Wiley Smith, as above set out, all persons holding, or owning title to or interest in property situated in said Turner addition (including those under and through whom plaintiff holds title), granted to Wiley Smith or to his immediate grantors all the rights and easements in and to all those parts of streets and alleys of said Turner addition which lay within the boundaries of said 43% acres so acquired and fenced by Wiley Smith, as above stated, and agreed to the extinguishment of all their said rights and easements. All the parts of streets and alleys of said Turner addition which lay within the

boundaries of the 43% acres acquired and fenced by Wiley Smith, as above stated, ceased to be such at that time, and all easements thereon as such were then extinguished.

"The defendant's fence, of which plaintiff complains herein, stands wholly upon said 43% acres of land acquired and fenced by Wiley Smith, as above set out, and wholly upon land now owned by defendant.

#### "Conclusions of Law.

"The defendant's fences and hedge complained of by plaintiff, being situated wholly upon defendant's land, in or upon which plaintiff holds no right or easement, the said defendant rightfully maintains such fences and hedges, and plaintiff is not entitled to interfere therewith, and is not entitled to the relief sought here."

#### Plaintiff's first assignment of error is:

"The court erred in denying the plaintiff in error the relief sought, when the undisputed evidence showed that plaintiff had no other way of ingress and egress to and from his property except over the one foot reserved by plaintiff in error."

Under this assignment, he submits two propositions, to wit:

(1) "Ingress and egress to property is an absolute necessity, and if one is deprived thereof he is deprived of his property."

(2) "Where the antecedent grantor conveyed a portion of his land, the law will not presume that he intended to deprive himself of the enjoyment of the remainder."

[1, 2] This assignment presents the question that plaintiff has a right of way by necessity over the premises of defendant. In plaintiff's pleading, he asserts that his property fronts and abuts on Pine street in the N. P. Turner addition, and that Mt. Vernon street in the Rossmoyne addition took the place of Pine street, and that his property fronts and abuts on Mt. Vernon street on the east, and on the alley to the north, and that he has an express easement on and over same, which defendant has obstructed. This pleading does not support an easement by implication or necessity, but, if this were not true, the assignment must be overruled, for a way of necessity arises only between grantor and grantee, and cannot exist when there was never any unity of ownership. 14 Cyc. 1172. In the instant case defendant was not plaintiff's grantor. There is no privity of title between them. It is well settled that a way of necessity arises where one has sold land to another, not having any outlet save over the land of the grantor, in which the grantor, by implication, grants a right of way, but defendant here was not plaintiff's grantor. Williams v. Kuykendall, 151 S. W. 629; Alley v. Carleton, 29 Tex. 74, 94 Am. Dec. 260. The rule is equally well settled that necessity alone, without reference to any relations between the respective owners of land, is

not sufficient to create this right. The fact that one's land is completely surrounded by the land of another does not, of itself, give the former a way of necessity over the land of the latter, where there is no privity of ownership. *Ellis v. Blue Mountain Forest Ass'n*, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570. But plaintiff contends that, having purchased his property as fronting and abutting Mt. Vernon street, he is entitled to ingress and egress over said street, and to deny him this right is to deprive him of his property. The court found, and the admitted facts show, that plaintiff's property does not front or abut on said street, but that there is a strip of land a foot or more in width between plaintiff's land and the street and alley, and, while plaintiff's deed calls fronting 92.25 feet on Mt. Vernon street on the east, still, as a matter of fact, it does not do so, and, besides, defendant did not sell plaintiff the property; neither is said property of plaintiff any part of said Rossmoyne addition, but is entirely without same, and does not touch said street or alley at any point, and as defendant was not plaintiff's grantor, and plaintiff's grantor did not have any interest in or to said Rossmoyne addition, there is no privity of title between them. No way of necessity can be presumed or acquired over the lands of a stranger. 9 R. C. L. § 31, p. 770. It has also been held that, when easements have been created by sale of lots abutting upon a proposed street or alley, a purchaser of the land set apart for such street or alley at a tax sale is not estopped to interfere therewith by fencing or inclosing the street or alley, inasmuch as he does not claim under the original owner, by whose grants the easements were created. *Smith v. Griffin*, 14 Colo. 429, 23 Pac. 905.

[3] By the second assignment plaintiff complains that the court erred in denying him the relief sought, because the evidence showed that the fence complained of was a nuisance. He follows this with two propositions to the effect that any fence erected so as to withhold ingress and egress of plaintiff to and from his property, or the ingress and egress of the public to his property, is a nuisance. As found by the court, Wiley Smith in 1877 built a fence on the land on the line between his property on the east and the property on the west, of which plaintiff's is a part, and that fence has been continuously maintained until the laying out of the Rossmoyne addition in 1914 by defendant. The fence complained of is the continuation of the Smith fence, simply being a new one at the old place. It is not contended but that it is on the property of defendant, and there is no evidence that the fence or hedge were constructed or maintained in an improper or unlawful manner. One who uses his property in a lawful and proper manner is not guilty of a nuisance merely because the

particular use which he chooses to make of it may cause inconvenience or annoyance to his neighbor, and nothing which is legal in its erection can be a nuisance per se. 29 Cyc. 1159. The assignment is overruled.

By the third assignment of error plaintiff assails the finding of the court that defendant had acquired title to the streets as laid out in the Turner addition situated in the Rossmoyne addition by limitation. In considering this assignment, it is well to take note of the description by which the parties purchased their respective lands. The record discloses that the Republic of Texas patented to Obedience Smith 19 and a fraction labors of land July 23, 1845, in which survey the premises in controversy are located; that on April 21, 1848, said Smith survey was subdivided and a map of said subdivision recorded in the deed records of Harris county, the land or portion here in controversy being lot No. 10 of such subdivision, and containing 50 acres, the same being 564.6 varas, or about 1,570 feet, long from north to south, and 500 varas, or about 1,390 feet, wide from east to west; that in 1848 this 50 acres of lot No. 10 was conveyed to J. A. Harris, who died, leaving as his sole heirs his widow, Mary W. Harris, and four children, Joseph A. Harris, Chas. L. Harris, Ellen H. Harris, and Nettie Harris; that in 1871 the widow, Mary W. Harris, conveyed her undivided one-half interest in said lot to N. P. Turner that in 1872, by decree of partition of the district court of Harris county, the south half or south 25 acres of said lot 10 was awarded to N. P. Turner, and the north half was divided among said Harris children, Ellen H. Harris being awarded the northwest  $6\frac{1}{4}$  acres, Chas. L. Harris, the southwest  $6\frac{1}{4}$  acres, Joseph A. Harris, the northeast  $6\frac{1}{4}$  acres, and Nettie Harris, the southeast  $6\frac{1}{4}$  acres. The south half of lot 10 acquired by Turner was 785 feet wide by 1,390 feet long. March 28, 1877, Wiley Smith bought from W. S. Dugat (who held the same by trustee's deed from J. B. Likens, trustee for N. P. Turner) all of the Turner south half of lot 10, except a strip 290 feet wide off of the west end, the deed from Dugat to Wiley Smith describing the land conveyed as follows:

"Beginning at an iron stake in the northwest corner of block No. 57, N. P. Turner addition; thence west 1,100 feet to a stake; thence north 785 feet to a stake; thence east 1,100 feet to a stake; thence south along the west line of Nibbs' and Pilant's lands 785 feet to the place of beginning, containing 19.82 acres and embracing blocks Nos. 33, 34, 35, 36, 37, 38, 39, and 40, and fractional blocks Nos. 43, 44, 45, 46, of N. P. Turner addition to the city of Houston, in Harris county, Tex., and being a part of the Obedience Smith survey, hereby conveying and intending to convey the property conveyed to me by J. B. Likens, trustee, which deed is of record in Harris County Deed Rec-

ords, vol. 17, p. 170, to which reference is here made. The field notes of a certain tract of land adjoining the west line of Nibbs' and Pilant's land about two miles southwest of the courthouse of Houston, the aforesaid land formerly owned by N. P. Turner described as follows: Beginning at an iron stake in the northwest corner of block 57, N. P. Turner addition; thence west 1,100 feet to a stake; thence north 785 feet to a stake; thence east 1,100 feet to a stake; thence south along the west line of Nibbs' and Pilant's lands 785 feet to the place of beginning, containing 19.82 acres of land, as surveyed by N. Carroll, civil engineer and surveyor.

"N. Carroll, Civil Engineer and Surveyor"

—the parties agreeing that the beginning corner—northwest corner of block No. 57—in this description is at the southwest corner of said lot 10 of the said Obedience Smith survey.

Ellen H. Harris sold her  $6\frac{1}{4}$  acres of the north half of said lot to Wiley Smith April 10, 1877. Chas. L. Harris sold his  $6\frac{1}{4}$  acres to one J. H. Gray, who sold to Wiley Smith on March 28, 1877. By these three purchases made March 28, 1877, and April 10, 1877, Wiley Smith became the owner of the west half of the north half of said lot 10 and all of the south half of said lot 10 except the strip 290 feet wide off the west end. The land claimed by plaintiff is in the north end of this 290-foot strip. Immediately after his purchase of said lands Wiley Smith commenced to fence and improve same, and built a house thereon, and prior to June 1, 1877, went into actual possession of all of said lot 10 so bought by him, having already erected a fence entirely around his said lands. The evidence further showed that the fences built around said land by Wiley Smith remained on the identical lines on which they were originally erected, maintained intact by the several owners and holders of said land, until same came into the possession of defendant, and was in 1914 platted into the Rossmoyne addition to the city of Houston; that, when defendant acquired the Wiley Smith land, it was farm land, under fence. The land plaintiff claims is to the west of same, separated by the division fence erected by said Wiley Smith in 1877, which has been continuously maintained on the exact line on which it was originally erected ever since. The fence and hedge complained of by plaintiff is right up against the old fence on the defendant's side of the line. When defendant laid out the Rossmoyne addition, it laid out same, streets, blocks, alleys and all, wholly within the fences and lines inclosing same. Mt. Vernon street and the alley which plaintiff claims an easement in and over do not touch, front, or abut plaintiff's land at any point, the evidence showing that there is a strip at least one foot wide between plaintiff's land and defendant's land at all points on Mt. Vernon street and said alley on which

is situated the fence and hedge complained of. In other words, the portion bought by Smith in the south half of said lot 10 was a rectangular tract 1,100 feet long by 785 feet wide, containing 19.82 acres of land, which shows that same was surveyed and sold by acres, which included every foot of land within the bounds set forth. It will be noticed that when Smith bought the 19.82 acres in said south half of said lot 10, the line 1,100 feet, if deducted from the whole line, 1,390 feet, left exactly 290 feet. This shows that said south half, or 25 acres, although the same had been platted by N. P. Turner and called the Turner addition to the city of Houston, was afterwards by him, through his trustee, J. B. Likens, sold to W. S. Dugat, and by Dugat to Wiley Smith, by acre measurement, covering and including the entire Turner addition in the south half, other than and except the said 290-foot strip, so that defendant's purchases, being by acreage, included, as to the Turner addition in the south half of lot 10, all alleys, streets, and blocks, by actual measurement, and having been immediately fenced by Smith, and he and those holding under him having continuously cultivated, used, and enjoyed same adversely to all others for and during the period from about June 1, 1877, to the date of trial, defendant and those under whom he held had acquired title by limitation to all of the land, including the streets and alleys in said Turner addition included within the bounds of defendant's tract. It is further to be observed that the Turner addition was never at any time within the corporate limits of the city of Houston or within the limits of any town or municipality. This is admitted by all parties hereto. At the time same was platted by Turner and called the Turner addition to the city of Houston it was three-fourths of a mile from the nearest limits of said city, was then open farm lands, surrounded by farm lands, and was never any part of any municipality until 1913, when the city limits of Houston were extended to include same, and in 1914 the territory was replatted as the Rossmoyne addition by defendant.

[4, 5] But plaintiff insists that, title to public streets having once vested in the public, no individual can acquire sufficient title thereto by limitation as to deprive an abutting owner of his right of ingress and egress. We do not regard this as a sound proposition of law as applied to the facts of this case. Under the facts, a sufficient answer to this contention is that the said Turner addition, when laid out and platted, was not embraced within any municipality, and therefore did not constitute any part of the city of Houston or of any town or city, nor was it the beginning of a new town.

"The legal, as well as the popular, idea of a town or city in this country, both by name and

use, is that of union, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants—that is a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of same place, not different places. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. The statutes which permit municipal corporations to annex territory without special legislative authority in each case always require that the territory so annexed be contiguous, and when the annexation is left in the discretion of a judicial tribunal contiguity will be required as a matter of law." R. C. L. § 40, p. 734.

The Turner addition to the city of Houston, so-called, was, in fact, no addition. It was not contiguous to the city of Houston at any point, but, to the contrary, was three-fourths of a mile from the nearest point of the limits of said city. The word "addition" means to add to, to become united with, to become a part of the subject or matter to which the addition is to be made, and therefore in cases of additions to the territory of towns or cities the territory to be added must be adjoining or contiguous to the territory of the town or city to which it is to be added. And, since the Turner addition was not contiguous or adjoining to the city of Houston, and as same was not any part of any municipality, nor was it the beginning of a new town, then there was no legal dedication of the streets and alleys of same to the use of the public, and especially is this true in the absence of any acceptance of said attempted dedication by user or otherwise. But, if this were not true, still the assignment is not well taken, for article 5683, V. S. C. S., providing that no person, by occupancy or adverse possession, shall acquire title to any part of any street, sidewalk, or ground which belong to any town, city, or county, or which have been dedicated to the public use of any town, city, or county by the owner thereof, did not become effective until July 4, 1887. Prior to that time limitation by occupancy or adverse possession ran against towns and cities and counties, the same as individuals. When Wiley Smith bought the land in the south half of said lot 10, composing the Turner addition (except the 290-foot strip), and fenced, occupied, and improved same in the spring of 1877, the statute of limitation began to run against any sort of claimed dedication or use of same by any other person or entity whatever, and the 10 years necessary to perfect title by limitation had elapsed before said law went into effect July 4, 1887. Therefore, if there had ever been any dedication of the streets in said Turner addition to the public use, limitation had run against same, and the court

did not err in so holding. Up to 1887 counties, cities, and towns were not mentioned in any statute of limitation, but in 1887 (Laws 1887, c. 40), the Legislature amended article 3200, Rev. St. 1879 (now article 5683, Vernon's Sayles' Civil Statutes), which amendment went into effect July 4, 1887. *Johnson v. Llano County*, 15 Tex. Civ. App. 421, 39 S. W. 995; *Brown v. Fisher*, 193 S. W. 357; *Walton v. Harigel*, 183 S. W. 785; *Hardin County v. Nona Mills Co.*, 112 S. W. 822; 9 R. C. L. Easements, § 67. This assignment is overruled.

We think, upon the evidence, no other judgment than one in favor of defendant could, have been properly rendered.

The judgment should be affirmed, and it is so ordered.

### PAYNE, Agent, v. WYNNE. (No. 2428.)

(Court of Civil Appeals of Texas. Texarkana.

June 25, 1921. Rehearing Denied

July 2, 1921.)

1. Commerce  $\S$  27(5) — Test as to whether employee was engaged in "interstate commerce" at time of injury stated.

The test as to whether an employee was engaged in interstate commerce, within the Federal Employers' Liability Act, at the time of the injury, is whether he was at such time engaged in interstate transportation, or any work so closely related to it as to be practically a part of it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. Commerce  $\S$  27(8)—Locomotive repairer held not engaged in "interstate commerce" at time of injury.

Railroad employee injured while engaged in the repair of an engine which had been placed in the roundhouse for repairs after having finished its round trip, to remain in the roundhouse until completion of the work of repairing, held not engaged in "interstate commerce" at the time of the injury, within the Federal Employers' Liability Act, though the locomotive had been used in both interstate and intrastate commerce before being placed in the roundhouse for repairs, and although it was similarly used after the repairs had been completed.

Levy, J., dissenting.

Appeal from District Court, Smith County; J. R. Warren, Judge.

Suit by Carrie Wynne, administratrix, against John Barton Payne, Agent. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

As temporary administratrix of the estate of R. F. Wynne, deceased, the appellee brought the suit to recover damages for the benefit of the minor sister of the deceased,

as next of kin dependent upon him, for the alleged negligent death of R. F. Wynne. R. F. Wynne, 35 years old, was killed April 24, 1919, while assisting in repairing engine No. 560 in the roundhouse of the railway company at Tyler, Tex. He was a carman's helper, and was assigned as assistant in making repairs on the tank or tender and the framework of locomotives. He and his coemployee were engaged at the time of injury in suit in raising the front of the tender or tank of engine 560 in order to make certain needed "light or running repairs" of the tender or tank. The engine part had been cut loose or detached from the tender or tank and backed away. They used two hydraulic jacks to raise the front end of the tender or tank. While R. F. Wynne was under the tank or tender engaged in placing a block on the trucks of the tender to let the tank rest on it while the repairing was being done, one of the jacks suddenly gave way or went down, and the tank fell towards deceased and on his head, killing him instantly. The jack was not in safe repair and was defective, and leaked so as to impair its power to sustain weight.

Plaintiff's petition alleged that the Director General of Railroads was engaged in interstate commerce at the time of the death of deceased, and that the deceased, as an employee of the Director General, engaged in making the repairs, was also engaged in interstate commerce. The ground of this contention was that the engine was used in interstate commerce at the time of the death of deceased. And continuing, the petition alleged:

"When the deceased was injured and killed the defendant, as a common carrier by railroad, was engaged in commerce between different states, and the deceased was employed by the defendant, and as such employee was engaged in such interstate commerce, in that the locomotive and tender, the latter of which deceased was engaged in repairing at the time he was killed, was at the time of said injury, and long theretofore had been, assigned to, and was regularly and constantly used and employed by, the defendant in hauling, over the road of the said St. Louis Southwestern Railway Company of Texas, freight trains, cars, and shipments of freight originating in Texas and en route to and destined to other states, and also trains, cars, and shipments of freight en route to and destined to points in Texas from other states, and in that at the time of the said fatal injury the said locomotive and tender were only temporarily in the roundhouse of the said railway company, and remained there for a few days only, for the purpose of being repaired; and while said repairs were being made, so that the tender and engine could be, as the same was, again at once used by the defendant in hauling or pulling such interstate cars and freight; and in that at the time of the deceased's death he was engaged in repairing the tender of said locomotive for the purpose of said engine and tender being used at once by the defendant in

hauling such interstate freight, and that said locomotive and tender were regularly assigned to, and regularly and constantly used by, the defendant in hauling such interstate freight, both before and after the said repairs were made."

The defendant answered by (1) a general denial, and (2) specially pleaded—

"that at the time R. F. Wynne was killed he was not engaged in either interstate or intrastate commerce; but was engaged in repairing, in defendant's machine shops in the city of Tyler, an engine that had been used, prior to the time that it was put in defendant's shop for repairs, in hauling of freight trains over the railway of the St. Louis Southwestern Railway Company of Texas, and which trains hauled both interstate and intrastate commerce, and at other times only intrastate commerce; and after it had been repaired in defendant's shops, subsequent to the death of said Wynne, it was so used in the hauling of freight trains over said railway; that said engine had never been before the death of said Wynne, and has never been since his death, permanently devoted to the transporting alone of interstate cars, but was used for such business as it might be needed for;"

—and (3) contributory negligence, and (4) assumed risk.

The case was tried before a jury on special issues, and their findings were (1) that the jack in question was not in reasonably safe repair or condition to be used in making the repairs on the tender; (2) that it was negligence on the part of the defendant in furnishing the deceased the jack, in the condition it was in, to do the repairing required; (3) that such negligence was the proximate cause of the injury to the death of the deceased; (4) that the injury to the deceased was not the result of an accident; (5) that the deceased was not guilty of contributory negligence; (6) that the deceased did not assume the risk of being injured by the condition of the jack; and (7) that the beneficiary was dependent on the deceased at the time of his death. The jury also made a finding as to the amount of damages. There is evidence to support these findings of fact, and they are here adopted as the facts of the appeal, without making further statement of the evidence on any of those issues.

The St. Louis Southwestern Railway Company of Texas, the railway in question, is a Texas corporation, and its general offices, roundhouses, and machine shops are located at Tyler, Tex. Tyler is the end of three divisions of the road in Texas—from Tyler to Waco, from Tyler to Lufkin, and from Tyler over the Fort Worth Division to Mount Pleasant and Texarkana, Tex. The state line between the states of Texas and Arkansas runs through and divides the city of Texarkana. This line of railroad extends to the state line of Texarkana, and there

makes physical connection with the railroad of the St. Louis Southwestern Railway Company, an Arkansas corporation. As testified:

"The other connections which the St. Louis Southwestern Railway Company of Texas has at Texarkana are the Kansas City Southern, the Missouri Pacific, or Iron Mountain, as it is called."

The said two St. Louis Southwestern railways are called "the Cotton Belt System." As testified:

"The Cotton Belt Railroad in Texas is a part of a system of railroads. This Cotton Belt System extends into the states of Arkansas, Texas, and Missouri. Texarkana is the connecting point between the Cotton Belt System in Texas and the Cotton Belt System north of Texas. \* \* \* In handling cars of freight destined to points in Arkansas, Missouri, and the north and east over the Cotton Belt Railway, it is at Texarkana that the Cotton Belt would deliver them to its other part of the system; and it is at Texarkana that freight cars coming into Texas over the Cotton Belt System from Arkansas, Missouri, and other points north and east would be delivered to the Cotton Belt of Texas."

And, quoting from the witness:

"Under the system in operation on the Cotton Belt (the railroad in controversy) the engines are assigned to through freights or to local freights. What is meant by that is that an engine pulling a freight train would be assigned, for instance, to pull through freight trains or it would be assigned to pull local freight trains. \* \* \* The difference between a through freight train and a local freight train is that a local freight train picks up and sets out loads at different stations on the line, and a through freight train pulls cars from one terminal to the other; that is, where they are loaded with freight moving out of the state or moving from one point in the state to another."

It was then proven that engine No. 560, the one in question, was one of the largest types of freight engines in use on this railroad. Engines of the 560 class, 2 as the witness said,

"are usually given to the handling of freight trains, and to the handling of through freight trains. In an occasional emergency they sometimes handle some other class of freight trains; in an occasional emergency they handle any train that might be necessary to be handled; in other words, they are usually applied to the handling of those through freight trains, but when necessary they are applied to other purposes. If we have cars of freight destined to points outside of Texas, then those cars, as a rule, are pulled in the through freight trains. Smaller type or smaller size engines than this 560 were set aside or used regularly or ordinarily in the local freight-train service."

On cross-examination the witness was asked the following question:

"Q. Now are there any locomotives on the Cotton Belt that are used exclusively for pull-

ing cars destined from the state out of the state, and from out of the state in the state—interstate commerce?

"Ans. No; there are no particular locomotives that are set aside for the pulling of interstate commerce; in other words, the locomotives are used to pull indiscriminately interstate and intrastate commerce. There are not any trains that are used for pulling exclusively interstate commerce or intrastate commerce; and this locomotive in question, 560, was not set aside for that particular purpose, but it was used indiscriminately in pulling interstate or intrastate commerce."

On direct examination the witness said:

"Yes; 560 was set aside and used regularly in pulling through freight trains. I said in answer to the attorney that in case of emergency it might be then called out and used for some other freight service besides the through freight service, but its regular use to which it is put or set aside is the handling of through freight trains."

And the witness Haley testified:

"This engine (560) had been used in the hauling of freight trains for some time before the death of Wynne, and mostly, if not altogether, in hauling through freight shipped into and out of Texas from and to other states. It was used in hauling through freight, but I do not know what trip it had last made before it was placed in the roundhouse for this particular repair. I don't know how long it remained in the roundhouse before it went on the road again. I don't know what service it was used in when it went out on the road again the first time after Wynne's death, as to whether used to haul a passenger or freight train, local or through freight to another state. \* \* \* I don't know as to any part of this matter, except that the engines move such freight as the company has to haul."

"The company," it appears,

"has a roundhouse and machine shops at Tyler, and is prepared to make running repairs on engines, and cars and other rolling stock at Tyler. Tyler is a division point. Tyler is the home terminal of the locomotive engines that pull the freight trains."

And it was then proven that Engine No. 560, hauling a train of 26 cars, reached Tyler, Tex., the home terminal of the engine, at 3:30 o'clock a. m., April 23, 1919, and was billed to the roundhouse for repairs at, according to the records of the roundhouse foreman, "3:40 o'clock a. m., April 23, 1919." According to the official train record of that particular train movement, engine 560 was, at the time of reaching the end of its run at Tyler, hauling a through freight train consisting of fourteen carloads of intrastate freight, and twelve carloads of freight originating in Texas and destined to points in other states. Deceased was killed in the afternoon of April 24, 1919, while assisting in making repairs on engine 560 at the time it was in the roundhouse. The repairs on

this engine were completed, and it was marked "O. K., ready for service," at 6 o'clock p. m., April 26, 1919. At 9:30 o'clock a. m. of April 27, 1919, engine 560 left Tyler, Tex., pulling an outgoing through freight train to Texarkana, consisting of 24 loaded cars and 3 empty cars. The train record shows that 10 of the cars were loaded with freight originating in Texas and destined to points in other states; some of the other 14 cars, the number not stated, were loaded with intrastate freight, and the destination of the remaining cars was not shown.

The plaintiff introduced the train record of the operation and movement of engine 560 from April 1, 1919, prior to the death of Mr. Wynne, to June 1, 1919, a period of 60 days, showing the trips or runs made by the engine, the train pulled, and the character of the freight hauled. This train record constitutes all the evidence offered in the trial as to the operations and movements of engine 560; and, in the absence of any evidence to the contrary, it is presumed in point of fact that this engine was assigned and used only in pulling through freight trains. The train records showed that on each and every trip during the period of time mentioned engine 560 pulled a freight train containing cars loaded with intrastate and cars loaded with interstate freight, unless as to the following:

"May 1, 1919. Engine 560, Conductor Stevens, into Tyler 9:50 p. m. from Texarkana. Train load 35 empty box cars moving from Texarkana to Tyler."

"May 27, 1919. Engine 560, extra, Conductor Akers, arriving Tyler 10 a. m. from Texarkana. Train load 34 empty refrigerator cars. Moving Texarkana to Tyler, and one carload hay from Boston, Texas, to Lufkin, Texas."

The agent of appellant, testifying from the company's train records above stated, said:

"These are the only instances in which, from the records, I find trips made by engine 560 within the dates mentioned in which there was not in the train pulled by that engine interstate commerce. Now, recapitulating and going over my evidence of the in-bound trains into Tyler, and the records we examined here the other day and these records here now, I don't think I find, with two possible exceptions, that is, a train load of refrigerator cars to Lufkin, and a load of empty box cars to Texarkana, any trips made by engine 560 in which there was not in the train pulled by that engine interstate commerce, within the dates mentioned, that is, April 1 to June 1, 1919, and from my recollection of the records that we went through the other day I don't think that we find that there was a train that moved into Tyler without an interstate shipment in it; and these records of out-bound trains all show interstate shipments in the train, with the possible exception of the two instances just spoken of. \* \* \* Each one of those trains also contained intrastate shipments or intrastate cars; each train contained intrastate as well

as interstate shipments or cars during the time inquired about, and pulled by engine 560."

And as to the above train of May 27 the same witness, continuing, said:

"On May 27, 1919, that train was extra. That train consisted of a train load of empty refrigerator cars. I traced all of those cars to see whether or not there was any portion of the train of empty refrigerator cars that came from Texarkana to Tyler; that is what I made these records from, the in-bound records, to get the out-bound movements. These empty refrigerator cars were distributed between Tyler and Lufkin at various sidings for storage. Those places at which they were distributed were the places from which, at that season of the year, they were shipping berries or tomatoes. The principal part of those shipments of refrigerator cars from those points on the Lufkin branch were made to interstate points—the principal portion of them were made to interstate points, that is, to points outside of Texas."

The evidence therefore justified the finding of fact, involved in the judgment of the trial court, that (1) the railroad company in question was regularly engaged as a common carrier of interstate commerce as well as of intrastate commerce; and (2) such railroad company regularly and uniformly actually used engine 560, in controversy, both before and after the injury in suit, in hauling through freight trains over its road, and that each of these through freight trains hauled by this engine, with the exception of one train on May 1, 1919, was composed of cars moving interstate commerce and of cars moving intrastate commerce; and (3) such railroad company maintained at Tyler, Tex., its general machine shops and a roundhouse, and there made repairs and "running repairs" on its engines, cars, and other rolling stock; and (4) the deceased was an employee of such railroad company in the roundhouse at Tyler, Tex., assigned to the work of assistant or helper in making repairs on the tender and framework of engines; and (5) engine 560, on which deceased was working at the moment of his death, was, immediately after completing its usual round trip from Tyler, Tex., to Texarkana, Tex., of April 23, 1919, placed temporarily in the roundhouse for "running repairs" to make it safe for service on the road.

Marsh & McIlwaine, of Tyler, for appellant.

Johnson, Edwards & Hughes, of Tyler, for appellee.

LEVY, J. (after stating the facts as above). The appellant requested and the court refused to give a peremptory instruction to the jury to return a verdict for the defendant. The court instructed the jury, as a matter of law, that the character of service the de-



ceased was employed in at the time of his injury was interstate commerce. Error is predicated upon the ruling of the court, upon the ground that—

"there was no evidence that deceased, R. F. Wynne, at the time he received the injury that resulted in his death, was then employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908, governing the liability of an interstate carrier for injury to its employees while employed in interstate commerce; but all the evidence showing, and there being no evidence otherwise showing, that he was at the time engaged in making repairs in the roundhouse upon an engine which had been used in hauling over the railroad company's lines freight trains carrying both intrastate and interstate freight, and which was used in the same way after the accident."

The question for decision is one of pure law, it is believed, of the legal effect attaching to the facts of this case. It is clearly and fully established from the evidence that engine 560, on which deceased at the very moment of his death, in the afternoon of April 24, 1919, was working in the regular course of his employment, (1) was actually used, regularly and uniformly, between terminal points in the state of Texas, in moving through freight trains containing interstate as well as intrastate commerce, and was not exclusively used in moving trains containing intrastate commerce, up to the time it was taken to the roundhouse; and (2) was placed in the roundhouse in Tyler, Tex., for purposes of repair, at 3:40 o'clock a. m., April 23, 1919, after it had reached its terminal station at Tyler, Tex., and had finished its round trip of the day, and remained there in the roundhouse until 6 o'clock p. m., April 26, 1919, when the repairs were completed, and it was then marked "O. K., ready for service," and (3) at 9:30 o'clock a. m., April 27, 1919, actually began to move in its trip from Tyler, Tex., to Texarkana, Tex., hauling cars containing both interstate and intrastate commerce; and (4) was actually used, regularly and uniformly, between points in Texas, in hauling through freight trains containing interstate as well as intrastate freight, and not used exclusively in hauling intrastate freight, after the repairs were made on it. In this connection it further appears that while Tyler, Tex., was the home terminal of engine 560, and it had ended its customary state trip at that place, the journey of the usual interstate shipments it pulled did not end at Tyler, Tex., but were regularly further forwarded in through freight trains to their destination, drawn by other engines likewise used as engine 560 between points in the state. The controlling questions, then, arising for determination, are: (1) Does the fact that the engine was regularly and uniformly used between points in the state

of Texas in hauling commerce destined to points in another state, and not exclusively used in hauling intrastate commerce, before and after the injury, entitle the employee performing and injured in repair work in connection with the engine to the benefit of the provision of the federal act (Act April 22, 1908 [U. S. Comp. St. §§ 8657-8665]), although at the time of its repair the engine finished its round trip and reached its final destination, and was not to go out on its next trip hauling interstate freight until such indefinite time as the works of repair might be finished? Or (2) does the particular fact that the engine had finished its round trip and finally reached its regular terminal station, and was then placed in the roundhouse for purposes of repair, to remain there until such time as the work of repairing might be finished, affirmatively show that the employee performing and injured in the repair work on the engine is not entitled to the provisions of the federal act?

[1] The test of "employment in such service," under the federal act in question, as stated by the United States Supreme Court, is:

"Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" *Shanks v. Ry. Co.*, 239 U. S. 556, 38 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; *Ry. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941.

And applying this test, the Supreme Court has plainly decided that an employee is entitled to the provisions of the act when injured by reason of the work of "repairing" or "operating" or performing duties connected with cars, engines, bridges, tracks, and pumping stations of railroads, because the work so done is indispensable, and so closely related to "interstate transportation" as to constitute it, in practice and legal effect, a part of it, provided the evidence affirmatively shows such instruments or employment are in actual use or service in the transportation of interstate commerce at the given time of "the injury" suffered by the employee. *Pedersen v. Ry. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *Ry. Co. v. Collins*, 253 U. S. 77, 40 Sup. Ct. 450, 64 L. Ed. 790; *Ry. Co. v. Wright*, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; *Ry. Co. v. Otos*, 239 U. S. 349, 36 Sup. Ct. 124, 60 L. Ed. 322; *Ry. Co. v. Bower*, 241 U. S. 470, 36 Sup. Ct. 624, 60 L. Ed. 1107; *Ry. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *Ry. Co. v. Delk*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 591. And unless the evidence affirmatively shows that the instrument, at the given time of "the injury" suffered by the employee, is in actual use in "interstate transportation," the test laid

down is not met and the act does not apply to the case. *Ry. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; *Ry. Co. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397; *Ry. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163. And, further, the intention to use, and the purpose to do, after the injury, viewed from "the time of the injury," are "remote probabilities" or "accidental later events," not having direct relation to the actual use of the instrument or service of employment at the time of the injury. For, as stated in the *Behrens* and *Yurkonis* Cases, *supra*.

"The mere fact that the coal might be, or was intended to be, used in the conduct of interstate commerce after the same was mined and transported" is immaterial under the statute; and "that he [the injured employee] was expected, upon the completion of that task, to engage in another, which would have been a part of interstate commerce," did not make the injury one received by the plaintiff while he was engaged in interstate commerce.

In the cases of *Pedersen* and *Collins*, *supra*, it was said that a bridge, track, or pumping station regularly used as an instrumentality of interstate commerce is employed in interstate transportation at the time the repairs are commenced or work done; such instrumentalities, in their very nature, are assigned to interstate commerce; and there is no distinct or separable interval or given time in which they could be devoted to intrastate commerce or to no commerce at all. They are fixtures permanently devoted, and can be so, to actual use in interstate commerce, and impossible of "use exclusively" in intrastate traffic so long as the railroad is hauling interstate commerce at all. They are never out of use for interstate commerce. A bridge, like the railroad of which it is a component part, is permanently and immediately there in readiness for its next regular and customary use of trains to pass over it, in orderly and schedule time, containing interstate commerce. But the actual relation and connection that railroad bridges and like fixtures have to interstate transportation are not similar and entirely like that of "cars" and "engines" at the given time of "the injury" to the employee. "Cars" and "engines," unlike fixtures, are ambulatory and capable of "movement," and can be only assigned to, or have connection with, "transportation" of persons and property that is "interstate" in its character by means of trips or journeys hauling or moving such commerce. They can be used "exclusively," either regularly or occasionally, in intrastate commerce; and, unlike a bridge or track, an engine or car can terminate and finish each of its regular trips. When the particular trip hauling interstate freight is finished, and it has reached its destination,

then whether it goes out on another trip, or ever goes again in interstate transportation, is entirely dependent upon the subsequent purpose and intention of the company in respect thereto. Its daily work is, in a way, like that of an employee. After an employee of the railroad assigned to interstate work has finished his day's work and has left the premises, he is not engaged in interstate commerce, within the meaning of the act, in the interval until he has returned to the premises and his usual work. And it was because of the evident differences in the actual relation of the two kinds of instrumentalities to interstate commerce at the time of the injury that, in the case of *Ry. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, the *Pedersen* Case, *supra*, was distinguished on the facts by the language of the opinion, *viz.*:

"This [referring to the state of facts proven in the case concerning the use of the engine] is not like the matter of repairs upon a road permanently devoted to commerce among the states."

[2] And it is thought by a majority of this court that the *Winters* Case, *supra*, rules the instant case, in their view that is here now given. In the *Winters* Case, as in the instant case, the injured employee was engaged in making "repairs" in the roundhouse upon "an engine." The engine, before the injury, "had been used in the hauling of freight trains over the defendant's line of road," and "which freight trains hauled both intrastate and interstate commerce," and "it was so used after the plaintiff's injury." It was specifically shown both that the engine was in the roundhouse for repairs only at a time between October 18 and October 21, about three days, and that at the time the engine was placed in the roundhouse it had just finished its trip to Marshalltown, pulling a freight train carrying both interstate and intrastate freight; and the first time it was used after the injury on October 21 it pulled a freight train carrying both interstate and intrastate freight out of Marshalltown. Also see the case in 126 Minn. 260, 148 N. W. 106. The United States Supreme Court held that the facts proven were "not sufficient to bring the case under the act." The ruling was one of pure law, of the legal effect attaching to the facts proven. As outlined by the court, "it does not appear that this engine" (1) "was destined especially to anything more definite than such business as it might be needed for," and (2) "it was not interrupted in an interstate haul to be repaired and go on," and (3) "had not yet begun upon any other interstate business," and (4) "at the moment it was not engaged in either" traffic. The ruling was made notwithstanding the fact appeared affirmatively that the engine on the last trip before re-

pairs, and on the first trip after the injury, was actually used in interstate transportation. The court seemed significantly to observe in respect to such proof of "actual use" of the engine that "it had simply finished some interstate business, and had not yet," meaning at the time of the injury, "begun upon any other." And the court finally and plainly stated that—

"its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

The effect, it is evident, of the ruling is that the evidence respecting the "actual use" of the engine in interstate transportation, both before and after the time it was put in the roundhouse for repairs, could not be legally construed as relating and applicable to "the time of injury," in face of and notwithstanding the affirmative fact that the engine had finished its trip and was in the roundhouse, out of any service in commerce, although temporarily so merely for the purpose of repairs. It is thought the Winters Case was so considered in *Ry. Co. v. Collins*, supra. It is manifest, we believe, that the court did not mean to suggest, and to have the opinion construed as holding, that if the evidence had shown a more constant and regular use of the engine in hauling interstate freight, or was not in "exclusive" intrastate service, that then in that event such evidence of "use" would have changed the ruling. It is thought that the opinion in that case broadly held, and intended to so hold, that an engine can be assigned to interstate commerce only through means of special trip movements, and, as the engine in that case had finished its round trip and reached its final destination and was placed in the roundhouse, out of any service in commerce, although temporarily so merely for purposes of repair, that legally it conclusively appeared as a fact that the engine was not in movement or readiness to move in "interstate transportation," within the meaning of that term, at and during the time the repairs in the roundhouse were being made upon it, and therefore the case was not within the terms of the law showing injury at the precise time "while engaged in interstate transportation." As an engine can only, as there held, be assigned to interstate commerce by means of special trip movement hauling interstate commerce, then this ruling was in accordance with the other decisions of that court in laying down the rule to trace the point of beginning, continuance, and termination of a trip or journey of engines and cars in "interstate transportation."

As the instant case is ruled by the law of the Winters Case, in our view it is concluded that the judgment should be reversed, and judgment here rendered in favor of the appellant, with costs of appeal and of the

trial court. Otherwise the judgment should be affirmed.

The writer, though, does not agree in, and dissents from, the conclusion of the majority of the court that the legal effect attaching to the facts is not to entitle the plaintiff to the provision of the act. We do not disagree that the evidence shows in point of fact that the engine at the time it was placed in the roundhouse for repairs was regularly used in pulling through freight trains containing both intrastate and interstate commerce, and had finished the particular round trip in road service hauling interstate commerce.

The Winters Case is, I think, different from and does not rule the instant case, in that the engine in the instant case was assigned to and regularly used in, pulling through freight trains in interstate transportation of commerce to the time it was placed in the roundhouse for repairs. In the Winters Case the court construed the evidence as a whole, as showing that the engine was not as a fact assigned to regular use in hauling interstate freight, but used in special trip movements in hauling interstate freight, and consequently the fact of its relation or nonrelation to interstate commerce at the time of the injury was dependent upon mere trip movements. And as the engine there did not, under the proof, come within the test of mere trip movements, which is that of actual movement or readiness therefor on the road at the time in hauling cars containing interstate commerce, the court concluded that the facts proven were "not sufficient to bring the case under the act."

The decisions supra, under which is formulated the test mentioned above laid down by the United States Supreme Court, define when and how far a given instrument used in railway transportation is connected with and can be assigned to interstate commerce, which is, as to "cars" and "engines," (1) when the engine or car is assigned to regular use in hauling interstate freight; or, (2) if not assigned to regular use in hauling interstate commerce, then when assigned to use in any special trip or occasion, and in actual movement or readiness therefor, in hauling interstate freight at the time of the injury to the employee; or (3) in actual transit or readiness therefor at the time of the injury, between two states. The term, as used in the test, "engaged in interstate transportation," is not construed, as to "cars" and "engines," by the Supreme Court broadly to relate and have reference, and consequently of application in every case alike, only to actual trip movement or readiness therefor in hauling interstate freight. The term signifies, as construed, the business of interstate commerce and the connection or relation of the engine or car thereto, either regularly or in

special instances. And the simple question in each case left open for determination is that of whether or not the particular instrument or employment in point of fact comes within one of the three groups above mentioned, and, if so, which one. If, for instance, the particular engine or car in point of fact comes within group 2 above, of assignment to use in a special trip movement in hauling interstate commerce, then such engine or car has connection or relation to interstate commerce if there were a beginning, continuance, and no termination of the trip in "interstate transportation." Likewise, if the particular engine or car in point of fact comes within group 1, of assignment to regular use in hauling through freight trains containing interstate commerce, and there is such regular use, then such engine or car has connection or relation to interstate commerce. The holding that a "car" or an "engine" can be assigned to interstate commerce, and is so assigned when set aside and regularly used in interstate transportation, is authorized by the "dining car" case of *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. It is clear from both the *Pedersen* and the *Collins* Cases, *supra*, that a railroad bridge, track, or pumping station can be devoted regularly to the transportation of interstate commerce. The "dual uses" in the two branches of commerce do not necessarily make a bridge, track, or pumping station any the less instrumentalities in interstate commerce, because, in their very nature, there is no sufficient definite and fixed interval of time between the uses of such instrumentalities in the two. Why cannot an "engine" or "car," as much so as fixtures, in fact be devoted regularly to interstate transportation? Then wherein is the difference? The difference is only that, as to cars and engines, which are ambulatory, the proof in each case must affirmatively show that the "car" or "engine" has connection with, or is regularly used in, "interstate" transportation, and not "exclusively" used in "intrastate" transportation generally nor specially on the occasion at the given time of "the injury" in suit. When that question is settled, then the case here is settled. Then the engine being regularly used in interstate transportation, as here, the placing of the engine in the roundhouse for repairs upon completion of the particular round trip on the road would not, it is thought, legally operate to withdraw it from any relation to, or connection with, interstate commerce. Repair of a bridge or track does not operate to withdraw it from interstate commerce. And if, as it was, the engine was connected with, or regularly used in, transportation of interstate commerce at the given time it was placed in the roundhouse for repairs, then, it is believed, neither

the fact that a roundhouse was the place selected for the repairing, nor the length of time here shown required for the repairs, can change the legal situation.

In these views, I conclude that the judgment should be affirmed.

**THOMASON et al. v. McENTIRE et ux.**  
(No. 9522.)

(Court of Civil Appeals of Texas. Fort Worth.  
March 26, 1921. Rehearing Denied May 21,  
1921.)

**1. Appeal and error §768—Appellant's briefs accepted as a proper presentation of case in absence of reply briefs.**

In the absence of reply briefs by appellees, the Court of Civil Appeals is authorized to accept appellant's briefs as a proper presentation of the case, without an examination of the record under court rules 40 and 41 (142 S. W. xiv).

**2. Mines and minerals §58—Lessors held entitled to cancellation of lease procured by fraud.**

Where oil and gas lease was procured by lessee's promise that he would transfer the lease to a corporation, and where such promise was made by the lessee without the intention to perform it and for the fraudulent purpose of deceiving the lessors, and where the lessors were in fact deceived thereby, the lessors, on the lessee's failure to comply with such promise, were entitled to a cancellation of the lease.

**3. Mines and minerals §74 — Purchasers of interest in lease held not innocent purchasers without notice of fraud which had induced execution of lease.**

Lessors were entitled to cancellation of fraudulently procured oil and gas lease as against third persons who had purchased interests in lease from the lessee at a time when they knew or by the exercise of reasonable diligence should have known that the lessee had induced the execution of the lease by a promise to transfer lease to a corporation and to give the lessors stock therein, made without the intention to perform the promise, and for the fraudulent purpose of deceiving the lessors; the third persons not being innocent purchasers without notice.

**4. Limitation of actions §199(2) — Lessors' discovery that lessee had not transferred lease did not start as matter of law running of limitations against action to cancel for fraud.**

Where the lessor was blind and illiterate and had confidence in and trusted the lessee to carry out his promise to transfer the lease to a corporation by which promise lessee had fraudulently induced the lessor to execute the lease without intending to comply therewith, the mere discovery that the lease had not been transferred to the corporation did not as matter of law charge lessor with knowledge of the fraud so as to start the running of the statute of limitations.

5. Limitation of actions  $\S$ 73(3)—Limitations not available defense against wife suing to cancel lease affecting homestead.

In a husband and wife's action to cancel oil and gas lease on their homestead, the defense of limitation was not available against the wife by reason of her coverture.

6. Appeal and error  $\S$ 1096(3) — Opinion on prior appeal not conclusive on subsequent appeal as to issue not raised during first trial.

Opinion on former appeal was not conclusive on a subsequent appeal on issue not raised during the first trial.

#### On Motion for Rehearing.

7. Mines and minerals  $\S$ 58—Evidence held to prove that stock lessee had agreed to give lessors was worthless.

In lessors' action to cancel oil and gas lease, evidence held to prove that corporate stock which lessee had agreed to transfer to lessors was worthless.

Appeal from District Court, Stephens County; W. R. Ely, Judge.

Action by S. J. McEntire and wife against G. J. Thomason, in which G. W. Thomason and another intervened. Judgment for plaintiffs, and defendant and interveners appeal. Affirmed.

See, also, 210 S. W. 563.

H. G. McConnell and E. D. McKenzie, both of Haskell, and Wm. E. Hawkins, of Austin, for appellants.

J. R. Stubblefield, of Eastland, for appellees.

DUNKLIN, J. G. J. Thomason, defendant, and G. W. Thomason and Y. L. Thomason, interveners, have appealed from a judgment in favor of S. J. McEntire and wife, plaintiffs, canceling a certain instrument in writing executed by plaintiffs and alleged to constitute a cloud upon their title to a tract of land situated in Stephens county. That instrument was as follows:

"The State of Texas, County of Stephens:

"Know all men by these presents that we, S. J. McEntire and wife, S. A. McEntire, of Stephens county, Tex., the party of the first part, in consideration of the sum of \$1.00 paid by G. J. Thomason, party of the second part, the receipt of which is hereby acknowledged, and the further consideration hereinafter mentioned, have granted, bargained, sold, and conveyed, and do by these presents grant, bargain, sell, and convey, unto the parties of the second part their heirs and assigns, all of the coal, oil, and gas and other minerals in and under the following described land, together with the right of ingress and egress at all times for the purpose of drilling, mining, and operating for minerals, and to conduct all operations and to lay all pipes and railway necessary for the production, mining, and the transportation of the coal, oil, gas, water, or other minerals, and shall have the right to remove all machinery,

fixtures and improvements placed thereon at any time, reserving, however, to the parties of the first part their proportionate part of cash dividends, which shall be determined by the number of shares of stock owned by them, and such payment made quarterly without demand, said land being described as following, to wit: 160 acres known as S. W.  $\frac{1}{4}$  sec. No. 10, block 7, S. P. Ry. Co. Cert. 17/532, being situated in Stephens county, Tex., and more particularly described in deed records of said county, containing 160 acres, more or less.

"To have and to hold the above-described premises unto the said parties of the second part, their heirs and assigns, upon the following conditions: In case operation for either the drilling of a well for coal, oil, gas, or other minerals is not commenced and prosecuted with due diligence within 15 months from this date on the above-described premises on one or more of their leases owned by parties of the second part, then the second party agrees to pay to the first party the sum of 10 per cent. per annum on the par value of each dollar of stock owned by first party; it being agreed that the first party is to take shares of the capital stock of Diamond Coal Oil & Gas Company at par value as payment of the above-named 10 per cent. until such well or shaft is commenced, and it is agreed that the completion of such well or opening up one mine, gas or oil well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease. Such payment will be made direct to the holder of said stock.

"In case the parties of the second part should bore and discover either coal, oil, gas, or other minerals, then in that event this grant, incumbrance, or conveyance shall be in full force and effect for 20 years from the time of the discovery of said products, and as much longer as coal, oil, gas, water, or other minerals can be produced in paying quantities thereon. Whenever sales are being made of the product on the land above described, such sales shall be added to the sales of the product from all leases owned by the parties of the second part, and a settlement thereof shall be made at the end of each quarter.

"And it is further agreed that the second parties, their heirs and assigns, may at any time hereafter surrender up this grant and be relieved from any part of the contract heretofore entered into that may at that time remain unfulfilled. Then and from thereafter this grant shall be null and void, and no longer binding on either party.

"It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, administrators, and assigns.

"Witness our hands this 18th day of August, A. D. 1909.

"W. R. Power (Witness).

"Heff McEntire (Witness).

his  
"S. J. x McEntire.  
mark  
"S. A. McEntire."

Attached to the instrument is a certificate of a notary in statutory form and sufficient

on its face to bind both grantors, unless the attack made thereon in plaintiffs' pleadings be sustained.

On the same day that plaintiffs executed this instrument G. J. Thomason obtained like instruments covering six other tracts in the same vicinity, owned by persons other than plaintiffs and aggregating 1,568 acres, two of those tracts being owned by M. F. Ham and wife, and later instruments of like character on two other tracts aggregating 593 acres in the same vicinity, the instrument relating to one of those two tracts being dated in October, 1909, and the other dated in May, 1910.

On January 11, 1911, G. J. Thomason executed to his two brothers, G. W. Thomason and Y. L. Thomason, who are interveners herein, a written conveyance of an undivided two-thirds interest in "all the coal, oil, and gas and other minerals in and under" all those nine tracts of land, in the description of which the instruments under which G. J. Thomason claimed and which are mentioned above were specifically referred to; and a cash consideration of \$2,400 paid to G. J. Thomason by interveners was recited. That instrument was never filed for record nor acknowledged before a notary public or other officer.

One of the grounds upon which plaintiffs based their suit for cancellation of the instrument was fraud, which it was alleged was practiced upon them by the defendant, G. J. Thomason, and which induced the execution of the instrument. It was alleged, in substance, that prior to the execution of the instrument the defendant represented that a certain corporation known as the Diamond Coal, Oil & Gas Company had large financial assets sufficient to develop the mineral resources, and especially the coal, which it was believed existed in the vicinity of the plaintiffs' land; that, if the people living in that community would execute to him mineral leases on their respective tracts of land, he would thereafter transfer to said corporation each and all of said leases, and in consideration therefor would give to the lessors stock in the corporation on the basis of \$5 per acre of the land so leased; that it was the defendant's purpose to build, or have the corporation to build, a railroad in the immediate vicinity of the plaintiffs' land for the purpose of shipping all coal that might be mined, and that the said corporation would have abundant resources to perform all such undertaking. It was further alleged that plaintiffs, relying upon the truthfulness and good faith of said representations, were thereby induced to execute the instrument in controversy; that each and all of said representations were false and were fraudulently made by the defendant to induce the execution of the instrument; that the representations so made by the defendant to

transfer all of said leases to said corporation were made with no intention to perform the same; and that, pursuant to the said fraudulent scheme and intent then moving him, the defendant has never transferred any of said leases to said corporation, but has held and claimed them in his own name and right.

Another ground for cancellation was the alleged abandonment of any and all rights or benefits conveyed by the instrument.

A further ground upon which a cancellation was sought was that the property described in the instrument was the homestead of the plaintiffs at the time the instrument was executed, and that the same was not signed and acknowledged by plaintiff Mrs. McEntire as her voluntary act and deed, in compliance with the statutes in such cases made and provided, and that that fact was known to the defendant at the time the instrument was delivered to him.

It was further alleged that the cash consideration of \$1 recited in the instrument was never paid; that while plaintiffs received stock in the corporation at the rate of \$5 per acre for the lease on their land, the same was wholly worthless, and that the corporation had never owned any assets whatever; that the defendant did not begin mining operations within the time specified in the instrument, and after beginning the same did not prosecute the same with diligence; and it was further alleged that plaintiff had never received any stock in the corporation as rentals for delay in beginning operations. The truth of all of plaintiffs' allegations were put in issue by the pleadings of the defendant and interveners.

In their pleadings the interveners further alleged that for a valuable consideration paid and without any notice of the fraud alleged in plaintiffs' petition, or of the alleged defective acknowledgment of the instrument, they had purchased from the defendant G. J. Thomason, on January 11, 1911, an undivided two-thirds interest in all the coal, oil, gas, and other minerals in plaintiffs' land.

The defendant also invoked the statutes of limitation of two years and four years as against the plaintiffs' suit.

The case was tried before a jury on special issues, and the following is the substance of the findings so made:

(1) The defendant, G. J. Thomason, by means of fraudulent representations, as alleged by plaintiffs, did induce the plaintiffs to execute the instrument in controversy.

(2) Plaintiffs filed this suit within two years after discovering such fraud and within two years after they could have discovered it by the exercise of reasonable diligence.

(3) The defendant G. J. Thomason, did not, either directly or indirectly, pay to plaintiffs a valuable consideration for the lease in controversy.

(4) The defendant G. J. Thomason did not

begin drilling operation for coal, oil, gas, or other minerals on plaintiffs' land, or any other land on which he took leases, within 15 months from the date of the plaintiffs' lease, and did not prosecute the drilling operations thereafter begun with due diligence.

(5) Neither defendant nor interveners paid to the plaintiffs 10 per cent. of the par value of the stock held by them in the Diamond Coal, Oil & Gas Company, either in money or in stock in said company.

(6) No well was completed nor mine opened upon plaintiffs' land, or any other land leased to defendant in that vicinity, either by defendant or by the interveners.

(7) The land described in plaintiffs' petition was their homestead at the time the instrument in controversy was executed.

(8) Plaintiff Mrs. S. A. McEntire did not sign that instrument willingly.

(9) The mineral contract in controversy was abandoned by both defendant and interveners.

(10) The defendant and the interveners all abandoned the rights, if any they had, to the land in controversy.

The following were additional special issues requested by the interveners, with the findings of the jury thereon:

"Did G. W. Thomason, in January, 1911, purchase from G. J. Thomason one-third of the minerals conveyed by the lease in controversy without notice of the claims of the plaintiffs in this case or any of them, and did he pay said G. J. Thomason value for the same at the time? Answer: No.

"Did G. W. Thomason, in 1911, purchase from G. J. Thomason one-third of the minerals in and under the land described in plaintiffs' petition for a valuable consideration paid at the time, and without notice of the claims of Mrs. McEntire that she had not willingly executed or acknowledged the lease in controversy? Answer: No.

"Did Y. L. Thomason, in January, 1911, purchase from G. J. Thomason one-third of the minerals conveyed by the lease in controversy without notice of the claims of the plaintiffs in this case, or any of them, and did he pay said G. J. Thomason value for the same at the time? Answer: No.

"Did Y. L. Thomason, in 1911, purchase from G. J. Thomason one-third of the minerals in plaintiffs' petition for a valuable consideration paid at the time and without notice of the claims of Mrs. McEntire that she had not willingly executed or acknowledged the lease in controversy? Answer: No."

The last-mentioned issues requested by the interveners followed and were made subject to the refusal of the court of interveners' request for a peremptory instruction for findings in their favor on those issues.

[1] Counsel for appellees have not seen fit to file briefs in reply to elaborate briefs filed by appellants. In the absence of such reply briefs, we would be authorized to accept appellants' briefs as a proper presenta-

tion of the case without an examination of the record. Rules 40 and 41 (142 S. W. xiv). However, in view of the fact that the jury has found in appellees' favor all issues submitted to them, we have felt it our duty, in justice to them, to examine the record fully, which we have done, and our labors have included the reading of the entire statement of facts. But we do not wish our action in this instance to be taken as a precedent and as an invitation for counsel to thus impose upon this court extraordinary labors which they themselves should perform.

The verdict of the jury imports findings sustaining all of the allegations of fraud on the part of the defendant in plaintiffs' pleadings, and, independent of others of such charges, the evidence was sufficient to sustain the finding that defendant, G. J. Thomason, in order to induce the execution of the instrument in controversy, promised plaintiffs that he would transfer to the Diamond Coal, Oil & Gas Company, a private corporation, all the rights and interest conveyed by that instrument, as well as those acquired by him from other landowners in that vicinity under instruments of like character, and that said promise on the part of the defendant was made by him with no intention to perform it and for the fraudulent purpose of cheating and deceiving the plaintiffs, and that such promise was one of the material inducements which caused plaintiff to execute and deliver the instrument.

[2] The finding by the jury last mentioned, independent of the findings on other issues of fraud, was sufficient to warrant a cancellation of the instrument as against defendant and also interveners if the plea of innocent purchasers by the latter and the defense of limitation urged by the defendant were properly rejected by the jury and trial court. *C., T. & M. C. Ry. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; *Cearley v. May*, 106 Tex. 442, 167 S. W. 725.

In this connection it is proper to note that the evidence shows that the Diamond Coal, Oil & Gas Company was incorporated under the laws of Arizona; that defendant, G. J. Thomason, held at least \$625,000 of the face value of the stock in that company, which was capitalized at \$700,000; that at the time of the execution of the instrument the corporation owned practically no assets and has never owned any; that the stock in the corporation was then and is now practically worthless; that on January 11, 1911, the defendant sold to his two brothers, G. W. and Y. L. Thomason, interveners, an undivided interest of two-thirds of all the leases acquired by him from plaintiffs and other landowners in that vicinity, receiving a cash consideration therefor of \$2,400; and that he had never transferred to the corporation any of said lease so obtained by him. He did not testify upon the trial of this case, although he was represented by

counsel jointly with the interveners, but certain portions of his testimony given upon a former trial of the case were introduced. In that testimony he stated, in substance, that he had agreed with plaintiffs and the other landowners from whom he obtained leases to transfer all of those leases to the Diamond Coal, Oil & Gas Company, and further testified that he held the same in trust for that company; but he did not offer any reason or excuse for not making the transfers to the company, nor does it appear that he rendered any account to that company for the \$2,400 cash received from his brothers for the sale of the two-thirds interest in all those leases. He did testify to the beginning of work on what was called the Ham lease, near plaintiffs' land, prior to his sale to his two brothers. But the evidence further shows that after such sale he, in conjunction with his brothers, carried on the development work on the Ham lease, which resulted in digging two or three holes in the ground in search for coal, one of which extended to a depth of more than 40 feet, about 4 feet square, and at the bottom of which coal was discovered which would be in paying quantities with proper railroad facilities for handling the same, but which facilities have never existed; and, according to the testimony of intervener G. W. Thomason, he and the other interveners paid a large portion, to say the least, of the expense of such development. The evidence warrants the conclusion that after the sale to the interveners they and defendant dealt with the leases under the assumption that the Diamond Coal, Oil & Gas Company had no interest therein.

The finding of the jury that plaintiffs have never received any consideration of value, not even the recited consideration of \$1 cash, for the instrument which they executed, is supported by uncontroverted proof, and a tender of a return of their stock was therefore unnecessary.

[3] The evidence was also sufficient to support the finding that when the interveners purchased from the defendant an undivided two-thirds interest in all of the leases, including the lease by plaintiffs, they knew, or by the exercise of reasonable diligence should have known, that one of the considerations for the lease which plaintiffs executed was the promise of the defendant to transfer that and the other leases to the Diamond Coal, Oil & Gas Company, and to give to plaintiffs stock in that corporation at the rate of \$5 per acre; that such promise by the defendant was made with no intention to perform it and for the fraudulent purpose of deceiving the plaintiffs and thereby inducing them to execute the instrument. That finding was sufficient to overcome the interveners' plea of innocent purchasers without notice.

[4] Furthermore, we are unable to disturb

the finding of the jury that the plaintiffs were guilty of no negligence in failing to discover the fraud practiced upon them by the defendant earlier than two years next preceding the filing of their suit for cancellation. While it is true they could have gone to the deed records of the county and there discovered that no transfer to the oil company had been rendered, yet it cannot be said, as a conclusion of law, that such a discovery, standing alone, as a further conclusion of law, would have made them chargeable with knowledge of the further fact that no such transfer had been executed, and that defendant had never intended to execute one, or that the oil company had never owned any assets. Plaintiff S. J. McEntire was blind, and that he was uneducated is shown by the fact that he signed the instrument with a cross mark, being unable to write his name. Defendant was a boarder at his house when the instrument was executed, and some of his brothers boarded there while development work was in progress. The evidence of the plaintiffs was sufficient to warrant the conclusion that they reposed confidence in the defendant and trusted him to carry out his agreement. While they did testify to an oral promise by the defendant that he would release the lease at any time plaintiffs might desire and that within two years thereafter he declined, upon their request, to do so, yet they further testified that defendant explained to them as his reason for not so doing was, in effect, that he could not do so in justice to the other landowners who had given similar leases for stock in the corporation, which leases were to be transferred to the corporation along with the plaintiffs, and upon the representation that the stock issued to those owners would participate in the benefits of all those leases, including that of the plaintiffs. Apparently the plaintiff decided to accept that explanation by the defendant as reasonable and as satisfactory.

Aside from the facts just related, there was no evidence to suggest to plaintiff that probably the defendant had not complied with his promise to transfer all of the leases to the corporation, and plaintiff S. J. McEntire testified without contradiction that he did not discover that such transfers had not been made until he heard the defendant so testify in court, in August, 1917, on the former trial of this case, that he had not theretofore made such transfers.

In this connection we will add that the statute of limitation of four years, and not the two-year statute, was the only statute that would bar the suit to cancel for fraud, and, while that statute was also pleaded by the defendant, that defense was not submitted to the jury; and, even though it could be said that the finding rejecting the defense of limitation of two years was not supported by the evidence, that would be



no cause for a reversal. Furthermore, interveners filed no plea of limitation at all. *Railway Co. v. Titterington*, supra; *Groesbeck v. Crow*, 91 Tex. 74, 40 S. W. 1028.

Further still, in addition to the absence of any finding by the jury sustaining the defense of limitation of four years, appellants have addressed no specific and single assignment to an implied finding by the trial court overruling that defense, and with evidence to support such a finding. The only instance in which it is urged that that defense was conclusively established by proof is in one of 37 separate and distinct propositions submitted under an assignment complaining of the refusal of defendant's request for a peremptory instruction to the jury to return a verdict in his favor as against plaintiffs' entire cause of action, which instruction was properly refused, in view of the evidence sustaining the allegations of fraud, if for no other reason.

[5] And it may be added that, the land being the homestead of plaintiffs at the time the lease was executed, and having been occupied and claimed by them ever since as such, the defense of limitation, under the statute, was not available against the cause of action asserted by Mrs. S. A. McEntire by reason of her coverture. See opinion in *Dutton v. Rush* (No. 9448), 235 S. W. —, <sup>1</sup> decided by this court March 12, 1921, not yet published, and authorities there cited.

[6] This is the second appeal of this case, the disposition of the former appeal appearing in 210 S. W. 563. In the opinion rendered on that appeal it was said that the evidence introduced upon the first trial was sufficient to warrant a peremptory instruction in favor of the defendant and interveners on their plea of the statute of limitation of two years. That ruling is invoked as decisive of the same issue on this appeal, upon the doctrine of stare decisis. We have examined the record of the former appeal, and find that the testimony of the plaintiff S. J. McEntire on the first trial was in many particulars substantially to the same effect as upon the last trial. He testified on the first trial that the defendant promised plaintiffs to convey the lease in controversy and all others taken in that vicinity to the Diamond Coal, Oil & Gas Company and had not done so; but the plaintiffs' pleadings, upon which the first trial was had, contained no allegation of any such promise, to say nothing of the absence of a further allegation that it was fraudulently made and with no intent to perform. Hence that issue was not in the case, and what was said upon the issue of limitation on the former appeal is not conclusive on this appeal with respect to that issue, at all events.

In their pleading upon which the case was first tried, plaintiffs proceeded upon

the theory that, if any statute of limitation applied to their suit, it was the statute of two years, and their briefs filed here on their first appeal were upon that theory, and, under one assignment of error presented, the contention was expressly made and urged that the statute of limitation of four years was not applicable. On the first trial, the trial judge filed findings and conclusions showing a holding that the suit was barred by limitation, but with no showing whether the two-year or four-year statute was intended. Hence the opinion rendered on the first appeal was upon the theory invited and urged by plaintiffs, who were appellants, that the statute of limitation of two years, and not the statute of four years, should govern, without stopping to determine whether or not that theory was correct; and after that opinion was handed down appellants did not file any motion for rehearing.

In their amended petition upon which the case was last tried plaintiffs, as in their former petition, again alleged facts which, if true, would refute the defense of the two-year statute of limitation, apparently upon the theory that that statute was applicable; but on the last trial judgment was rendered in their favor, and not against them, as was done on the first trial, and in order to reverse it, because of a bar of plaintiffs' suit by limitation, it would be necessary for this court to hold that the defense of four-year limitation was conclusively established, and that, too, in the absence of a proper assignment of error presenting that contention, which clearly cannot be done.

From the foregoing conclusions, it follows that the judgment must be affirmed, irrespective of the other issues discussed in appellant's brief, the determination of which, therefore, becomes unnecessary.

Affirmed.

#### On Motion for Rehearing.

The contention in appellants' motion for rehearing that the acreage covered by instruments obtained by defendant, G. J. Thomason, from persons other than plaintiffs on the same date aggregated 2,602 acres instead of 1,566 acres, as stated in the original opinion, and that the acreage covered by instruments thereafter obtained by the defendant aggregated 673 acres instead of 593 acres, as recited in the opinion, is not sustained by that portion of the statement of facts cited by appellants. But, in the interest of entire accuracy, we will say that the number of tracts first procured, exclusive of the tract in controversy, was nine instead of six, as recited in the opinion, although there were but six owners of those tracts.

In our opinion on original hearing it was said that plaintiffs alleged in their petition, in substance, that in order to induce

<sup>1</sup> Writ of certiorari pending in Supreme Court.

them to execute the instrument in controversy the defendant represented that a certain corporation known as the Diamond Coal, Oil & Gas Company had large financial assets sufficient to develop the mineral resources, and especially the coal, which it was believed existed in the vicinity of plaintiffs' land. That statement of plaintiffs' allegations was correct as far as it went, but in addition to those allegations, and in connection therewith, it was further alleged in the alternative as follows:

"Or he represented that such a corporation would be formed, and that when formed the same would have large financial responsibility and great financial assets, sufficient to develop the mineral resources, and especially the coal which he believed to exist in said community."

And the opinion on original hearing is now corrected to show such additional allegations in plaintiffs' petition.

The fifth special exception to the petition, found in defendant's answer thereto, reads as follows:

"For his fifth special exception this defendant says that plaintiffs' said petition is insufficient in that their allegations in reference to the alleged fraud practiced upon them by alleged representations on the part of this defendant concerning the organization of a corporation, because such allegations are indefinite, uncertain, vague, and not understandable, in that the said plaintiffs do allege in one breath that such representations were to the effect that such a corporation had already been organized, and in the next breath the allegation appears that such a corporation was to be organized, and the exception of this defendant to said petition is that he is entitled to notice by said pleadings of which form of the dilemma plaintiff will take in the trial of the case. In other words, he must elect whether he will say upon the trial that the defendant represented that said corporation had already been organized or whether he will say that he represented that it would in the future be organized."

The order of the court upon that exception sets out the exception in full and concludes as follows:

"And the court, having heard and duly considered said special exception, is of the opinion that the law is against the same, and therefore the defendant's fifth special exception to the plaintiff's second amended original petition is hereby in all things overruled, to which the defendant then and there in open court excepted."

In their motion for rehearing appellants, after referring to the alternative allegations in the petition noted above, said that—

"Said exception was sustained by the trial court, which, however, required and permitted plaintiffs to elect upon which of said alternative allegations they would stand and rely, and plaintiffs thereupon elected to stand upon the allegations to the effect then represented to plaintiffs that such corporation would be creat-

ed in the future, and that, when so organized, it would have such large financial assets," etc.

The correctness of the statement just quoted from the motion is refuted by the order of court, copied above, and we are cited to no other order in the transcript to sustain it, and have found none. Nor have we found in appellants' brief any assignment of error to the ruling of the court on the exception to the petition shown above.

It is also asserted in the motion for rehearing that after the exception to the petition was sustained—

"and in the trial of the case the evidence was accordingly restricted to such representations concerning the future, and the trial court admitted no evidence showing or tending to show that defendant then represented to plaintiffs that such corporation then already was in existence and had large financial assets. In other words, the case was actually tried with the view and upon the theory that the allegations of the plaintiffs concerning such representations relative to such large financial assets were prospective and promissory only, and were not representations as to the existing facts and conditions."

We have found in the transcript and have been cited to nothing indicating any exclusion by the court of evidence to sustain any of those allegations in the petition, in addition to which we find the trial court submits to the jury the following special issue, in which all of plaintiffs' allegations of fraud were included, and in the charge the jury were told:

"You will have with you for your consideration the pleadings in the case, and you will consider the same for a full and complete statement of all of the issues in this case, but you cannot consider them as evidence."

"Issue 1. Did the defendant, G. J. Thomason, by means of fraudulent representations, induce the plaintiffs to execute and deliver the written mineral lease which was offered in evidence in this case, as alleged by the plaintiffs? Answer 'Yes' or 'No.'"

The jury answered the question "Yes."

The plaintiff S. J. McEntire testified in part as follows:

"I will state to the jury just what Mr. G. J. Thomason stated to me when he came to secure this purported contract, just as near as I can. I had a form of contract drawn up there that he read to me and explained to me about it. He said that he was around getting parties to enlist into a company and wanted to get hold of some lands to operate on and he went on and told us as to what their intentions were. He said that the company wanted the lands to operate on to develop the country, and to work on, and that all that would go in with him, that would really have their lands leased and would go in as part of the company and the lands—the stock that we was to get in the company would be \$5, a share in the company to the acre, \$5 to the acre, and we would go into them; when it was developed

each man drew in accordance to what he had invested in the company, the stock that he held in it. \* \* \*

"Relative to what he said about this company as to whether or not it was organized or was going to be organized, it seems like his statement was that it was to be organized, this company, that all that went into it was a part of the company—all that taken stock in with him was a part of the company. He said the capital stock of the company was \$700,000.

"Relative to what he said about what property they would have resources or capital to develop the country, well, there was to be a sum set apart, but just exactly what that sum was I could not say, that was to be set apart for the development of the country.

"With regard to what he said about these leases that he was securing there about turning over these contracts to this company that was to be organized, he said the stock would be transferred into the company; I mean the leases would be transferred to the company. \* \* \*

"I believed the statements that he made to me about what was going to be done and about the organization of this company. I supposed he would do what he said. The promises that he made and the statements that he made there induced me to sign this purported contract. I hesitated at first. I told him we had our little place and had just got it paid out and we didn't wish to get entangled into anything at all, and he said more was the reason that I should go in, being in my condition, that in a short time it would enable me to live independently, and I had nothing to risk at all and all to gain. He said I risked nothing at all. That I was putting up what I had against their capital and means to operate. As to whether or not I called his attention to the fact that I was blind, I never told him anything about that. I hesitated to sign the agreement. I told him I didn't care to go into anything of the kind, that I did not know anything about it and that I was illiterate, unlearned, and a poor man and I didn't want to get my little place entangled in anything at all. He knew I was blind. I never told him anything about it that I remember. I was blind, and he knew I was blind before he came."

The statement of facts fails to show any testimony from G. J. Thomason, or any other witness, contradicting that testimony of S. J. McEntire. Furthermore, appellants' only assignment of error to the first issue submitted by the court does not present the contention embodied in the special exception above. That assignment reads as follows:

"The court erred in overruling defendant's objection to the first special issue submitted, the same being found in subdivision 1 of the objections made to the court's charge, this objection being in words and figures as follows: 'Defendant objects to the first special issue submitted for the reason that there is no evidence to authorize the submission of said issue, and for the further reason that the court does not define nor instruct the jury what fraudulent representations are referred to in said first special issue, and because, further, the answer of said special issue in the affirmative would not

justify or support any judgment in favor of the plaintiffs, because it would not show that the plaintiffs relied upon said representation and believed the same to be true, and because, further, it is shown by the positive testimony of the plaintiff that he did not rely upon said representation, but testified only upon insistent examination by his counsel that he supposed the same was true."

It is insisted that there was no evidence to show that on August 18, 1909, when the instrument in controversy was executed, the Diamond Coal, Oil & Gas Company had then been organized or chartered, and hence there was no proof to sustain the allegation to the effect that it then had no assets. And in this connection the following is said in the motion for rehearing:

"Parenthetically to this assignment, may we not suggest that on August 18, 1909, the Diamond Coal, Oil & Gas Company had not been organized or created, and that its articles of incorporation had not been filed, and that said articles of incorporation were filed subsequently, and that the charter of said corporation was granted by the state of Arizona at a still later date, to wit, August 24, 1909."

But the motion contains no reference to any evidence in the statement of facts to support that statement, and we have found none; hence we decline to give it any weight. Moreover, it was immaterial to plaintiffs' right of recovery that the fraudulent scheme alleged consisted of misrepresentations by the defendant of his intention to organize and charter a corporation which would have large financial assets, to be used in the development of the mineral resources of the land, rather than that such corporation had been already formed and then possessed such assets, if such representations were made with intent to deceive and defraud plaintiffs and with no intent to perform such a promise.

It is insisted further that this court erred in holding that the evidence showed that the stock or the Diamond Coal, Oil & Gas Company is practically worthless, and that we were in error in the statement that the defendant, G. J. Thomason, now holds in trust for the Diamond Coal, Oil & Gas Company an undivided one-third interest in the leases obtained by him from plaintiffs and the other landowners in that vicinity. The testimony of plaintiff McEntire was to the effect that the Diamond Coal, Oil & Gas Company had nothing that he could learn of. It was shown without controversy that none of the leases, or any interest therein, have ever been transferred to that company. Appellant G. W. Thomason, one of the interveners herein, testified on the trial as follows:

"So far as I know, there has never been any transfer of these leases to the Diamond Coal, Oil & Gas Company. I have no knowledge of

that at all. Relative to what the assets of the Diamond Coal, Oil & Gas Company, it had whatever interest, according as I understand it, that they had this property that went in as part of those assets. I do not know of anything else that it had."

Portions of the testimony of G. J. Thomason given on the former trial as shown in the stenographer's transcribed notes were read. He testified in part as follows.

"I have never transferred out of my name the leases or mineral rights. They still stand in my name. I have never transferred any of that to the company. \* \* \* I own about 500—about 640,000 or 625,000 shares of the stock of the Diamond Coal, Oil & Gas Company. The entire capitalization of the company was \$700,000. I paid quite a bit for that 625,000 shares of stock in the company."

Examined by the court:

"If I understand what you mean, I paid no cash consideration for it.

"Q. What did you pay for that 625,000 shares that you got from the Diamond Coal, Oil & Gas Company. A. At the time of the organization, right at that time?

"Q. What did you pay for it at the time you came in possession of it? A. Well, there was development work that was to be one of the means of payment. That was to be paid. That was a part of my obligation. With regard to whom I paid that, I paid that to the development work, the development of this stock.

"Q. Well, who did you pay it to? A. That was the obligation I taken on myself that I was to do that. When we organized, \$700,000 was the amount of shares of the capital stock of this corporation. This was the paid up capital stock. I do not know what that 700,000 shares, capital stock was paid in; I don't get your meaning, Judge. Relative to what we paid to get that charter when we organized this corporation, that was not organized in this state, and under the laws of Arizona we simply pay for the charter and organization. I do not remember how much we paid for the charter. As to whether or not I could give you some idea of what was paid for the charter, I do not remember. About \$100, I judge, was the amount. That did not constitute what was paid for the 700,000 shares of stock. Relative to what else I paid for the \$700,000—700,000 shares of stock in the beginning—well, in the beginning the stock was not considered to be worth much. I never considered that the stock amounted to practically nothing. That stock was a representation of each man's interest in the proposition. \* \* \* As to whether or not I considered the stock worth nothing, well in one sense I did not consider the stock as being worth very much. Of course it was worth something yet at that time we did not consider that it was worth a great deal. With regard to what it was worth, that taken as a representative, I would say between five or ten dollars."

[7] We have found no other evidence in the record as to the value of the stock, and we think the testimony quoted amply supports the conclusion reached that the stock in the Diamond Coal, Oil & Gas Company, which,

plaintiffs received for the lease in controversy, was and is practically worthless. There was no other evidence to show a single transaction by the officers of the corporation, or that it has kept up its legal existence, or that it in fact owns a single dollar of assets. If the corporation is not defunct, or if it owns any assets whatever, such facts are positively within the knowledge of defendant, who holds practically six-sevenths of the stock, and he should have made proof of such facts, if any, to rebut, to say the least, the prima facie showing of an entire lack of assets, or else defendant should have shown some reason why he could not produce such proof. The defendant, G. J. Thomason, further testified as follows:

"Relative to whether or not I own these mineral rights now, they are held in trust by me.

"Q. Do you own these mineral rights personally? Answer that question 'Yes' or 'No.' A. I own my interest in it. The interest that I have in the mineral rights of the McEntire land in this one case would be designated by the amount or between that part of the land; would be the pro rata to the whole and to the amount of stock that Mr. McEntire owns as to the whole amount of the stock of the corporation."

We construed the first statement in connection with the further answer of G. J. Thomason, quoted, to mean that he now holds the unsold one-third interest in the leases mentioned above in trust for the Diamond Coal, Oil & Gas Company. However, appellants now insist that that conclusion was incorrect. As to this, it is sufficient to say that, if our construction of that testimony was incorrect, the error was certainly more favorable to the defense urged against the allegations of fraud, which the jury sustained.

Appellants' motion for rehearing embodies a quotation from briefs filed by McEntire on the former appeal to show error in the recitals in the opinion on this appeal to the effect that plaintiffs' pleadings upon which the case was first tried contained no allegation of a promise by defendant to convey the lease in controversy to the Diamond Coal, Oil & Gas Company. Appellants do not quote from the pleadings, a copy of which is on file in this court, and presumably the original one on file in the trial court, but from an assignment of error appearing in the briefs. To copy those pleadings in full in this opinion would unduly lengthen it. We have again examined them, and find that they sustain what we said in our original opinion on this appeal.

Another criticism of the original opinion on this appeal is as follows:

"The Court of Civil Appeals erred in finding and in holding and in declaring in its opinion that the written conveyance of August 18, 1909, from plaintiffs to defendant, G. J. Thomason,

embodied a clause reading: 'Reserving, however, to the heirs of first party their proportionate part of cash dividends'—the corresponding clause in said conveyance being in fact as follows: 'Reserving, however, to the parties of the first part their proportionate part of the cash dividends.' In other words, instead of the word 'heirs,' said conveyance uses the word 'parties.' In reply to that criticism, we will say that the instrument in controversy was copied in full in the opinion, and, as copied, shows the exact language: 'Reserving, however, to the parties of the first part their proportionate part of the cash dividends,' etc.

And in no part of the opinion have we been able to find any statement to the contrary. But, even if there had been, the language of the instrument itself would control.

The statement in the original opinion that the evidence showed that defendant, G. J. Thomason, was a boarder in plaintiffs' home when the instrument in controversy was executed was erroneous, and it is withdrawn. But plaintiffs both testified without contradiction that he boarded with them when the development work on the Ham lease was in progress, under the defendant's direction and management. Plaintiffs' confidence in defendant at that time bore more materially upon the issue of plaintiffs' failure, sooner to discover the fraud alleged, which was involved in the defense of limitation.

We adhere to the conclusions reached that the evidence amply supports the findings of the jury on the issues heretofore discussed, and are of the opinion that upon those issues the judgment of this court heretofore rendered was correct, irrespective of the further finding by the jury that the rights originally acquired under and by virtue of the instrument in controversy have been abandoned; and the merits and effect of which finding, under the pleading upon which it was based, therefore, will not be determined, because unnecessary.

The motion for rehearing embodies 93 grounds, in addition to which, appellants have filed two separate typewritten arguments, one of 23 pages and the other of 14 pages, and in one of the written arguments it is said:

"It is very apparent from the findings, conclusions, statements, and remarks of this court in its opinion in this case that this court has dipped its brush into the wrong coloring and given to the facts in this case a coat of coloring which they do not deserve. We earnestly insist that this court carefully review this case and correct a number of its findings which will hereafter be pointed out in the different parts of the court's opinion."

In order to properly answer that criticism, we have been compelled to make these conclusions much longer than is usual in disposing of a motion for rehearing. But the unusual length has been caused chiefly by a

plain violation on the part of appellants' counsel of rule 31 (142 S. W. viii), governing procedure in the Courts of Civil Appeals, which requires that statements of proceedings shown in the record shall be made faithfully and upon the professional responsibility of the counsel who makes them; and it is apparent that the violation of that rule was due to the failure of counsel to carefully study the record as they should do, before indulging in such criticism of this court.

The motion for rehearing is overruled.

### TEXAS & P. RY. CO. et al. v. PRUNTY. (No. 8341.)

(Court of Civil Appeals of Texas, Fort Worth,  
March 25, 1916. Rehearing Granted  
May 14, 1921.)

#### 1. Appeal and error $\S$ 231(9)—Objection held not to point out error in charge.

An objection in trial court that instruction was erroneous "because same is not a correct definition of 'inherent vice,' but is ambiguous, unintelligible, misleading, and confusing in a manner calculated to be prejudicial to defendant," fails to point out any error in the charge, and the appellate court might properly refuse to consider it.

#### 2. Carriers $\S$ 230(7)—Instruction defining "inherent vice" held not affirmatively erroneous.

An instruction that "inherent vice" in an animal is some quality or characteristic of the animal that brings about its own injury or destruction, without fault on the part of any other supervening cause, was in the main correct, and no probable error was shown by its submission.

[Ed. Note. —For other definitions, see Words and Phrases, Second Series, Inherent Vice.]

#### 3. Trial $\S$ 260(1)—No error in refusing requested instruction covered by given charges.

There was no error in refusing to give a special charge, where other charges were given virtually covering the requested instruction.

#### 4. Trial $\S$ 194(20)—Charge as to temporary injury to stock held upon weight of evidence.

In an action against a carrier to recover for injuries to animals, the court properly refused to instruct as being upon the weight of the evidence, "even if you should think that the railway company negligently handled the stock en route, and thereby caused them to be damaged and depreciated in value upon their arrival at Decatur, yet if you find that the injuries and depreciation in value were only temporary, and that the stock recovered from such condition thereafter during the time plaintiff kept them, you will take into consideration such recovery or regaining of value in determining the value of the stock at Decatur."

Conner, C. J., dissenting.

Appeal from Wise County Court, J. W. Walker, Judge.

Suit by J. V. Prunty against the Texas & Pacific Railway Company. On appeal by defendant from judgment for plaintiff, questions were certified to the Supreme Court. Judgment of lower court affirmed in conformity with the opinion of the Supreme Court (230 S. W. 396).

McMurray & Gettys, of Decatur, and George Thompson, of Fort Worth, for appellant.

M. W. Burch, of Decatur, and R. F. Spencer, of San Antonio, for appellee.

BUCK, J. This suit was brought by appellee, J. V. Prunty, in the county court of Wise county for the sum of \$360, damages alleged to have been occasioned to a shipment of 20 head of mares and horses and 16 head of colts moved from Toyah, Tex., to Decatur, Tex., over the Texas & Pacific and Fort Worth & Denver City Railways, via Fort Worth, said damages being alleged to have occurred in the switchyards at Fort Worth, and both of the railway companies being made parties defendant.

Defendants answered, denying all of plaintiff's allegations, and alleging that plaintiff's said stock consisted of wild-range stock, mostly mares heavy with foal, which condition and wild nature constituted inherent defects; that, there being only one car of said stock, they necessarily had to be transported on a local freight train, which necessarily had to be frequently stopped along the route to take on and leave freight and to pass other trains; and that if any of plaintiff's said stock were injured or damaged, such damage was occasioned by reason of said inherent vice of the animals, and by reason of the ordinary jolts and jars necessarily incident to the movement of a local freight train.

Plaintiff by supplemental petition denied all the allegations in defendants' said answer.

The case was tried before a jury, and resulted in a verdict and judgment for plaintiff in the sum of \$287.07 against the defendant Texas & Pacific Railway Company, and denying any recovery against the Fort Worth & Denver City Railway Company. From this judgment the Texas & Pacific Railway Company appeals.

The first six assignments of error complain of the admission, over objection, of certain questions and answers, and involve the same question of law. The first assignment complained that—

"The court erred in permitting plaintiff's counsel to ask him, 'What was the difference, if any, between the reasonable market value of the mares at the time and in the condition in which they did arrive and the condition in which they should have arrived, handled with ordinary care and diligence?' To which plain-

tiff answered, 'I think it was any where from \$20 to \$25 difference.'"

The objection made by defendant was that said question and answer called for and involved a conclusion of the witness which he was not qualified to state and concerning a matter properly for the jury and not for the witness, because same involved a mixed question of law and fact, and because there was no allegation to support it, and because it was incompetent, irrelevant, and immaterial. The other questions propounded are very similar to this one, and the objections made thereto were, in substance, the same as here made. We are of the opinion that the assignments should be sustained. As to what constitutes ordinary care and diligence is a question for the jury. *H. & T. C. Ry. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808; *M., K. & T. Ry. Co. v. Brown*, 155 S. W. 979; *H. & T. C. Ry. Co. v. Davis*, 50 Tex. Civ. App. 74, 109 S. W. 422; *G., C. & S. F. Ry. Co. v. Kimble*, 49 Tex. Civ. App. 622, 109 S. W. 235; *I. & G. N. Ry. Co. v. Hamon*, 173 S. W. 613; 17 Cyc. 57, 58; *G., C. & S. F. Ry. Co. v. Bogy*, 178 S. W. 597. In the case of *Railway v. Roberts*, supra, the question of error presented was as to the following question, propounded to plaintiff by his counsel, and the answer thereto, to wit:

"From your own knowledge and experience as a cattleman, and from your experience in shipping cattle to the territory and vicinity over these roads, having gone with several shipments over the roads that these cattle were shipped, what is a reasonable time with which to transport a train of cattle from Llano to Fairfax, when they are transported with ordinary care and diligence?"

To this question and any answer that might be made thereto the defendants objected, on the ground that such question was the mere opinion of the witness on a mixed question of law and fact, and that the determination of what was a reasonable time was one for the jury to reach from all the facts. But the court overruling such objection, the witness made the following answer:

"I have had to make it in 34 hours, and I was thoroughly satisfied anywhere from 30 to 36 hours' (would be a reasonable time to make the trip). In addition to the objection that the witness could not testify to what was a reasonable time within which to transport said cattle, counsel [in the cited case] urged that it was not permissible for the witness to testify what in his opinion is or is not ordinary care and diligence, and that what is ordinary care and diligence was likewise a mixed question of law and fact, to be determined by the court or jury from all of the facts of the particular case; and to permit a witness to give his opinion thereon would be to submit the determination of the very issue of the case to a witness, instead of to the court or jury."

In answer to certified question from the Court of Appeals for the Third District, the

Supreme Court held that the questions and answers submitted did involve a mixed question of law and fact, citing *G., H. & W. Ry. Co. v. Hall*, 78 Tex. 170, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42, and further the court said:

"In answering, if he answered intelligently, the witness must have determined for himself what would constitute ordinary care, and then have deduced, from a consideration of all the elements that would, in his opinion, enter into the question of the time reasonably necessary for the transportation in the exercise of such care, a conclusion as to what that time should be. The elements or facts which should be considered were first to be determined in part by the court in the admission and exclusion of evidence; and the conclusion to be drawn from them, as to the time reasonably required to carry the cattle to their destination with ordinary diligence was then to be drawn by the jury by applying to the facts admitted in evidence their own judgment as to what would constitute ordinary diligence and a reasonable time."

In the instant case the witness would have to decide in his own mind what constituted handling with ordinary care and diligence on the part of the railway company, and the condition the horses would have been in if so handled, before he would be able to intelligently answer the question propounded.

The only case cited by the appellee which seems to be in conflict with the cases hereinabove cited is *K. C., M. & O. Ry. Co. v. West*, 149 S. W. 209, by the Austin Court of Appeals, opinion by Justice Rice. In that case the witness did not answer the question containing the feature objected to in the instant case, and therefore the expression of the opinion by Justice Rice that said question, if it had been answered, would not have been objectionable, is in the nature of obiter dicta. But, be that as it may, we think the question has been definitely and unmistakably decided contrary to the expressions contained in the opinion in the *West Case*, and we are forced to conclude that the trial court erred in admitting this testimony, and that assignments 1 to 6 inclusive, should be sustained.

We think it doubtful as to whether the witness Hub Dillehay sufficiently qualified to admit the testimony complained of in the seventh assignment. But we do not determine whether or not the question raised in said assignment, if standing alone, would justify a reversal.

[1, 2] The court in his charge gave the following definition, to wit:

"Inherent vice" in an animal is some quality or characteristic of the animal that brings about its own injury or destruction without fault on the part of any other supervening cause."

The objection made in the trial court and here urged in the eighth assignment is:

"Because same is not a correct definition of 'inherent vice,' but is ambiguous, unintelligible,

misleading, and confusing in a manner calculated to be prejudicial to defendant."

We do not think in its assignment appellant points out any error in this charge, and for that reason we might properly refuse to consider it (*McGraw v. Railway*, 182 S. W. 417), but if we should consider the assignment, while some change might have been advantageously made in the definition given, we think said definition in the main is correct, and that no probable error is shown by its submission.

[3] We do not find any error in the failure of the court to give the special charge requested by defendants, to the exclusion of which error is assigned in the ninth assignment, especially in view of the fact that in addition to the definition of inherent vice given in the main charge the court gave, at the request of plaintiff, special charge No. 2, and at the request of defendant special charges Nos. 1 and 2, covering virtually the same instruction as requested in the refused charge.

[4] In its tenth assignment appellant urges error to the refusal of the court to give the following charge:

"Even if you should find that the Texas & Pacific Railway Company negligently handled the stock en route and thereby caused them to be damaged and depreciated in value upon their arrival at Decatur, yet if you find that the injuries and depreciation in value were only temporary, and that the stock recovered from such condition thereafter during the time plaintiff kept them, you will take into consideration such recovery or regaining of value in determining the value of the stock at Decatur."

We think such charge would have been upon the weight of the evidence. *G., C. & S. F. Ry. Co. v. Stanley*, 89 Tex. 44, 33 S. W. 109; *M., K. & T. Ry. Co. v. Mulkey & Allen*, 159 S. W. 114; *P. & N. T. Ry. Co. v. Holmes*, 177 S. W. 506; *H. & T. O. Ry. Co. v. Lindsey*, 175 S. W. 709. In the case of *Railway v. Mulkey & Allen*, supra, the Dallas Court of Appeals, in an opinion by Justice Rasbury, and in discussing an assignment based upon the refusal to give a similar charge, says:

"The court below correctly charged the jury on the measure of damages, and permitted the broadest kind of inquiry into the condition of the cattle at the time of their shipment, at the time of their arrival, as well as their condition and improvement while being fed and before they were sold. As we understand it, these are inquiries going to prove or disprove the actual damages, and may be, and doubtless were, considered by the jury in the instant case; but we do not understand that proof of such matters is authority for the court to suggest to the jury in his charge that such facts have been proven and may be considered by the jury in estimating the actual loss. Their admission in evidence is the warrant for their consideration, but the court may not seek out that particular fact, and especially direct the

attention of the jury to the fact that that particular testimony may be considered. The rule is that the actual loss is recoverable; and what the actual loss is is a question to be determined by the jury from all the facts taken and considered as a whole, without special reliance on any particular fact or circumstance"—citing *Railway v. Word*, 51 Tex. Civ. App. 206, 111 S. W. 753.

We need not consider the question raised in the eleventh assignment as to newly discovered evidence, inasmuch as the case has been reversed for the reasons heretofore given, and this question will not be presented in another trial.

Judgment reversed, and the cause remanded as to appellant, but undisturbed as to the Fort Worth & Denver City Railway Company.

CONNER, C. J. (dissenting). In this case the evidence that appellee's horses were delivered to the appellant railway company for transportation in good condition is abundant. It also seems as well established in the evidence that when delivered at their destination they were in a badly injured condition, which was proximately caused by delays and rough handling, chargeable to appellant, and it will be observed in the opinion of the majority that the reversal of the judgment below in appellee's favor is grounded alone upon a single proposition, to wit, that the trial court committed prejudicial error in permitting answer to the following question:

"What was the difference, if any, between the reasonable market value of the mares at the time and in the condition in which they did arrive and in the condition in which they should have arrived, handled with ordinary care and diligence?"

To which the plaintiff answered:

"I think it was anywhere from \$20 to \$25 difference."

The conclusion of the majority that the question and answer were erroneous rests upon the further conclusion that the ruling of our Supreme Court in the case of *H. & T. C. Ry. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808, requires such a holding, but with this latter conclusion the writer most respectfully disagrees. Of the other cases cited by the majority, all of which are predicated upon the Roberts decision, the cases of *Railway Co. v. Davis*, 50 Tex. Civ. App. 74, 109 S. W. 422, and *Railway Co. v. Hamon*, 173 S. W. 613, undoubtedly support the majority conclusion, and to these cases may be added *T. & P. Ry. Co. v. Jones*, 58 Tex. Civ. App. 182, 124 S. W. 194, by this court in which the opinion was written by Mr. Justice Dunklin, and in which also the writer concurred.

Later, however, when the question again came before this court in the case of *Railway Co. v. McIntyre & Hampton*, 152 S. W. 1105, the writer, upon further consideration, en-

tered his dissent, as will be seen by a reference to that case, and he now again reiterates his dissent to the end that, should the parties so desire, the differences in opinion may be harmonized, and the question authoritatively determined by our Supreme Court. As it seems to the writer, the technical difficulties in the administration of the law are complex at the best, and he does not think they should be multiplied by unnecessary or unwarranted extensions of decided cases, and he has not been able to avoid the conviction that the ruling in the present case, and in the other Courts of Civil Appeals cases supporting it, is not warranted by the decision in the case of *Railway Co. v. Roberts*. In the Roberts Case, as will be seen by reference to the question which is set out in the majority opinion, the answer required of the witness was what was a "reasonable time within which to transport" the train of cattle between the points named? This of course was the very question upon which the plaintiff's case rested, and which it was necessary for the jury to determine. If the shipment was "unreasonable" under the circumstances the defendant was necessarily guilty of negligence, and the court, therefore, well said that the question and answer were objectionable as involving a mixed question of law and fact, which was for the jury's determination from all of the evidence. The question in the present case, however, and in the other Courts of Civil Appeals decisions referred to, as it seems to the writer, is quite different. Here the plaintiff was offered as an expert on the question of values, his qualification as such is not attacked, and the question propounded to him merely required an answer as to the difference, if any, in values. To that was the question alone addressed and to that alone was the answer as actually given by the witness directed. It is true that in a sense the interrogatory involved the question, in a collateral way, of how the cattle "should have arrived, handled with ordinary care and diligence," but, as stated, the witness was not requested to give his opinion upon that question. That was a question and an issue to which much evidence in the case was addressed, and which by separate clause of the court's charge was distinctly submitted to the jury. As embodied in the question it was purely hypothetical. In other words, for the purpose of the question the witness was asked to state what the value of the cattle would have been if it be assumed that they arrived in the condition they should have arrived, handled with ordinary care and diligence. It is easily inferable that a witness qualified to speak as to the state of the market at the point of destination could properly give his opinion on market values, even though, he, himself, had never made nor accompanied a cattle shipment, or had any knowledge that would enable him to deter-



mine whether a shipment between given points was, or was not, within a reasonable time and with ordinary care. It is well settled in the authorities that counsel may get the opinion of a qualified witness upon a hypothetical question. See 2 Words and Phrases 2d Series, p. 926, citing Order of United Commercial Travelers of America v. Barnes, 75 Kan. 720, 90 Pac. 293. See, also, 17 Cyc. p. 242. In the authority last cited, it is said:

"Assumption of facts in putting a question might almost be regarded as a test of whether a witness is being examined as an expert. The expert, properly so called, is asked what would be his judgment, upon all or any prescribed part of the facts, as to which evidence has been lawfully admitted by the court, assuming that they are true; provided that a sufficient number of facts are assumed to enable the witness to give an intelligent opinion. Having no facts in mind as the result of observation, it is in this way alone that the proper basis for a reasonable judgment can be furnished. The requirement that the question should be in a hypothetical form, stating facts of which there is some evidence in the case, continues throughout the examination of experts, so far as the attempt to elicit affirmative facts is concerned, and applies equally to cross-examination as to direct, to the redirect as to original case, and to experts introduced either by plaintiff or by defendant."

And in 1 Greenleaf on Evidence (15th Ed.) pp. 579, 580, in speaking of instances in which the opinions of witnesses are competent, it is said:

"And such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself, as proved by other witnesses on the trial. But where scientific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved. And if the facts are doubtful, and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence what is his opinion upon the case on trial, *though he may be asked his opinion upon a similar case, hypothetically stated.*" (Italics those of the writer.)

In the case of Scalf v. Collin County, 80 Tex. 514, 16 S. W. 314, our Supreme Court in ruling that a witness could give his opinion on an issue of sanity vel non, said, among other things:

"Where the issue is one upon which the witness may properly state his opinion, he may do so notwithstanding his answer embraces the very issue on trial."

In the case of C., R. I. & G. Ry. Co. v. Jones, 118 S. W. 759, by the Court of Civil Appeals for the Sixth District, and in which a writ of error was refused, the following question and answer were objected to as invading the province of the jury, viz.:

"What was the market value of these horses at that time if they had been transported properly, and had arrived there without any unnecessary delay?"

To which the witness answered:

"I think they were worth \$100 per head, if they had arrived there in proper condition."

In disposing of the objection the court, among other things, stated:

"Market value is largely a matter of opinion, and it was not error to permit the witness to state his opinion as to the market value of the horses at La Junta had they arrived there in proper condition; it appearing that he was acquainted with the market value at that place of such horses. T. & P. Ry. Co. v. Donovan, 86 Tex. 378, 25 S. W. 10. The answer did not 'invade the province of the jury.' It merely stated the opinion of the witness as to the market value of the horses at La Junta if they had arrived in 'proper condition.' Whether they did arrive there in that condition or not was left, so far as the answer of the witness was concerned, without suggestion one way or the other, to the jury."

In the case of G., C. & S. F. Ry. Co. v. King, 174 S. W. 960, by the Court of Civil Appeals for the Fourth District, it was said, among other things:

"There was no error in permitting the witness to testify as to the market value of the horses in the condition they arrived and what it would have been if they had been delivered in the time and manner they should have been."

The question and answer of the witness in that case is not set out in the opinion, but the statement of the court clearly implies that the opinion of the witness on the question of value was sought upon the contingency assumed that the horses there involved had been delivered "in the time and manner they should have been."

In the case of K. C., M. & O. Ry. Co. v. West, 149 S. W. 206, it was shown, as here, that the plaintiff was an experienced cattleman and familiar with the market value of cattle at the point of destination, and he was asked by his counsel the following question:

"Considering the condition of the cattle when they left Talpa, and the wear and tear incident to their trip of 100 miles, the ordinary wear and tear, the way they are handled with reasonable care, or in the ordinary way, we will say, was there a market for these cattle at Mary Neal and in that section?"

Objection was made to this question:

"On the ground that it assumed that said cattle should have gotten there in good condition, predicated the question on a supposition based on a mixed question of law and fact, for which reason it was improper."

The objection was overruled, and the witness, without answering, was thereupon asked: "What could they have been sold for at

that time?" To which he answered: "Twenty-six dollars a head anyhow." In disposing of the question thus presented, the court said:

"In the first place, it appears that the witness did not answer the question propounded, to which objection was made; but, even if it be so considered, we think the question was proper. It did not call for his opinion upon any mixed question of law and fact, as was done in the case of *H. & T. C. Ry. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808, relied upon by counsel for appellant, where the witness was asked, after stating his experience, what, in his opinion, was a reasonable time within which to transport a train of cattle from Llano to Fairfax, when they are transported with ordinary care and diligence. Here it appeared that the witness knew the exact condition of the cattle when they left Talpa. He was merely requested to state whether or not there was a market value for these cattle at Mary Neal, and what said market value would have been, if they had been handled in the usual or ordinary way in transit. (The question assuming that they were handled in the ordinary way, and taking into consideration the wear and tear incident to such a trip.) It seems to us that an experienced cattleman, who had frequently shipped cattle and who knew the condition of the cattle when shipped, and who was shown to have known their market value at destination, ought to be able to give his opinion as to what such market value would be, provided they had been handled with reasonable care or in the ordinary way, and that to allow such an answer would not infringe the rule laid down in the case last above cited."

The authorities last cited, in the judgment of the writer, are opposed to the conclusion of the majority, and present the better view. He, accordingly, as stated, enters his dissent, and gives it as his opinion that the judgment below should be affirmed.

#### After Response of Supreme Court to Certified Questions.

BUCK, J. The original opinion in this appeal was rendered March 28, 1916. The majority of the court reversed and remanded the cause as to appellant, but left undisturbed the judgment as to the Ft. Worth & Denver City Railway Company. In the opinion of the majority it was held that there was error in the trial court's action in permitting plaintiff's counsel to ask him:

"What was the difference, if any, between the reasonable market value of the mares at the time and in the condition in which they did arrive and the condition in which they should have arrived, handled with ordinary care and diligence?"

To which plaintiff answered:

"I think it was anywhere from \$20 to \$25 difference."

The objection made by the defendant was that said question and answer called for and involved a conclusion of the witness which he was not qualified to state, and concerning a matter properly for the jury, and not for the witness, because same involved a mixed question of law and fact, and because there was no allegation to support it, and because it was incompetent, irrelevant, and immaterial. Chief Justice Conner dissented, holding that the question and answer mentioned was not subject to the objections made by the defendant. On motion for rehearing and to certify, we certified to the Supreme Court the question of the admissibility of the following questions and answers:

"(1) What was the difference, if any, between the reasonable market value of the mares at the time and in the condition in which they did arrive and the condition in which they should have arrived, handled with ordinary care and diligence? Answer: I think it was anywhere from twenty to twenty-five dollars difference.

"(2) What was the difference, if any, in the reasonable market value of the colts at the time they arrived, in the condition they were in, and in the condition in which they have arrived, handled with ordinary care and diligence? Answer: There was anywhere from fifteen to twenty dollars difference.

"(3) What would have been their (the two mares) reasonable market value if handled with ordinary care and diligence? Answer: Eighty-five dollars.

"(4) As to the colts, what would they have been worth if they had been handled with ordinary care and delivered in good condition? Answer: Thirty-five dollars.

"(5) What would the 14 mares have been worth upon their arrival here if they had been handled with ordinary care and had been delivered in good condition? Answer: Well, from \$65 to \$75.

"(6) What was the difference, if any, between the market value of the mares in the condition in which they did arrive and in the condition in which they should have arrived, handled with ordinary care and diligence? Answer: Well, there was a difference, I would judge, from \$15 to \$25."

On April 20, 1921, the Supreme Court answered the certified questions, and held that they were admissible. See 230 S. W. 396. Hence, in obedience to the opinion of the Supreme Court, we set aside the judgment of the majority reversing and remanding the cause, and here overrule all assignments and affirm the judgment below.

**CITY NAT. BANK OF CORPUS CHRISTI v. CRAIG et al. (No. 6581.)**

(Court of Civil Appeals of Texas. San Antonio. June 8, 1921. Rehearing Denied June 29, 1921.)

1. *Lis pendens* §18—Purchaser or incumbrancer has no constructive notice of suit unless notice is filed.

Rev. St. 1911, arts. 6837-6839, prevent the operation of *lis pendens* in any suit or action where a transfer or incumbrance is executed by a party to the suit to a third party for a valuable consideration without notice, unless the notice prescribed is filed in the "*lis pendens* record," and the filing of a return of a sheriff on a levy made by virtue of a writ of attachment was no compliance with the law of *lis pendens*, and could not give notice under the statute.

2. Records §7—Filing has not force of recording.

Without a special provision in a law making filing of a paper equivalent to its record, no filing of such instrument would have the force and effect of a record for the general law is that any grant, deed, or instrument of writing, authorized or required to be recorded, which shall have been duly proven up or acknowledged for record and duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed, or instrument.

3. Attachment §323—Judgment §768(1)—Mere filing of return of attachment not recording thereof.

The filing and record of a copy of a writ of attachment and return thereon is similar to the filing and record of abstracts of judgments, and in both instances the law prescribes what shall be done when the instrument is presented, and in order for either to become a lien it must be actually recorded by the clerk, as provided in Rev. St. 1911, arts. 5616, 6858.

Error from District Court, Nueces County; W. B. Hopkins, Judge.

Suit by the City National Bank of Corpus Christi against Mrs. Nellie M. Craig and others. N. H. Hand intervened, claiming prior lien on land attached by plaintiff. From judgment for plaintiff subject as to its attachment to lien of intervener, the plaintiff brings error. Affirmed.

E. B. Ward, of Corpus Christi, for plaintiff in error.

Kleberg, Stayton & North, of Corpus Christi, for defendants in error.

FLY, C. J. This is a suit by plaintiff in error against defendant in error and Nellie M. Craig, Jr., Henry H. Craig and Kathryn Craig, who, for convenience, will be identified as plaintiff and defendant, to recover on a note for \$5,500, dated May 12, 1915, and another for \$593.35, dated September 11, 1916,

and for foreclosure of an attachment lien on certain lots of land in Nueces county, which were levied upon, on August 11, 1917; a copy of such levy having been filed immediately with the county clerk of Nueces county by the sheriff. N. H. Hand intervened, claiming a superior lien on the land through a deed of trust executed on October 31, 1917, by Nellie M. Craig, given to secure her promissory note for \$2,350. It was alleged that intervener had no notice of the attachment lien at the time the deed of trust was executed and recorded. No jury was demanded, and the court rendered judgment in favor of plaintiff as against defendant for \$9,146.72, and for foreclosure of a deed of trust lien, against Mrs. Nellie M. Craig, Nellie M. Craig, Jr., Henry H. Craig, and Kathryn C. Craig, on certain lots, but secondary as to a lien held by Niles H. Hand on certain described lots, all in Bay View addition to the city of Corpus Christi. Judgment was rendered in favor of Hand against Mrs. Nellie M. Craig for \$3,270 and a foreclosure of a prior lien to that of plaintiff on lots 6, 7, 8, 9, 10, 16, 17, 18, 19, and 20 in block 15, said Bay View addition. Plaintiff sued out a writ of error, making the bond payable to Niles H. Hand alone.

There are but two questions in this case presented by the record, and they are as to whether the filing of the return of the attachment levy on the lots on which Hand claimed a mortgage lien was sufficient to put him on notice as to the attachment lien, or in case it did not, was Hand charged with notice by pendency of the suit. Before the rights of Hand arose, the suit of plaintiff against the Craigs had been filed, and the sheriff had levied on the property in controversy, and filed his return with the county clerk of Nueces county. The matter filed by the sheriff was not recorded by the clerk until after Hand's rights had attached. No statutory *lis pendens* notice was ever filed by plaintiff.

[1] Prior to 1905, the filing of a suit was notice to every one of *lis pendens*, and in order to relieve purchasers and other interested parties of the burdens imposed by the doctrine of pendente lite, as held by the courts of Texas, the following law was passed on April 15, 1905 (Laws 1905, c. 128) by the Twenty-Ninth Legislature:

"During the pendency of any suit or action, legal or equitable, involving the title to real estate, or seeking to establish any legal or equitable estate, interest or right, present or future, vested or contingent, therein or to enforce any lien, charge or incumbrance against the same, any party plaintiff, as also any party defendant seeking affirmative relief therein, may file with the county clerk of each county where such real estate or any part thereof is situated a notice of the pendency of such suit, to be signed by the party filing the same or

his agent or attorney, setting forth the number and style of the cause, the court in which pending, the names of the party thereto, the kind of suit and a description of the land affected."

The second section of the act requires the county clerk to record the notice in a well-bound book, styled "Lis Pendens Record," and to index the same both direct and reverse, under the names of each and all parties to the suit.

In the third section of the act it is provided:

"The pendency of such suit or action shall not prevent effective transfers or incumbrances to a third party for a valuable consideration and without other notice, actual or constructive, by a party to the suit of any such real estate as against a subsequent decree for the adverse party, unless such notice shall have been properly filed under the name of the party attempting to transfer or incumber in the county or counties in which said land is situated."

The sections of the act mentioned are placed in the Revised Statutes as articles 6837, 6838, and 6839. That law had the effect of effectually superseding common-law rules prevailing at the time of its enactment as to notice pendente lite. As said by the Court of Civil Appeals of the Second District, in the case of *Burke-Simmons Co. v. Konz*, 178 S. W. 587:

"The Legislature having assumed to legislate upon the question of lis pendens, and to prescribe steps to be taken and rules to be observed, in order that a litigant, in a suit involving title to land, may invoke its protecting aegis, so far as the statutory regulation extends, in our opinion it supersedes and limits the common-law rules theretofore prevailing with reference thereto."

The statute would be futile and present no excuse for its existence if it did not set aside former rules as to the matter. The Supreme Court denied a writ of error in the case cited, and, as there was only the one point in the case, must necessarily have approved the decision.

In the case of *Pope v. Beauchamp*, 110 Tex. 271, 219 S. W. 447, the Supreme Court views the act of 1905 as viewed by this and the Fort Worth Court of Civil Appeals. In that case the Supreme Court, in holding that the act did not embrace within its scope anything to affect the bona fide purchaser of negotiable paper, said:

"The act can be given no other effect than as preventing the operation of lis pendens in any suit or action of the character mentioned where a transfer or incumbrance is executed by a party to the suit to a third party for a valuable consideration, without notice, unless the notice prescribed in article 6837 has been filed. By its terms the act in no wise purports to extend the effect of notice of any pending

suit or action, but does impose a limitation on the prevailing common-law doctrine. However, there can be no doubt of the legislative purpose to restrict and not to extend the binding force of judgments on those acquiring rights pendente lite in good faith and for value and without actual notice, in the light of the history of statutes of the class to which our statute belongs."

The evidence fails to show that the intervenor had any notice, actual or constructive, of the pendency of the suit, and it follows that the rule of lis pendens would not apply under the facts of this case.

It is not denied that the sheriff filed his return on the levy made by virtue of the writ of attachment, but that would not be a compliance with the law of lis pendens, and could not give notice under the statute, but if it gave notice at all it must be through compliance with the law as embodied in article 6858, in regard to the record of the return of the sheriff therein provided for.

Article 6858 was enacted in 1889, when the common-law rule as to pendente lite was in force and effect, and seems to have been passed with that rule in view, for it seems to have no effect whatever so far as land attached within the county where the suit is pending is concerned. The law says:

"If the real estate levied upon is situated in any county other than the one in which the suit is pending, then, in case of failure to make the record aforesaid, the attachment shall not be valid against subsequent purchasers for value and without notice and subsequent lienholders in good faith."

That was said in a law passed 16 years before the lis pendens statute was enacted, and at a time when the mere pendency of a suit in the county where the land was situated affected every one with notice. Consequently, whether the return in attachment was filed in the county where the suit was pending and the land situated or not, the common-law rule of pendente lite prevailed. This question is adverted to in the case of *Woldert v. Netherhut*, 18 Tex. Civ. App. 602, 46 S. W. 378, but was not decided, although the intimation is that the filing and registration is unnecessary in the county of the suit and the land. It is held in the case of *Davis v. Farwell*, 49 S. W. 657, that the provisions of article 6858 did not have any effect in the county where the suit was pending and the land situated. Both of those cases were decided before the passage of the law of 1905 as to lis pendens.

In the case of *Neville v. Miller*, 171 S. W. 1109, it was held by the Court of Civil Appeals of the Seventh District that the failure to record the levy of attachment in a county different from that in which the suit was pending did not destroy the lien, but that it rendered it invalid as to subsequent purchasers and subsequent lienholders in

good faith, which is merely a reiteration of the statute.

The decisions cited confirm us in the view that the law as embodied in article 6858 did not affect the status of the purchaser of land situated in the county where the suit was pending, whether it was attached or not, for he was affected with notice by the rule of pendente lite, and the recording of the levy of the writ of attachment had no effect whatever. That rule of pendente lite was set aside and abolished by the law of 1905, and the rule of lis pendens would not arise unless the statute was complied with, or notice otherwise of the pendency of the suit was brought home to the subsequent purchaser or lienholder. In other words, the filing and registration of the levy of attachment being totally unnecessary to fix the lien, and in reality having no application to land in the county where the suit was pending, could have no more effect after the law of 1905 was passed than it had before, and the suit where an attachment is levied would be in the same category of any other suit, and would come directly within the purview of the law as to lis pendens. According to the decisions, the law as to registration of returns on levies of attachment writs meant nothing before the lis pendens law was passed, as to lands in the county of venue, and no reason can be assigned now for making it interfere with or take the place of the lis pendens statute.

[2, 3] Even if the provisions of article 6858 should apply, we do not think that plaintiff has brought itself within the scope and efficacy of that statute, because the return of the levy of the attachment was not recorded as required by that law. There is no provision in the law as embodied in article 6858, as to the filing of the copy of the writ and return being notice, but, on the other hand, it is distinctly stated that failure to record the writ and return would render the attachment lien invalid as to subsequent purchasers for value, without notice, and subsequent bona fide lienholders, in counties outside the county of the venue, the only places in which any efficacy is given to the filing and record of the writ and return. The filing of a deed of conveyance, mortgage, deed of trust, and other instruments named in article

6828 is made effective by the very terms of the statute, and for that reason alone such filing is notice. The same is true of notice of lis pendens. Article 6859. Those laws have no applicability to the filing of copies of writs of attachments and returns of levies. That law would come within the provisions of article 6842, which makes the record of any instrument required to be recorded notice to all persons of the existence of such grant, deed, or instrument. Without a special provision in a law making the filing of a paper equivalent to its record, no filing of such instrument would have the force and effect of a record, for the general law is that any grant, deed, or instrument of writing, authorized or required to be recorded, which shall have been duly proven up or acknowledged for record and duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed or instrument.

The filing and record of a copy of a writ of attachment and return thereon is similar to the filing and record of abstracts of judgments, and in both instances the law prescribes what shall be done when the instrument is presented. In both instances the clerk is commanded to file and record the instrument. In the case of abstracts of judgments it has been held that, in order for the abstract to become a lien, it must be actually recorded as provided in chapter 1, tit. 86, Revised Statutes. *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501; *Vidor v. Rawlins*, 93 Tex. 259, 54 S. W. 1026. In the first case cited, the court draws the distinction between the class of instruments which the law declares the filing of them to have the force of a record and those special instruments provided for by certain special laws. In the latter case an actual entry on the record is necessary to give them vitality. To the same effect is the decision in *Vidor v. Rawlins*. The law as found in article 6858 gives a lien only in case of a record, just as the lien is fixed by record and index in article 5616, in the case of abstracts of judgments. The mere levy of the attachment, under the law as it now exists as to lis pendens, was not notice of pendency of a suit. The law mentioned repealed all laws in conflict with it.

The judgment is affirmed.

**WALKER et al. v. LANE. (No. 9553.)**

(Court of Civil Appeals of Texas. Fort Worth.  
April 9, 1921. Rehearing Denied  
May 14, 1921.)

**Mines and minerals** §78(5) — Extensions of time for beginning of oil well constituted estoppel of original lessor.

Extensions of time for the beginning of an oil and gas well, made by the original lessor in conjunction with other joint owners of the land, sublet by the original lessee, held to have constituted an estoppel of the original lessor to claim in equity that the lease on his land which was not sublet was terminated by reason of the failure of the original lessee and his codefendants to begin a well or pay rentals on such land within the first year of the life of the lease, or, at all events, within the six-month period provided for in the first extension agreement.

Appeal from District Court, Palo Pinto County; J. B. Kirth, Judge.

Suit by J. M. Lane against B. B. Walker and others. From judgment for plaintiff, defendants appeal. Judgment reversed, and rendered for defendants.

Penix & Miller and W. L. Dean, all of Mineral Wells, for appellants.

Ritchie & Ranspat and T. P. Perkins, all of Mineral Wells, for appellee.

**DUNKLIN, J.** J. M. Lane and wife, Lucy Lane, and A. B. Lane executed what is usually termed an oil and gas lease to B. B. Walker, on 1,602 acres of land situated in Palo Pinto county. The lease was dated February 21, 1917, and recited a cash consideration paid by the lessee of \$1,602, and the further consideration of the covenants of the lessee therein contained. It stipulated that it should continue in force for a period of 10 years and as much longer thereafter as either oil or gas shall be produced therefrom in paying quantities, and that the lessors should receive, as royalties, one-eighth of all oil produced from the land and a stipulated sum for the gas from each well in which gas might be found. It contained the further stipulation that if operations for drilling a well should not be commenced on the land on or before February 21, 1918, the lease would terminate, unless the lessee should pay to the lessors \$1,602, which would operate and be accepted as a rental for the next succeeding year, and that by paying a like rental before the beginning of each succeeding year the lessee should have the right to continue the lease in force for the full 10-year period without drilling a well. The lease contained this further stipulation:

"The lessee shall have the right to assign this lease, or any portion of the acreage covered thereby, in which last event the lessee shall be liable only for royalties accruing from

operations on the acreage retained, and be liable only for such proportions of the rentals due under said lease as the acreage retained by the lessee bears to the entire acreage covered by said lease and the assigns of the lessee shall have corresponding rights and privileges with respect to said royalties and rentals as to the acreage so assigned."

On February 5, 1918, B. B. Walker, the lessee, transferred and assigned to J. E. Whiteside all rights and interests he acquired under the lease, in and to two tracts covered by the instrument, aggregating 800 acres. The consideration for said assignment, as recited therein, was \$1 cash paid and certain covenants and agreements which were not mere options, and some of which were as follows:

"As a part consideration hereof, grantee agrees to begin the operations for drilling a well on the above-described premises before the 21st day of February, 1918, and that grantee will continue in good faith to sink said well to the productive sand, in what is known as the productive sand of the Caddo field, unless oil or gas is discovered in paying quantities at a lesser depth.

"Grantee agrees to pay all royalties provided for in said Lane lease and assume the conditions thereof so far as same applies to the land hereinabove described.

"It is understood that the said grantor herein is to have an undivided one-sixteenth ( $1/16$ ) interest without cost to him in the first well drilled on said premises and is to have a  $1/16$  interest in all wells drilled thereon thereafter after all expenses of drilling, completing and making same ready for production is paid."

J. M. Lane, who was the sole owner of the tracts, the lease on which Walker did not assign to Whiteside, instituted this suit against B. B. Walker and the Banker's Oil & Refining Company and the Banker's Oil Company, to whom the lease on those tracts was transferred by Walker, to cancel the lease as to those tracts. From a judgment in favor of plaintiff decreeing the cancellation prayed for, the defendants have appealed.

No drilling was done on any part of the land covered by the lease during the first year, and no rentals have ever been paid by any of the defendants on the 800 acres which defendant Walker retained. But plaintiff, Lane, joined by his wife and A. B. Lane, executed and delivered to Whiteside, Walker's assignee, the following extension agreements, and received from him the considerations therefor recited in those agreements:

"State of Texas, County of Palo Pinto.

"Know all men by these presents that whereas A. B. Lane, J. M. Lane and Lucy Lane did execute and deliver to B. B. Walker a certain oil, gas and mineral lease of date the 21st day of February, A. D. 1917, on certain tracts, parcels of land laying, being and situate in Palo Pinto and Stephens counties, Texas, fully described in said lease; and,

"Whereas, the said B. B. Walker duly assigned by this instrument in writing to J. E. Whiteside of Muskogee, Oklahoma, his interest in said oil, gas and mineral lease, on the following described tracts of land, to wit:

"First tract: One hundred sixty (160) acres of land, the N. W. one-fourth ( $\frac{1}{4}$ ) of the S. E. one-fourth ( $\frac{1}{4}$ ) and the S. E. one-fourth ( $\frac{1}{4}$ ) of the S. W. one-fourth ( $\frac{1}{4}$ ) of survey No. 11, block 4, and the N. E. one-fourth ( $\frac{1}{4}$ ) of the S. E. one-fourth ( $\frac{1}{4}$ ) and the S. W. one-fourth of the S. E. one-fourth ( $\frac{1}{4}$ ) of said section 11, block 4.

"Second tract: All of section No. 14, block No. 4, T. & P. Ry. Co., containing 640 acres, more or less, and as part consideration for said assignment, the said J. E. Whiteside agreed to drill a well on said premises; and

"Whereas, owing to the various conditions arising out of transportation brought about by the present war that is now existing, it was impossible for the said J. E. Whiteside to commence the actual drilling of said well by the 21st day of February, 1918, and it was only possible to begin the operations for the drilling of said well by said time:

"Now, therefore, in consideration of the premises and further consideration of eight hundred dollars (\$800.00) cash in hand paid by J. E. Whiteside, the receipt of which is hereby acknowledged and confessed, we, the said A. B. Lane, J. M. Lane and Lucy Lane, do hereby extend the time for the actual beginning of the drilling of said well for six months from and after this date, and extend the conditions and provisions of said lease for said period of time.

"Witness our hands this 10th day of March, A. D. 1918.

[Signed] A. B. Lane,  
"J. M. Lane,  
"Lucy Lane."

"Caddo, Stephens County, Texas,

August 5, 1918.

"This memorandum of agreement made and entered into this fifth day of August, 1918, by and between J. M. Lane, A. B. Lane and Mrs. J. M. Lane, parties of the first part, and Jas. E. Whiteside party of the second part, that, for the consideration of two hundred (\$200.00) dollars, the receipt of which is hereby acknowledged, does hereby grant to the party of the second part an extension of forty (40) days time from the 21st day of August, 1918, to commence the drilling of a well and if the same is not commenced then said extension is dead.

"[Signed] J. M. Lane.

"A. B. Lane.  
"Mrs. J. M. Lane."

The drilling of a well was begun by Whiteside on September 28, 1918, which was within the 40-day extension provided for in the last extension agreement. But no well was ever begun on the land reserved by Walker.

In his original petition plaintiff alleged that no well was begun on the land retained by Walker during the first year of the lease, and that no rentals were paid prior to the expiration of that year for the next succeeding year, and those facts were urged as one of the grounds for the cancellation sought. In their answer defendants pleaded the two ex-

tension agreements copied above as estoppels against plaintiff to claim the cancellation sought, alleging, in substance, that they were made with full knowledge of Whiteside's contract with Walker and the benefits to accrue to the latter by its performance. By supplemental petition, plaintiff pleaded that the second extension agreement with Whiteside was made with the express understanding, by and between the parties thereto, that the same should apply only to the land that had been sublet to Whiteside by Walker, and should be without prejudice to plaintiff's right to cancel the lease as to the land retained by Walker for noncompliance with the conditions and stipulations contained in the original lease executed to him. And in answer to a special issue the jury found the facts to be as so pleaded by the plaintiff, but there was no pleading nor finding by the jury that the first extension agreement was executed with such an understanding and reservation on the part of plaintiff. But in his supplemental petition plaintiff did plead and the jury found that Whiteside did not begin a well within the six-month period allowed in the first extension agreement, and that for that further reason the lease on the land retained by Walker had lapsed.

Whether or not the extensions of time for the beginning of a well, so made by the plaintiff in this suit in conjunction with the other joint owners of the land sublet to Whiteside, but with the intention and understanding with respect to the second extension pleaded by plaintiff and found by the jury, constituted an estoppel of plaintiff to claim, in a court of equity, that the lease on his land which was not sublet to Whiteside was terminated by reason of the failure of Walker and his codefendants to begin a well or pay rentals on that land within the first year of the life of the lease, or, at all events, within the six-month period provided for in the first extension agreement, is the controlling question to be determined on this appeal; and we have concluded that it should be answered in the affirmative.

Walker, the original lessee, had the right to procure the drilling of a well by some person other than himself, and the performance of the contract he obtained from Whiteside would have inured to his benefit in preserving the lease in full force and effect as to the 800 acres retained by him, and that expected benefit was a material consideration which induced him to sublet to Whiteside 800 acres of his lease; and that contract was likewise for the benefit of the lessors. In fact, the development of their land for oil and gas production was one of the material, if not the most material, object or inducement which moved them to execute the lease. The evidence shows without controversy that plaintiff and the other lessors knew of the assignment of the 800 acres of the original

lease and of the contract made by Whiteside to drill the well, and that they acquiesced in and ratified it by extending the time for its performance according to its terms, knowing also that Walker had retained 800 acres of the land leased to him out of which he expected a profit from a fulfillment by Whiteside of his contract to drill a well on the remaining 800 acres, and that such expected profit was a material consideration which induced Walker to sublet 800 acres of his original lease to Whiteside. Instead of asserting their right to cancel the lease in its entirety after they discovered that Whiteside would not be able to begin the well before the expiration of the first year of the lease term, they elected to extend the one already made with Walker. They, as well as Walker, were beneficiaries of the original contract, and they could not in equity accept the benefits accruing to them under it and deny to Walker the benefits likewise due him under the same contract. They could not accept and ratify the contract, in so far as the same was beneficial to them, and reject the rest that was for Walker's benefit. *Bigelow on Estoppel*, p. 744 et seq.; 2 *Black on Rescission & Cancellation*, §§ 594, 595; 21 *Corpus Juris*, p. 1206.

The jury found further that Walker knew of the making of the second extension agreement, and the understanding and intention of the parties thereto, as pleaded by plaintiff prior to September 19, 1918, which was the date the six-month extension provided for in the first extension agreement expired, and a few days before Whiteside began to drill the well, and that he was not induced by the same to forego commencement of drilling operations himself, or to omit the payment of rentals on the 800 acres retained by him. But there was no finding nor contention made by plaintiff that either Walker or any of the defendants was a party to those extension agreements.

The merits of the defense of the estoppel invoked against plaintiff's suit for cancellation did not depend on a showing that defendants were misled to their injury by reason of either or both of the extension agreements made by plaintiff with Whiteside. In the absence of such a showing those agreements made with plaintiff's knowledge of defendants' rights, as stated, had the effect to estop the plaintiff from claiming the cancellation sought, under the doctrines announced in *Bigelow on Estoppel* (8th Ed.) p. 732, as follows:

"A party cannot, either in the courts of litigation or in dealings *pais*, occupy inconsistent positions. Upon that rule election is founded. 'A man shall not be allowed,' in the language of the Scotch law, 'to approbate and reprobate.' And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding—it cannot be withdrawn

without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position."

And again on page 744:

"So also one who accepts the terms of a deed or other contract must accept the same as a whole; one cannot accept part and reject the rest. Thus, a party actively affirming a transaction such as a contract or a purchase, by receiving and retaining money upon it, is estopped thereafter to deny the force of any of its express or implied terms or conditions."

See, also, *Pryor v. Pendleton*, 92 Tex. 384, 47 S. W. 706, 49 S. W. 212; *Mitchell v. Porter*, (Com. App.) 223 S. W. 197; *Rogers v. Trevathan*, 67 Tex. 406, 3 S. W. 569; *Mayo v. Tudor*, 74 Tex. 471, 12 S. W. 117; *Davis v. Mitchell*, 225 S. W. 1117; *Simkins on Equity*, p. 668; 16 Cyc. 791; 40 Cyc. 1895.

In *Pryor v. Pendleton*, 92 Tex. 384, 47 S. W. 706, 49 S. W. 212, cited above, it was held that a daughter who had by an instrument in writing recognized the assumed right of her father to devise the community property of himself and his deceased wife, who had died intestate, was estopped thereafter to claim as heir of her mother a different interest from that devised to her by her father, although it appeared that she had executed the instrument with the understanding that she did not thereby intend to waive her right to claim the interest in the community estate which she had inherited from her mother. And it further appeared in the opinion on the original hearing that other devisees who invoked the estoppel had not been misled to their injury by reason of the act upon which the plea of estoppel was based.

There is a distinction between waiver and estoppel, although the distinction is often difficult to determine, and the two terms are frequently used in the same sense. It is said that intention to waive is one of the essential elements of waiver, as distinguished from estoppel. But that is not true of the character of estoppel invoked in this suit which is sometimes designated in the authorities as estoppel at law, or quasi estoppel, as distinguished from estoppel in pais under the strict rules of equity; and the fact that plaintiff did not intend to waive his right of cancellation as against Walker when he executed the second extension agreement did not exempt him from the operation of the estoppel pleaded. And the same could have been said of the first extension if plaintiff had alleged and proved that it likewise was executed with the same understanding and intention on his part, although there was an absence of such pleading and proof. 16 Cyc. pp. 754 to 795; 40 Cyc. pp. 255 to 263; *Simkins on Equity*, p. 668; *Pryor v. Pendleton*, 92 Tex. 384, 47 S. W. 706, 49 S. W. 212; 40 Cyc. 1895.

For the reasons noted, the judgment of the trial court is reversed, and judgment is here rendered for appellants.



**HOUSTON ELECTRIC CO. v. SCHMIDT.**  
(No. 687.)

(Court of Civil Appeals of Texas. Beaumont.  
June 9, 1921. Rehearing Denied  
June 22, 1921.)

**1. Evidence**  $\Leftrightarrow$  123(1)—Statement of motorman immediately after and at place of accident part of *res gestæ*.

Statement of the motorman immediately after collision of street car with automobile and at the place of the accident that, if he had not thought it was a jitney, he would not have hit it so hard, is admissible as part of the *res gestæ*.

**2. Witnesses**  $\Leftrightarrow$  379(2)—Prior statement admissible to contradict and impeach.

Statement of the motorman just after collision of his car and an automobile that, if he had not thought it was a jitney, he would not have hit it so hard, is admissible to contradict and impeach his testimony that the car was standing still at the time of the collision.

**3. Trial**  $\Leftrightarrow$  120(2)—Statement in argument of a fact not in evidence improper.

Statement in argument of a fact not in evidence, as by plaintiff's counsel that on a previous trial for the same accident defendant had certain witnesses, not now present, and that they testified then, is improper, as depriving defendant of the right to a verdict based solely on the sworn testimony.

**4. Trial**  $\Leftrightarrow$  132—Improper argument held not withdrawn.

Statement of counsel when his argument was objected to, "If \* \* \* [it] is not proper, I will withdraw it," is not a withdrawal thereof.

**5. Trial**  $\Leftrightarrow$  133(6)—Statement held not an instruction to disregard improper argument.

Statement of the court to the jury on objection to statements in argument, "I suppose, maybe, gentlemen, you had better disregard those statements of counsel; it is not evidence, neither one of them," accompanied by a direction to the reporter, "Don't take down what I am saying," does not amount to an instruction to disregard, but is rather calculated to impress the jury with the idea that counsel's remarks were proper.

**6. Trial**  $\Leftrightarrow$  129—Improper argument held not invited error because of opposing counsel's comment on absence of witnesses.

Statement of plaintiff's counsel in argument that on a previous trial for the same accident defendant had certain witnesses (two persons who, as it appeared from the evidence, were in the car with plaintiff at the time of the accident), and that they testified then (facts not in evidence), is not invited error because of defendant's counsel having commented on absence of the witnesses, on plaintiff's not producing them; comment on absence of witnesses who are, or from their connection with the circumstances should be, possessed of a knowledge of the transaction inquired about, and who are not present, being proper, and not beyond the record, but fairly within it.

**7. Appeal and error**  $\Leftrightarrow$  1060(1)—Reversal granted for improper argument where evidence of negligence was close.

The testimony on the issue of negligence being such that the jury could have found either way, and it being impossible to say that it appears probable that the verdict was not influenced by the improper statement in argument of plaintiff's counsel that on a previous trial for the same accident defendant had certain witnesses, not present at the last trial, and that they then testified, reversal will be granted.

Appeal from District Court, Harris County; J. D. Harvey, Judge.

Action by Mary Schmidt against the Houston Electric Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood and Fouts & Patterson, all of Houston, for appellant.

Ward & Ward, of Houston, for appellee.

O'QUINN, J. This appeal is from a \$10,000 judgment awarded appellee, a child about four years of age, on a jury's verdict, for personal injuries received in a collision between the automobile in which she was riding with her father, mother, and others and one of appellant's street cars. The accident happened at night on the Harrisburg road, within the city limits of Houston, the automobile being outbound towards Harrisburg, and the street car inbound towards Houston. The car track was laid in that portion of the street customarily used by vehicles and the public generally, the outside rail being within about two feet of the ditch bordering the street on its south side. This placed the street car, moving towards Houston, on the left side of the center of the driveway and the automobile on the right side. The grounds of negligence alleged by appellee were: (1) Speed of the street car; (2) condition of the tracks; (3) defective headlight on the street car; and (4) discovered peril.

Appellant answered by general demurrer, general denial, and plea of contributory negligence. The case was tried before a jury upon special issues, and the jury returned a verdict against the appellant on every issue submitted. Appellant filed a motion to set aside the verdict and findings of the jury, which was overruled, and judgment was entered for appellee.

[1, 2] By its fifth assignment of error appellant complains:

"The court erred in admitting in evidence the testimony of the witness B. W. Martin with reference to his having heard the motorman say that he thought it was a damn jitney or he would not have hit it so hard, for the reason that witness' answer conclusively shows that it was hearsay testimony, and it is not

shown that the alleged statement of the motorman was made under circumstances that would render it admissible as being *res gestæ*."

The witness testified by deposition, and the questions and answers involved are as follows:

"Interrogatory 21: (a) State what, if any, statements or observations with reference to the collision were made after the collision by the motorman or person who was operating the street car at the time of the collision. (b) When were such statements, if any, made, with reference to the time of the collision?"

"Answer: (a) The motorman said, as he stopped and got out of the street car, just after the collision, that if he had known it was not a jitney he would not have hit it so hard. That he thought it was a damn jitney. He was standing right between the automobile and the street car when he said that, and he was talking to others standing around him. (b) He made the statements just after the collision and after he had gotten out of the street car and walked around in front of his car, and he was about four or six feet from the side of the street car at the time."

The statement of the motorman was made at the place of accident and immediately after its occurrence. All declarations or exclamations uttered by parties to a transaction and which are contemporaneous with and accompany it, and are calculated to throw light upon the motives and intentions of the parties to it, are clearly admissible as part of the *res gestæ*; not only such declarations, but also such as are made under such circumstances as will raise a reasonable presumption that they are spontaneous utterances of thoughts created by or springing out of the transaction itself and so soon after as to exclude the presumption that they were the result of premeditation or design. *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *Railway Co. v. Gray*, 95 Tex. 424, 67 S. W. 763; *McGowen v. McGowen*, 52 Tex. 657; *Railway Co. v. Boring*, 166 S. W. 76. We think the testimony was also admissible to contradict and impeach the testimony of appellant's witness, the motorman in charge of the car, who testified that the car was standing still at the time of the collision. *Railway Co. v. Dyer*, 76 Tex. 156, 13 S. W. 377; *Railway Co. v. Jackson*, 93 Tex. 262, 54 S. W. 1023; *Railway Co. v. McMeans*, 188 S. W. 693; *Main St. Garage v. Eganhouse*, 223 S. W. 318. The assignment is overruled.

[3] In its fourth assignment of error appellant complains of the action of counsel for appellee in his closing argument to the jury. The record reflects the following:

"Be it remembered on the trial of the above styled and numbered cause in this court on the 15th day of March, A. D. 1920, the following proceedings were had: During the argument in the case to the jury W. H. Ward, counsel for plaintiff, used the following lan-

guage: 'And you comment on why Tannhauser and Smith are not here, and I will ask Mr. Withers why they are not here. You had them here before and they testified before.' At this juncture Palmer Hutcheson, counsel for defendant, inquired: 'Is that in the record?' To this Mr. Ward replied: 'No; but you asked the question.' The following then transpired:

"Mr. Hutcheson: Your honor, I think the cause should be argued within the record, and I shall request that you ask counsel to confine it to the record, and request the court to instruct the jury not to consider such statements of counsel.

"The Court: I will give you a bill. I didn't pay attention to either one.

"Judge Ward: They asked the question why witnesses are not here, and I said why they are not here. If the argument is not proper, I will withdraw it.

"The Court: In other words, you may have a bill to show it satisfactorily.

"Mr. Hutcheson: That is satisfactory. George Ward knew enough about it to know what he was doing.

"The Court (addressing the jury): I suppose, maybe, gentlemen, you had better disregard those statements of counsel. It is not evidence, neither one of them. (To the reporter:) Don't take down what I am saying. (Thereupon the court made some remarks to counsel in a light vein.)"

"The court, in making the statement to the jury as above quoted, considered that he was instructing the jury not to consider the statements of counsel for plaintiff to which objection had been made, but counsel for defendant, because of what had occurred, as above shown, did not so consider it, but, on the contrary, considered that he was to have his complete bill showing that the court refused to instruct the jury to disregard said statements of plaintiff's counsel, and for that reason did not make any further request of the court to give any further instructions to the jury on the subject.

"The parties Tannhauser and Smith, referred to by Mr. Ward in his argument, were two occupants of the automobile in which plaintiff was injured at the time of the collision, and they were not produced to testify upon the trial of the case, and defendant's counsel, in their argument, commented upon their absence and raised the point that they had agreed with the theory of the accident advanced by plaintiff, or they would have been produced as witnesses. No objection was interposed by Mr. Ward to this argument.

"Mr. Withers, referred to in the argument, had been a witness for the defendant in the trial of the case, and his testimony showed that he was associated with the claim department of the Houston Electric Company at the time of collision and at all times since. No question whatever was asked Mr. Withers by either party nor did he give any testimony relative thereto as to the whereabouts of Tannhauser and Smith, or their reasons for not being present as witnesses, and there was nothing in the record upon which to base any conclusion that Mr. Withers had anything to do with the absence of these witnesses or knew anything about the cause of their absence.

"To which action of the court defendant then and there in open court excepted, and here now in open court tenders its bill of exceptions

No. 9, and prays that the same be examined, signed, and approved by the court and ordered filed as part of the record in this case, this the 1st day of May, A. D. 1920.

"Presented and agreed to by attorneys for plaintiff.

"This bill of exception examined, found correct, and signed and approved and ordered filed as a part of the record in this case this 24th day of May, 1920. Harvey, Judge Eightieth Judicial District of Texas."

The witnesses mentioned, Tannhauser and Smith, were acquaintances and friends of John Schmidt and family, and at the time of the accident were in the car with Schmidt, the injured party. The record discloses that one of them, Tannhauser, was at the time boarding with the Schmidts, and that at the time of the collision Mrs. Schmidt was sitting on the back seat of the car between Tannhauser and Smith. John Schmidt was dead at the time of the trial in this cause, having died after the trial of the case against appellant, wherein he (Schmidt) was plaintiff. His testimony on the former trial (wherein he was plaintiff) was read by plaintiff in the instant trial. The record herein does not disclose that either Tannhauser or Smith was present at or testified in the trial of the John Schmidt case, or that they or either of them had ever attended court at any time in any case growing out of said accident. No mention of them is made except Mrs. Schmidt testified that they were in the car, and that she sat between them. The effect of counsel's statement and argument was to place before the jury material testimony not given under oath and strongly calculated to influence them in their verdict. It was the statement of a fact not in evidence. The record nowhere discloses that appellant ever had the witnesses summoned or in court in any case, or that appellant had ever used them as witnesses in any case. It conveyed to the jury, as a fact, that the appellant in a case involving the very same facts and matters as the instant case had had the persons named in court as witnesses for appellant, and had used them as witnesses, but that on this occasion, in this case, the appellant had not produced said witnesses, thus making, creating, and leaving the impression with the jury that said witnesses had before testified unfavorably to appellant, and that was the reason for their absence. It is apparent that by his statement, "I will ask Mr. Withers why they are not here; you had them here before and they testified before," counsel could not have had any other purpose than to influence the jury by impressing them with the opinion that appellant had kept the witnesses away. They were absent in the instant trial, so the conclusion was that their testimony must have been damaging to appellant; hence its reason for keeping them away. There was

absolutely no testimony upon which to base such argument, and, whatever may have been the purpose of such argument, it was, in our opinion, calculated to have that effect, and to deprive appellant of its legal right to have a verdict at the hands of the jury, based solely upon the sworn testimony. *Railway Co. v. Wood*, 91 S. W. 803; *Railway Co. v. J. O. Woolridge & Son*, 105 S. W. 845; *Western Union Tel. Co. v. Perry*, 95 Tex. 645, 69 S. W. 131.

[4, 5] Counsel for appellee contends that, when the argument complained of was called to the court's attention, he (counsel) promptly withdrew same, and that the court instructed the jury to disregard it, and that, if the argument was improper, it was cured by said withdrawal and the court's instruction. As shown by the bill of exceptions, the argument was not withdrawn, but, as we view it, substantially repeated when counsel said, "They asked why witnesses are not here, and I said why they are not here," and then said, "If the argument is not proper, I will withdraw it." This was not a withdrawal of the statement. Neither did the court instruct the jury to disregard the statement of counsel. His remark to the jury, "I suppose, maybe, gentlemen, you had better disregard those statements of counsel; it is not evidence, neither one of them," and then, in the presence and hearing of the jury, telling the reporter, "Don't take down what I am saying," did not amount to an instruction to disregard, but was rather calculated to impress the jury with the idea that the remarks and statement of counsel were proper. The issue of negligence was sharply contested—the vital issue in the case—and upon the testimony the jury could have found for either party. The argument was calculated to influence the jury, and the court should have pointedly sustained the objection to same and plainly told the jury to disregard it. *Railway Co. v. Musich*, 33 Tex. Civ. App. 177, 76 S. W. 219; *Railway Co. v. Burton*, 25 Tex. Civ. App. 63, 60 S. W. 316; *Garritty v. Rankin*, 55 S. W. 368; *Hunstock v. Roberts*, 65 S. W. 677.

[6] But counsel for appellee insists that, if the argument was error, it was invited error, for the reason that counsel for appellant went out of the record and commented on the absence of said witnesses, on appellee's not producing said witnesses, and that his statement and argument was in reply thereto. This was not invited error. It has always been considered proper for counsel to comment on the absence of witnesses who are, or from their connection with the circumstances should be, possessed of a knowledge of the transaction inquired about, and who are not present. Comment, under such circumstances, cannot be said to be beyond the record, but fairly within it. *Railway Co. v. Boone*, 105 Tex. 188, 146 S. W.

533; *Freeman v. Vetter*, 61 Tex. Civ. 569, 123 S. W. 909, 130 S. W. 190.


[7] As we have said above, there was testimony introduced from which the jury might have found either way as to negligence. In this state of the record, we cannot say that it appears probable that the verdict of the jury was not influenced by the improper argument of counsel, and, unless it can be so said, the verdict should be set aside. The policy of the appellate courts is to condemn any argument that is not within the facts, and that is especially true in cases involving uncertain damages. *Galveston Electric Co. v. Dickey*, 56 Tex. Civ. App. 490, 120 S. W. 1134; *Dillingham et al. v. Scales*, 78 Tex. 205, 14 S. W. 566.

There are numerous other assignments of error presented, but, as the matters therein urged may not arise upon another trial, we will not discuss them.

For the error discussed, the judgment will be reversed, and the cause remanded.

#### GEE v. LYLES. (No. 710.)

(Court of Civil Appeals of Texas. Beaumont. June 23, 1921. Rehearing Denied June 29, 1921.)

Partition  43—Suit for partition of leasehold interest properly brought in county where land situated; "other property."

Under Rev. St. 1911, art. 1830, subd. 13, providing that suits for partition of lands or other property may be brought in the county where such lands or other property, or a part thereof, may be, suit by one member of a partnership to buy oil leases on lands in Nacogdoches county against the other partner for half expenses incurred, half the proceeds of sales of leases, and for partition of the 570 acres of leases in Nacogdoches county, which had not been sold, was properly brought in Nacogdoches county, and defendant partner's plea of privilege to have the case removed to the county of his residence was improperly sustained; if the leasehold interest involved was not "land," it was "other property."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Action by R. F. Gee against G. W. Lyles and others. From an order sustaining the named defendant's plea of privilege, plaintiff

appeals. Judgment reversed, and cause remanded.

S. M. Adams, of Nacogdoches, for appellant.

Harris & Harris, of Nacogdoches, for appellee.

WALKER, J. This is an appeal by R. F. Gee, plaintiff below, from an order of the district court of Nacogdoches county, sustaining the plea of privilege of G. W. Lyles, one of the defendants below, to have the case removed to the county of his residence. There were other defendants, but, as their interests are not involved in this appeal, we will not discuss their relation to the case.


Gee and Lyles entered into a partnership to buy oil leases on lands in Nacogdoches county. Gee was to do the buying. Each was to pay half of the expense. The leases were to be taken in Lyles' name, and he was then to sell the leases at \$2 per acre, and the proceeds were to be divided equally between them. Gee bought something over 5,000 acres of such leases, all in Nacogdoches county, at an expense of about \$800. Lyles sold all these leases, except 570 acres. The parties were not able to agree on a settlement, and, on the facts as stated, Gee brought this suit, praying for judgment against Lyles for one-half of the expenses incurred by him, one-half of the proceeds of sales of the leases, and for partition of the 570 acres, which had not been sold. Lyles answered by plea of privilege, as above stated, which was duly controverted by appellant. The plea was sustained, and the case ordered transferred to Dallas county.

The court erred in sustaining appellee's plea of privilege. If the leasehold interest in the 570 acres of land in Nacogdoches county, which appellant prayed to have partitioned, was not "lands," it was "other property," within the meaning of subdivision 13, art. 1830, which provides:

" \* \* \* Suits for the partition of lands or other property may be brought in the county where such lands or other property, or a part thereof, may be. \* \* \* "

This interest cost money. It had a market value. It was the subject of litigation. It was property appertaining to lands in Nacogdoches county. Under this article, the venue was properly laid in Nacogdoches county.

The judgment is reversed, and the cause remanded.

 For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**STATE ex rel. POLLOCK v. BECKER, Secretary of State. (No. 22961.)**

(Supreme Court of Missouri, in Banc. Aug. 1, 1921.)

**1. Constitutional law §70(1)—Statutes §35½ — Legislative declaration of necessity preventing referendum not conclusive on courts.**

The Legislature, under Const. art. 4, § 57, could not close a judicial determination as to the real character of any law by saying that such law was "necessary for the immediate preservation of the public peace, health or safety" of the state, and the Supreme Court may examine the face of the Legislative act, and if in fact it is not for the immediate preservation of the public peace, health, or safety of the state, can and will declare the legislative declaration to that effect void and of no effect.

**2. Evidence §11—Judicial knowledge taken of current history.**

Courts take judicial knowledge of current history and judicially know what all know. (Per Graves, J., James T. Blair, C. J., and Walker, J.)

**3. Statutes §184—"Reason of law" life of law.**

There is a familiar maxim, uniform in its application, that the reason of the law is the life of the law, or, as the pedants put it, *ratio legis est anima legis*, the reason of the law meaning the occasion or moving cause of its enactment. (Per Walker, J., James T. Blair, C. J., and Graves, J.)

**4. Evidence §29—Judicial notice taken that statute affects only certain township.**

The court may take judicial notice that a statute, relating to townships which have or may hereafter have a certain population, at present applies to only a certain township in the state. (Per Walker, J., James T. Blair, C. J., and Graves, J.)

**5. Statutes §35½—Exemption from referendum defined; "immediate preservation;" "public peace;" "public safety;" "public health." health."**

The phrase "except as to laws necessary for the immediate preservation of the public peace, health or safety," within Const. art. 4, § 57, exempting such laws from referendum, presupposes real or existing danger and impelling necessity, the word "preservation" presupposing a real or existing danger, "immediate preservation" being indicative of a present impelling necessity with nothing intervening to prevent the removal of the danger, "public peace" meaning that quiet, order and freedom from disturbance guaranteed by law and laws in regard to "public safety," being allied in their application and effect to those enacted to promote the public peace, preserve order, and provide that security to the individual which comes from an observance of law, and "public health" meaning the wholesome sanitary con-

dition of the community at large. (Per Walker, J., James T. Blair, C. J., and Graves, J.)

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Public Peace; First and Second Series, Preservation—Preserve.]

**6. Statutes §181(2)—Construed to avoid absurdity.**

Statutes are not to be construed so as to result in an absurdity. (Per Walker, J., James T. Blair, C. J., and Graves, J.)

**7. Constitutional law §21—Courts not bound by construction placed on adopted provision.**

Although the general rule is that courts are bound by the construction placed upon a constitutional provision taken from the Constitution of another state at the time of its adoption, there are exceptions to such rule, one of which is that where the courts of the adopting state are of the opinion that the foreign construction is erroneous, the borrowed provision does not carry with it the prior construction in the originating state.

**8. Statutes §35½—Acts relating to justices and constables held not exempt from referendum.**

Senate Bills Nos. 4, 5, 6, 7, passed in the spring of 1921 (Laws 1921, pp. 233, 234, 231, 204), amending Rev. St. 1919, §§ 2688, 2689, 2143, and repealing chapter 22, art. 9, including sections 2923-2943, selecting one township, and legislating out of office justices and constables, and permitting governor to appoint successors, held not for the "immediate preservation of the public peace, health and safety" within the meaning of Const. art. 4, § 57, providing that such statutes are not subject to referendum.

Higbee and David E. Blair, JJ., dissenting.

Original proceeding by the State, on the relation of John H. Pollock to compel Charles U. Becker, Secretary of State, to accept and file referendum petition. Writ made permanent.

This is an original proceeding by mandamus instituted in this court by the relator against the respondent, the Secretary of State, seeking to compel him to accept and file four certain referendum petitions, hereinafter to be more fully described, so that the laws mentioned in the petitions may be placed upon the ballots at the next general election of the state for confirmation or rejection by the voters of the state.

The pleadings in the case fully and clearly present the legal proposition presented to this court for determination, and for that reason I shall here present them in full. They are as follows:

**Petition.**

"This action was brought in the name of the state of Missouri at the relation of John H. Pollock against Charles U. Becker, Secretary of State. The petition, which was filed in this court on the 18th day of June, 1921, alleges

that the relator is a resident and citizen of Kansas City, Jackson county, Mo., and a legal voter and qualified elector in said city, county, and state, and at the November election in 1918 was elected justice of the peace within and for Kaw township, in said county and state, for a term of four years, and that the respondent Becker is now the duly elected and acting Secretary of State of the state of Missouri; and the Fifty-First General Assembly convened at Jefferson City January 1, 1921, and adjourned sine die on March 21, 1921, and passed, among others, Senate Bill No. 4 [Laws 1921, p. 233], entitled 'An act to amend section 2688 of the Revised Statutes of Missouri 1919, relating to justices of the peace, abolishing the offices of the justices of the peace elected in districts in certain townships, and providing for the transfer of business pending before such justices;' and Senate Bill No. 5 [Laws 1921, p. 234], entitled, 'An act repealing article 9, including sections 2023 to 2043, inclusive, chapter 22 of the Revised Statutes of Missouri 1919, entitled "justices and constables in townships of two hundred thousand and less than four hundred thousand inhabitants," and enacting a new article in lieu thereof;' and Senate Bill No. 6 [Laws 1921, p. 231], entitled 'An act to amend section 2689 of the Revised Statutes of Missouri 1919, relating to justices of the peace;' and Senate Bill No. 7 [Laws 1921, p. 204], entitled, 'An act amending section 2143 of the Revised Statutes of Missouri 1919, relating to constables, abolishing the office of constable in districts in certain townships and providing for constables in such townships;' that all four of said bills have a common interest and pertain to the same subject, and affect the same parties—that is, said bills abolish the offices of eight justices of the peace and all constables and clerks in Kaw township, Jackson county, Mo. Senate Bill No. 4 provides that on the 1st day of July 1921, the offices of the justices of the peace elected or appointed in districts in all municipal townships containing a city of 100,000 inhabitants and less than 300,000 inhabitants, and the office of clerks to such justices shall be abolished, and all jurisdiction and powers vested in such justices of the peace are vested in other justices of the peace provided for in said bill; Senate Bill No. 5 provides for the election of five justices of the peace in such township at the general election in 1922, and provides that until such election the Governor shall appoint and confer jurisdiction upon such new justices of the peace to make certain rules, etc.; Senate Bill No. 6 provides for the appointment of other justices of the peace by the county court of Jackson county; Senate Bill No. 7 abolishes all of the constables holding office after the 1st day of July, 1921, in said Kaw township, Jackson county, Mo., and provides for the election of new constables at the general election in 1922, and authorizes the Governor to appoint until such general election.

"The petition of relator further alleges that all of said bills were approved by the Governor of Missouri on the 11th day of March, 1921, and that on the 18th day of June, 1921, and within 90 days after the adjournment of the Fifty-First General Assembly, the relator presented to the Secretary of State, in the pres-

ence of the Governor, 1,538 legal referendum petitions, containing the total of 65,248 names of legal voters and qualified electors of the state of Missouri, which petitions were legally signed by more than 5 per cent. of the legal voters and qualified electors in more than two-thirds of the congressional districts of the state of Missouri, asking for a referendum on all four of said Senate Bills in order that the people might, at the general election in 1922, vote for the approval or rejection of said measures; that said Secretary of State, wholly disregarding his duties, and without any legal right or authority, refused to accept, receive, and file said referendum petitions against said bills, and assigned as his sole and only reason for such refusal that said bills were not referable, because each of the bills contained, among other provisions, the following language: "This enactment is hereby declared necessary for the immediate preservation of the public peace, health or safety, within the meaning of section 57, art. 4, of the Constitution of Missouri."

"The petition further alleges that it is not true that said bills, or either of them, are necessary for the immediate preservation of the public peace, health, or safety within the meaning of section 57 of article 4 of the Constitution of Missouri, but that said bills are purely local in their character, and pertain to Jackson county, Mo., only, and that such statements contained in said bills are false and untrue, and that such an attempt on the part of the Legislature to prevent said bills from being referred to the people is unconstitutional and void, and in violation of section 57 of article 4 of the Constitution of Missouri, and that such action on the part of the Secretary of State was and is arbitrary and unfair; that by the refusal of the respondent to accept, receive, and file such referendum petitions, the relator and all other citizens of Missouri have suffered and will suffer irreparable wrong and injury, and the people of the state will be denied their constitutional right to vote for the approval or rejection of said measures, and will be entirely without redress of said wrongs without the interposition and interference of this court by its writ of mandamus.

"The prayer of the petition prays this court to issue its writ of mandamus, directing and commanding respondent as Secretary of State, to forthwith accept, receive, and file in his office at Jefferson City, Mo., all of the said referendum petitions pertaining to said Senate Bills Nos. 4, 5, 6, and 7, and to detach the sheet containing the signatures and affidavits and cause them to be attached to one or more printed copies of the measures so proposed, and to deliver such detached copies of such measures to the relator, and that the respondent be compelled to forthwith transmit to the Attorney General of the state of Missouri a copy thereof in order that said Attorney General shall provide and return to the Secretary of State a ballot title for said measures, and that said respondent be compelled to furnish to each of the county clerks of the state of Missouri a certified copy of the ballot title and numbers of the several measures to be voted upon at the coming general election, and for such other relief as may be found necessary and expedient

to cause the respondent to do that which in justice and right ought to be done.

"After the filing of the petition in this court, relator and respondent entered into a stipulation agreeing that the petition might stand for the alternative writ; that the respondent have until the 28th day of June, 1921, within which to plead; that the cause be submitted to the court upon briefs filed by both parties; that relator have until the 5th day of July, 1921, to file his brief, and that respondent have five days thereafter to file his answer brief, and that relator have three days thereafter if desired, to file reply brief; and that Senate Bills Nos. 4, 5, 6, and 7 be consolidated in one action, and all questions as to joinder be waived."

#### Answer.

"On the 28th day of June, 1921, respondent filed his answer to said petition of mandamus, and in said answer says:

"Admits that relator is a resident and assessed taxpaying citizen of Kansas City, Jackson county, Mo., and is a legal voter and qualified elector in said city, county, and state, and was on the 2d day of November, 1918, elected a justice of the peace within and for Kaw township, Jackson county, Mo., for a term of four years; admits that respondent is and has been the Secretary of State of Missouri since the 10th day of January, 1921; admits that the Fifty-First General Assembly of Missouri convened at Jefferson City on January 5, 1921, and adjourned sine die on the 21st day of March, 1921, and passed, among other acts, Senate Bills Nos. 4, 5, 6, and 7, with the titles as pleaded; alleges that copies of said Senate Bills Nos. 4, 5, 6, and 7 are attached and marked 'Exhibits A, B, C, and D,' and made a part hereof; admits that all four of said bills have a community of interest—that is, said bills are similar, affect the same parties, pertain to the same subject, are companion bills, and one is useless without all; admits that all of said bills were approved by the Governor on the 11th day of March, 1921, and that on the 18th day of June, 1921, in the office of the Secretary of State, and in the presence of respondent and the Governor of Missouri, relator presented as against each of said bills 1,538 referendum petitions, containing a total of 65,248 names of legal voters and qualified electors of the state of Missouri, which said petitions were legally signed by more than 5 per cent. of the legal voters and qualified electors in each of two-thirds of the congressional districts of the state of Missouri, as set out in detail in relator's petition; admits that said petitions were presented in order that said Senate Bills Nos. 4, 5, 6, and 7 might be referred to the people of Missouri for their approval or rejection; admits that, at the time said referendum petitions were presented, relator demanded respondent to accept, receive, and file said petitions against each of said bills, and to detach the sheets containing the signatures and affidavits as alleged in relator's petition, and demanded that respondent forthwith transmit to the Attorney General of the state of Missouri a copy thereof in order that he might provide a ballot title for each of said measures, and demanded that respondent furnish to each of the county clerks of the state of Missouri

a certified copy of the ballot titles and numbers of the several measures to be voted upon at the coming general election, and demanded that respondent fully comply with chapter 47 of the Revised Statutes of Missouri 1919, and other laws appertaining to the referendum acts of the Legislature; and admits that respondent refused to accept, receive, and file said referendum petitions against each and all of said bills; denies that in refusing to accept, receive, and file said petitions respondent wholly disregarded his duties as Secretary of State; admits that each of said bills contained among other provisions, the following language: 'This enactment is hereby declared necessary for the immediate preservation of the public peace, health and safety, within the meaning of section 57 of article 4 of the Constitution of Missouri.'

"Denies that it is not true that said bills, or either of them, are necessary for the immediate preservation of the public peace, health, and safety within the meaning of section 57 of article 4 of the Constitution of Missouri; denies that said bills, and each of them, are purely local in their character, and pertain to Jackson county only, and do not affect the citizenship of Missouri in any particulars; denies that the statement contained in each of said bills is false and untrue, and denies that such statement does not prevent said bills from being referred to the people for their approval or rejection, and that the action of the Legislature in inserting said statements in said bills was unconstitutional and void, and in violation of section 57 of article 4 of the Constitution of Missouri; and denies that the action of respondent as Secretary of State was and is arbitrary, unfair, and in violation of section 57 of article 4 of the Constitution of Missouri, or with any other provision of the Constitution; denies that by his refusal to accept, receive, and file such referendum petitions the relator and other citizens of Missouri have suffered, and will suffer, irreparable wrong and injury, and the people of the state be denied any constitutional right whatsoever by reason of his said action; denies each and every allegation contained in relator's petition and alternative writ of mandamus not herein expressly admitted. Further answering, respondent states that he refused, and still refuses, to accept, receive, and file the referendum petitions tendered by the relator for the following reasons:

"(1) That said Senate Bills Nos. 4, 5, 6, and 7, and each of them, contain the following language: 'This enactment is hereby declared necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 57 of article 4 of the Constitution of Missouri.'

"Alleges that by reason of said legislative declaration contained in each of said bills, and by reason of the provisions of section 57 of article 4 of the Constitution of Missouri, said bills are not subject to, but are excepted from, the referendum.

"(2) That said bills, and each of them, are necessary for the immediate preservation of the public peace, health, and safety, and that therefore, by the provisions of section 57 of article 4 of the Constitution of Missouri, said bills are

not subject to the referendum; and alleges that, having made return fully to the relator's petition and the alternative writ of mandamus herein, respondent prays the court that the peremptory writ of mandamus prayed for by relator be denied."

#### Reply.

"On the 30th day of June, 1921, relator filed his reply to the answer of the respondent as follows:

"Admits that said Senate Bills Nos. 4, 5, 6, and 7, and each of them, contained the following language: 'This enactment is hereby declared necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 57 of article 4 of the Constitution of Missouri.'

"Denies that by reason of said legislative declaration contained in each of said bills, and by reason of the provisions of section 57 of article 4 of the Constitution of Missouri, said bills are not subject to, but are excepted from, the referendum; denies that said bills, and each of them, are necessary for the immediate preservation of the public peace, health, and safety, and therefore, by the provisions of section 57 of article 4 of the Constitution of Missouri, said bills are not subject to the referendum; further alleges that said statement in each of said bills is false and untrue, and in violation of section 57 of article 4 of the Constitution of Missouri, and that said bills are not excepted from the referendum by reason of said statement; and further alleges that it is not true that said bills, or either of them, are necessary for the immediate preservation of the public peace, health, and safety, and alleges that said bills are purely local in their character, and simply provide for legislating out of office eight justices of the peace and eight constables in one township (Kaw) in the entire state of Missouri, and that the bills are not in any sense necessary for the immediate preservation of the public peace, health, and safety.

"We submit, therefore, that there is simply one question for this court to determine, and that is whether or not the adoption by the Legislature of the 'peace, health, and safety clause' excepts these bills from the referendum. That is, May a Legislature select only one township in the entire state of Missouri and legislate out of office eight justices of the peace and constables who have been elected for a four-year term, and authorize the Governor to appoint their successors until the next general election? By stipulation filed and the pleadings, all other questions are eliminated, and the court is called upon to determine the one legal question involved."

John T. Barker, of Kansas City, and John M. Atkinson, of St. Louis, for relator.

Jesse W. Barrett, Atty. Gen., and Merrill E. Otis and Albert Miller, Asst. Attys. Gen., for respondent.

Wilbur F. Spottswood, of Kansas City, amicus curiæ.

WOODSON, J. (after stating the facts as above). There is but a single legal proposition presented by this record to this court for

determination, and that is, Has the Legislature of the state the constitutional authority under section 57, art. 4, of the Constitution, to enact a law, and debar the power of the courts of the state from passing upon the question as to whether or not the law is subject to referendum by adding thereto the words, "This enactment is hereby declared necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 57 of article 4 of the Constitution of Missouri"? Said section, in so far as here necessary, reads as follows:

"The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters in each of at least two-thirds of the congressional districts in the state shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions and for the support of public schools) either by the petitions signed by five per cent. of the legal voters in each of at least two-thirds of the congressional districts in the state, or by the legislative assembly, as other bills are enacted."

This question has been most elaborately and ably discussed by counsel for the respective parties, and all the authorities bearing upon the question from the various states of the Union have been cited; and, after a thorough consideration of the same, I am fully satisfied that the law of the case was, and is, fully and correctly declared by Judge Graves in the case of *State ex rel. v. Sullivan*, 224 S. W. 327, where the same legal proposition was presented to this court for determination that is here presented by this case. I fully concurred in the views as there expressed by Judge Graves, and adopt them as my views of the law of this case. While that opinion was not concurred in by a unanimous opinion of the court, yet there was but one dissent as to the law as there expressed regarding the question here presented. Judges Williamson, Goode, Blair and Williams dissented as to certain phases of the Graves opinion, but they had nothing to do with the question here under consideration.

For the reasons stated, I am of the opinion



that the writ of mandamus should be made permanent. It is so ordered.

GRAVES, J. (concurring). [1] I concur in the law announced by our Brother WOODSON in this case. He adopts what the writer said in paragraph 5 of the opinion in the case of *State ex rel. Westhues et al. v. Sullivan*, 224 S. W. loc. cit. 337 et seq. We there ruled upon what appeared to us to be the weight of authority, and the very reason of the matter, that the Legislature, under section 57 of article 4 of our Constitution, could not close judicial determination as to the real character of any law, by saying that such law was "necessary for the immediate preservation of the public peace, health or safety" of the state. We further said that this court could examine the face of the legislative act, and if in fact it was not for "the immediate preservation of the public peace, health or safety" of the state, we could and would declare the legislative declaration to the effect that it was "necessary for the immediate preservation of the public peace, health or safety" of the state void, and of no effect, as being in conflict with said constitutional provision, and the spirit thereof. We shall not reargue this naked principle of law which our Brother has adopted as his views. Nor would we write at all in this case, but for the fact that our learned associate has not discussed the character of the legislative acts before us at this time. He sets out an outline of them, and ordinarily this would, or should, suffice. In this record we find that learned counsel for respondent insist (1) that we borrowed our constitutional provision from Oregon, and are bound by the construction which the Supreme Court of that state placed upon it, before our adoption, and (2) that the laws here involved are, in fact, necessary for the "immediate preservation of the peace, health, or safety" of Missouri. The questions are seriously presented, and should be seriously considered. In their order we shall consider them, and such other contentions as may require notice.

I. It has been suggested that the views of the writer, expressed in paragraph 5 of the opinion in *State ex rel. Westhues v. Sullivan*, 224 S. W. loc. cit. 337, was obiter, and was only interesting "in view of the fact that the question might arise in futuro." It is true that a majority of my Brothers were of opinion that such case was decided before reaching that question, but counsel on both sides conceived the question to be thoroughly in the case, and on that theory briefed and vehemently argued it. What was written was in response to that insistence, and it was written after full investigation, not only of all the cases cited, but of all that could be found. It was written in exact coolness and deliberation, and far from a battle line, such as surrounds the instant case. But even obiter may express good law, and we think

this alleged obiter does express the law as well as the common sense of the question.

II. The general rule is that where a statute or a constitutional provision is borrowed from another state, and has received a construction in the initial state by the highest court of that state, the presumption is that the borrowing state adopted it in the light of such construction. This, however, is only a rule of statutory construction, and the exceptions to the rule are as ancient as the rule itself. When we say "general rule" above, we mean that such is the frequent expression of the courts. This court has often given similar expressions, where the question was under consideration. We have likewise given expression as to the exceptions. Nowhere are these exceptions more concisely stated than in 25 R. C. L. p. 1073; whereat it is said:

"The general rule just stated as to the construction of adopted statutes is by no means absolute or imperative on the courts of the adopting state, but is subject to numerous exceptions. The rule that the adoption of a foreign statute carries with it the prior construction in the originating state has been held to be applicable only where the terms of the statute are of doubtful import, so as to require construction. So the rule has been declared to be inapplicable where radical or material changes are made in the statute, where the statute had been materially changed by amendment, after the decisions construing it and before adoption, where the foreign construction is not in harmony with the constitution of the adopting state, or is contrary to the spirit and policy of the jurisprudence of the adopting state, or where the courts of the adopting state are clearly of the opinion that the foreign construction is erroneous, or that its application would lead to a denial of a substantial right."

To like effect is 36 Cyc. pp. 1154, 1155:

"Where the Legislature enacts a provision taken from a statute of another state or country, in which the language of the act has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with that construction. This rule of construction, however, while recognized by all the courts, is subject to a number of limitations. The construction placed upon the statute by courts of the state from which it was adopted is regarded as persuasive, and indeed as entitled to very great weight with the courts of the adopting state, but not as conclusive; and it will not be applied where it would be inconsistent with the constitution of the adopting state or contrary to the spirit and policy of its laws, or is regarded as unsound in principle and against the weight of authority."

In each of the foregoing quotations the italics are ours. Under the rule the court's interpretation to be considered is the interpretation given before the adoption. It could not be otherwise, because there could be no

presumption that a given construction had been adopted, with the adoption of the statute, unless the construction preceded the adoption. The cases all so hold, and had to so hold, by the very reason of the thing. In the early case of *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 856, this court, through Brace, J., found that we had borrowed an English statute which had been previously construed in a given way not once, but several times, before our adoption. This court refused to follow those constructions, because not consonant with the better reasoning of later cases. Some states do not recognize the rule at all, because a statute transplanted from one state system of laws to another state system of laws must be made to harmonize with the latter rather than the former. Many states hold that the previous construction is very persuasive, but not binding. The cases can be gathered from the texts and notes thereunder which we have cited supra.

The exception to the rule uppermost in our mind is that expressed in the terms, "or where the courts of the adopting state are clearly of the opinion that the foreign construction is erroneous, or that its application would lead to a denial of a substantial right." The *Kadderly Case*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, from Oregon, does not announce sound doctrine. The Washington court repudiated it, and their constitutional provision was not adopted until four years after ours, and long after the *Kadderly Case*. Our Constitution provides both for a legislative referendum and a referendum by the people. It is absolutely against all reason to rule that the Legislature can, by trick and chicanery, through a declaration against the very face of the bill, cut the people off from the constitutional rights to refer all measures, and yet retain the legislative right. In what we ruled in *Sullivan's Case* we had in mind all rules of statutory construction, as well as all exceptions to such rules. We have recognized the exceptions before (109 Mo. supra), but exercise the same privilege in that case. As said there, to hold that the Legislature could, by the use of a declaration to the effect that the given bill was "necessary for the immediate peace, health or safety" of the state, when in fact the bill itself showed no emergency, would be to destroy the constitutional provision. Neither court nor Legislature should so construe a Constitution as to make it self-destructive. But after all the section of the bill making this declaration of great emergency must be construed with all the other provisions of the bill, and if, when so construed by a court, it fails to measure up to the spirit of the Constitution, it must fail, we said enough in *Sullivan's Case*, and will not further reiterate.

III. [2] Of these bills, which change in a way the system of justices' courts in Jackson county and cut down the number of such

courts, and the number of the constables thereof, it is urged that they really go to the immediate preservation of the peace, health, and safety of the great state of Missouri. Courts are not supposed to be blinded bats. Of current history courts take judicial knowledge. What all knows the courts must judicially know. The current history shows the real purpose of these laws, and we need not state that history. It is known to every member of the Legislature, every judicial officer of the state, and every lawyer and citizen, who has read and kept abreast with the current history, made and now being made. To say that the purpose of these bills was to protect Missouri in some great, impending emergency relative to her peace, health, or safety, is not only in the face of the bills themselves, but in the face of what her citizens know. We need not go further.

JAMES T. BLAIR, C. J., and WALKER, J., concur.

WALKER, J. (concurring). The question here seeking solution is of grave importance. It involves the right of the people under the Constitution to enter into and become a part of the law-making power of the state. Correctly determined it cannot but tend to preserve and perpetuate that right; incorrectly determined, to destroy it.

The principal opinion by WOODSON, J., states in detail the facts upon which this controversy is based. However, a synopsis of same may not be inappropriate, if for nothing more than convenience of reference. The Fifty-First General Assembly repealed four laws concerning justices of the peace, their clerks and constables in certain municipal townships, and enacted other statutes relating to the same subjects in lieu thereof. To each there was appended this provision, that—

"This enactment is hereby declared necessary for the immediate preservation of the public peace, health and safety within the meaning of section 57, article 4 of the Constitution of Missouri."

Despite these provisions referendum petitions were circulated, and having been signed by the required number of legal voters, regarding which there seems to be no question, they were presented to the Secretary of State for filing. He refused to file them, basing his refusal on the provision attached to each above quoted. The proceeding at bar was thereupon invoked to compel affirmative action on the part of the Secretary of State.

I. It was declared by this court in *State ex rel. Kemper v. Carter*, 257 Mo. loc. cit. 70, 165 S. W. 773, that we adopted our constitutional provision in regard to the initiative and referendum from the Oregon Constitu-

tion. The Supreme Court of that state, in construing that portion of its Constitution, held in *Kadlerly v. City of Portland*, 44 Or. 118, 74 Pac. loc. cit. 720, 75 Pac. 222, that whether a law is excepted from the referendum, which declares that it is for the preservation of the public peace, health, and safety, is a question for the Legislature. In other words, that the Legislature may arbitrarily declare any act as for that purpose and thereby prevent its reference to the people for approval or rejection. It is to be determined, therefore, whether this rule is to be followed in construing the adopted provision in our own Constitution.

It may be admitted that it is a general rule when a statute or a constitutional provision has been adopted from another state that the construction there placed upon it by the highest court accompanies it, and is treated as incorporated therein. This rule, however, is not absolute. *Whitney v. Fox*, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed. 1145; *Coulam v. Doull*, 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596. If so, it would result not infrequently in so limiting the exercise of judicial discretion as to result in thwarting the will of the people as expressed in the constitutional provision. The arbitrary application of this rule was never intended, and cases are not wanting which demonstrate that it is subject to numerous exceptions. Especially is this true where, as in this case, the foreign construction is not in harmony with the spirit and purpose of our Constitution as declared in the provision sanctioning the initiative and referendum. Section 57, art. 4, Const. Mo.; *Bowers v. Smith*, 111 Mo. loc. cit. 52, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; *Hutchinson v. Krueger*, 34 Okl. 23, 124 Pac. 591, 41 L. R. A. (N. S.) 315, Ann. Cas. 1914C, 98; *Western Terra Cotta Co. v. Board Education*, 39 Okl. 716, 136 Pac. 595; *Boyd v. C. C. Ritter L. Co.*, 119 Va. 348, 89 S. E. 273, L. R. A. 1917A, 94. Furthermore, it is held in a large number of cases that a construction of a statute by the courts of the originating state will not be followed by the courts of the adopting state, if they are clearly of the opinion that it is erroneous and will result in the denial of a substantial right. *Dear Lodge County v. U. S. Fidelity Co.*, 42 Mont. 315, 112 Pac. 1060, Ann. Cas. 1912A, 1010; *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203; *Torrance v. Edwards*, 89 N. J. Law, 507, 99 Atl. 136; *Penn Br. Co. v. New Orleans*, 222 Fed. 737, 138 O. O. A. 191; *Gr. West. Sugar Co. v. Gilcrest Lbr. Co.*, 25 Colo. App. 1, 136 Pac. 553; *Rhoads v. Chicago, etc., Co.*, 227 Ill. 328, 81 N. E. 371, 11 L. R. A. (N. S.) 623, 10 Ann. Cas. 111; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Moore v. O'Leary*, 180 Mich. 268, 146 N. W. 661, Ann. Cas. 1916A, 373; *Dow v. Simpson*, 17 N. M. 357, 132 Pac. 568; *Pierson v. Min-*

*nehaha County*, 26 S. D. 462, 128 N. W. 616, Ann. Cas. 1913B, 386; *Ex parte Bowers*, 8 Okl. Cr. 201, 127 Pac. 20; *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11. In *Pierson v. Minnehaha County*, supra, the court said:

"This court should not, under any circumstances, be bound or required to follow what it deems to be an erroneous construction placed upon a foreign statute by a foreign court, any more than we should be required to follow an erroneous decision of our own court."

In *State ex rel. Brislawn v. Meath*, supra, the Supreme Court of Washington, in discussing the arbitrary rule announced in *Kadlerly v. Portland*, supra, pertinently said:

"The courts are not bound by mere forms, nor are they to be led by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look to the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been adopted to promote the public health, the public morals, or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In *Hutchinson v. Krueger*, supra, this question was given exhaustive consideration. Quoting from *State v. Campbell*, supra, the Supreme Court of Oklahoma says:

"We recognize the force of the rule that where one state adopts a statute from another state it adopts the construction placed thereon by the courts of that state. But this is a general rule, to which there are numerous exceptions. It is not an absolute rule."

In *Dixon v. Ricketts*, 26 Utah, 215, 72 Pac. 947, it was said:

"It is a general, though not a binding, rule of statutory construction, that where the provisions of a statute have received judicial construction in one state, and it is then adopted in another state, it is adopted with the construction so given it."

Further quoting from *Endlich on Statutes*, § 371, the court says:

"Whilst admitting that the construction put upon statutes by the courts of the state from which they are borrowed, is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing and is subject to the same rules of interpretation as any other legislative enactment. And it is manifest that the imported construction should prevail only so far as it is in harmony with the spirit and policy of the general legislation of the home state, and should not, if the language of the

act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter or to conflict with its settled practice."

In *Coad v. Cowhick*, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. Rep. 953, the court, construing a statute adopted from Ohio, refused to follow a decision of the latter court, holding a judgment not a lien upon after-acquired lands of the judgment debtor. The reasons stated by the Wyoming court were that the statute under consideration was not peculiar to Ohio, as other states had similar provisions, using the identical words or language, the same in substance, and because it considered the decision of the Ohio court to be opposed to the best reasoning and the weight of authority.

In *Ancient Order, etc., v. Sparrow*, 29 Mont. 132, 74 Pac. 197, 64 L. R. A. 128, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, the Supreme Court of that state, in construing a statute adopted from California, said:

"This court will not blindly follow the construction given a particular statute by the court from which we borrowed it, when the decision does not appeal to us as founded on right reasoning."

The limitation placed upon the rule by this court is that the construction given by the courts of a state to a statute will be given respectful consideration by the courts where such statute has been adopted. We said this much, no more, in the *Carter Case*, 257 Mo. 70, 165 S. W. 773.

In *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203, the Supreme Court of that state, in construing a statute adopted from Missouri, said in effect:

"To regard ourselves as absolutely bound by the construction given to this statute by the Supreme Court of Missouri would give it greater weight than if it had been construed originally by our own court, in which case the right and duty of this court to disregard its former ruling would not be denied, if, upon re-examination, it should be found opposed to the better reasoning, in conflict with the great weight of authority, or not in harmony with the spirit and policy of our laws."

From these cases and others of like import it will be seen that the arbitrary application of the rule in the construction of adopted statutes accords neither with reason nor precedent. The most conservative statement of its application is to be found in our later Missouri cases, in which it is said in effect that when a law is adopted by the Legislature of this state the construction placed upon it by courts of the state of its origin will be presumed to have met with the approval of the Legislature when adopting it. *Knight v. Rawlings*, 205 Mo. 412, 104 S. W. 88, 13 L. R. A. (N. S.) 212, 12 Ann. Cas.

325; *State ex rel. Gulon v. Miles*, 210 Mo. 127, 109 S. W. 595, 16 L. R. A. (N. S.) 699; *State ex rel. v. Carter*, *supra*. Thus expressed, the rule loses its arbitrary application, and becomes, as it should be, persuasive, in that if the former construction of an adopted law is found to be reasonable and in harmony with the spirit and purpose which prompted its adoption, a like construction will be given to it here. Otherwise not.

II. It becomes pertinent, therefore, to inquire as to the spirit and purpose of the people in incorporating the initiative and referendum into our Constitution. For reasons not necessary to be enumerated here, but of sufficient impelling power to prompt action, at the time it was determined to provide an efficient method for the checking and regulating of legislative power. This determination found expression and was given operative force in the adoption of the initiative and referendum. We are concerned here more particularly with the latter. It may be ordered, says, in effect, our organic law (section 57, art. 4) in regard to all matters of legislation, except laws necessary for the immediate preservation of the public peace, health, or safety, appropriations of current expenses of the state government, the maintenance of state institutions and the support of public schools. Comprehensive in its terms and definite in its exceptions, it requires, as *Hudibras* would have it, "neither gloss or comment, but may be unriddled in a moment." The ease with which it may be interpreted, however, must not lessen the force of the fact, which was the moving impulse in the adoption of the amendment, that the power thereby reserved is in the people, and that upon which it is to be exercised is the Legislature. In other words, the Legislature proposes and the people disposed of its acts, either by approval or rejection, as they may deem proper, save as excepted in the Constitution. Despite this unequivocal declaration of power it is contended by respondent, supported by the holding of the Supreme Court of Oregon in the *Kaddery Case*, *supra*, that the Legislature may nevertheless determine, not only the extent to which this power may be exercised or whether it may be exercised at all. This holding violates the spirit and destroys the purpose of the amendment. If the Legislature, as in the instant case, may except from the referendum acts abolishing the offices of justices of the peace, clerks, and constables in a designated township, and provide for the selection of their successors by simply declaring that such acts are for the immediate preservation of the peace, health, and safety, then a like exception may be effected by appending this provision to any other act, regardless of the absurdity of its application, and thus the constitutional power intended to be reserved will thereby be completely destroyed.

A blind following of the rule of construction we have discussed, stripped of all of its exceptions, is the chief refuge sought to sustain the contention that the Legislature may, in this instance by the magic of misapplied words, restore to itself a power reserved by the people to themselves. Construing the rule, however, in the light of the numerous exceptions noted and in harmony with the spirit manifested and the purpose intended to be accomplished in the adoption of the amendment, we avoid absurdities in the use of words otherwise unmistakable in their meaning, recognize without doing violence to same the limitations upon legislative power, and, at the same time, do not minimize that reserve to the people.

[3] III. There is a familiar maxim, uniform in its application, that the reason of the law is the life of the law, or, as the pedants put it, *ratio legis est anima legis*. By the reason of the law we mean, of course, the occasion or moving cause of its enactment. This is the touchstone of correct interpretation. Which, says a learned judge—

"If not sought out and found by the courts, they miss their prime and most august function." *Dudley v. Clark*, 255 Mo. loc. cit. 586, 164 S. W. 613.

Applying this maxim to the referendum provision, we found, without doing violence to either its words, context, or subject-matter, that the reason for its enactment was legislative regulation. Applying the maxim to the acts under review will therefore enable it to be determined regardless of barren rules or arbitrary precedents, whether the incorporation therein of the provision that they are for the preservation of the public health, etc., renders them immune from reference or whether this provision is a mere legislative brutum fulmen, incongruous in its setting, and hence inconsistent with the subject-matter of the acts.

[4, 5] Enough has been said to indicate the nature of the acts under review. By their terms they apply not to the justices' clerks and constables of the state or of a certain class of counties, but to those of townships which have or may hereafter have a certain population. This precludes their general application, and at the same time enables them to escape the constitutional pruning knife under the thinly veiled mantle or classification. As a matter of fact, of which we may take judicial notice, their present application is limited to the municipal township in which Kansas City is located. Unless, therefore, we attribute to them the virtue of Prince Ahmed's tent, which, at will, would cover an army, or could be folded within the compass of its owner's pocket, we cannot classify these acts as of a general nature, such as was evidently contemplated by the Constitution in the use of the word "public" in the referendum.

To emphasize this conclusion, an analysis of that portion of the excepting clause here under consideration is appropriate. It will be recalled that its wording, so far as is applicable here, is, "except as to laws necessary for the immediate preservation of the public peace, health or safety." The word "preservation," say the lexicographers, presupposes a real or existing danger; and "immediate preservation" is indicative of a present impelling necessity, with nothing intervening to prevent the removal of the danger. By the "public peace" we mean that quiet, order and freedom from disturbance guaranteed by law. *Neuendorf v. Duryea*, 6 Daly (N. Y.) 276; *Id.*, 52 How. Prac. (N. Y.) 269; *Gribble v. Wilson*, 101 Tenn. 612, 49 S. W. 736.

Laws in regard to "public safety" are allied in their application and effect to those enacted to promote the public peace, preserve order, and provide that security to the individual which comes from an observance of law. By the "public health" is meant the wholesome sanitary condition of the community at large. 1 Bl. Com. 122; *Anderson's Law Dict.*

[6] The meaning of these controlling words in the excepting provision, concerning the correctness of which there can be no reasonable ground of controversy, furnishes no reason, except such as may exist in the exuberant fancy of their draftsman, for the incorporation of this provision in the acts here subjected to interpretation. To assert that either the public peace or health or safety was so menaced in the township designated as to call for the enactment of a statute in the exercise of the police power is refuted by the language and evident purpose of the acts themselves. Read with an open mind, and an intelligent understanding of the words employed, and disregarding any esoteric meaning or purpose, their enactment might imply, with which we have no concern here, their real object or *raison d'être* to give it a Gallic flavor, was to effect a change in the personnel of the officers designated, as well as the laws defining their duties and prescribing their powers. Leaving the propriety of their enactment and the wisdom of their terms, so far as concerns their legitimate subject-matter, out of the question, they disclose no tenable ground which will stand the test of interpretation for the incorporation therein of the provision by which it was sought to exempt them from the referendum. Plainly put, the incorporation of this appendant provision involves an absurdity the presence of which is sufficient, under a well-established rule of construction, to authorize its rejection. It has no place or proper purpose in legislation of the character here being considered. Statutes are not to be construed so as to result in an absurdity. The provision should therefore be

held to be superfluous. *Darlington Lbr. Co. v. R. R.*, 216 Mo. 658, 116 S. W. 530; *Perry v. Strawbridge*, 209 Mo. 621, 108 S. W. 641, 16 L. R. A. (N. S.) 244, 123 Am. St. Rep. 510; *Johnston v. Ragan*, 265 Mo. 420, 178 S. W. 169; *Stack v. Gen. Bk. Co.*, 223 S. W. 89.

IV. It may be conceded that every intentment should be made in favor of the propriety of legislative action. Notwithstanding this presumption, however, the courts have, ever since the ruling by the Supreme Court of the United States, in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, exercised the right to determine whether legislative enactments are violative of the Constitution. "It is," said the learned Chief Justice in that case, "emphatically the province and duty of the judicial department to say what the law is." More imperative is this duty under modern Constitutions, in which the law-making power is no longer exclusively the province of the Legislature, but is divided between it and the people themselves. Instead, therefore, of the judicial construction of statutes, as at bar, constituting an invasion of the legislative province, it amounts to nothing more than a determination by the court as to whether the Legislature has properly exercised its discretion in declaring these acts subject to the police power exception, or whether its declaration was unwarranted, and, if sustained, will result in cutting off the people's reserved power to participate in legislation. If the constitutionality of an act was, therefore, a proper matter of judicial determination before the referendum amendment, it is none the less so since, because in its last analysis a ruling as to the proper application of the exception in the acts is nothing more than a judicial determination of their validity under the organic law. If the exception has been properly incorporated in the acts, then they are valid; if improperly incorporated, then they are invalid so far as the exception is concerned. We said in *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639, that "legislation is subject to existing constitutional restrictions." An apparent, much less a patent, violation of these restrictions will authorize judicial determination. Our power, therefore, is ample to enable us to determine, as we do, free from any tenable charge of unwarranted invasion, that the legislative declaration as to the immunity of these acts from the referendum was unwarranted.

In harmony with the foregoing conclusions, and sustaining them by a carefully analyzed array of cases, is the opinion of the Supreme Court of Montana in *State ex rel. Goodman v. Stewart*, 57 Mont. 144, 187 Pac. 641, in which Matthews, J., speaking for that court, has discussed and determined with clearness and strength of conclusion almost every phase of the matter at issue. An epitome

of these relevant rulings is all that is permissible here. They are as follows: As to whether an act is necessary for the immediate preservation of the public peace, etc., and thus excepted from the referendum, is to be controlled by the nature of the act, and not by a superfluous declaration of necessity incorporated therein; that the propriety of the incorporation of the exception in an act is a judicial question; that in determining same the utmost that can be considered in the face of the act, the history of the legislation, contemporaneous declarations of the Legislature, the evil to be remedied, and the natural or absurd consequences of any particular interpretation. From all of which the conclusion is authorized that if a statute purports to be for the preservation of the public peace, health, etc., and from its words and subject-matter it has no real or substantial relation to the act, or is a palpable invasion of rights reserved by the Constitution, it is the duty of the courts to so decide, and thereby give effect to the fundamental law. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 206. We therefore concur in the conclusion reached by WOODSON, J., in the principal opinion. This concurring opinion has been deemed necessary on account of the writer's dissent in *State ex rel. Westhues v. Sullivan*, 224 S. W. 337, which, upon a careful review, has been found to be unwarranted.

JAMES T. BLAIR, C. J., and GRAVES, J., concur.

JAMES T. BLAIR, C. J. (concurring). Section 57 of article 4 of the Constitution provides, among other things:

"The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve the power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative. \* \* \* The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions and for the support of the public schools) either" by petitions, etc.

At its regular session in 1921 the Legislative Assembly passed certain acts which were intended to make changes in the system of justice of the peace courts in Kansas City. Appended to one or more of these acts is the following:

**"Emergency.**—This enactment is hereby declared to be necessary for the immediate preservation of the public peace, health and safety within the meaning of section 57, article 4, of the Constitution of Missouri."

No emergency clause under section 36 of article 4 was attached or passed, but the principal bill contains a clause to the effect that it "shall become effective" July 1, 1921. Properly drawn petitions for the reference of these, signed by the requisite number of voters who possess the required qualifications, have been tendered to respondent for filing. He refused to file them because of the inclusion in the acts of the section which has been set out. This suit is brought to compel the filing of the petitions and the reference of the acts.

I. It is urged that the inclusion in the acts of the clause that the "enactment is hereby declared to be necessary for the immediate preservation of the public peace, health and safety" is conclusive upon the question of fact whether the act is so necessary. Upon this question much has been said in the briefs and in opinions prepared by my Brethren, and much can be found in the decisions they cite. Both sides of the argument are presented with vigor and learning. There is little that can be added. A few rather general observations may not be out of place.

(1) In the circumstances the remarks of a learned annotator can properly be given place so that a general view of the question may be had at the outset. In the copious note to the decision in *Hockett v. Licensing Board*, 91 Ohio St. 176, 110 N. E. 485, which is found in L. R. A. 1917B, at page 15, there appears (pages 27, 28) the following:

"According to another line of authorities the legislative determination is not conclusive. The latter conclusion, that the legislative determination to declare an emergency is not final, seems to be the correct one. The limitations upon the power of the Legislature to declare an emergency that only laws of a certain class shall be so subject, or that all laws except the class shall be subject to the referendum, without expressly vesting in the Legislature power to determine what laws come within that class, leaves to the courts the power to determine the question. In other words, a law must be a law belonging to the excepted class before it can be declared free from the referendum. Where the law is of the prescribed character the legislative determination that it shall be free from the referendum is final; but its determination that the law belongs to the excepted class is not. In support of this theory it has been pointed out that the clause excepting the named laws from the referendum is not the usual general emergency provision, but an exception to the otherwise universal application of the reserved power of referendum; that the clear purpose of the exception is to preserve unimpaired the right of the Legislature to exercise the police power so far as it may be

emergent; that the exception from the referendum includes only those certain, definite, and unquestioned phases of the police power which, in their very nature, may be and usually are emergent. It is further stated that, as the court exercises jurisdiction to determine whether an act of the Legislature is a valid exercise of the police power, it must be a judicial question whether the exercise by the Legislature of certain phases of that power which are selected and made an exception to the constitutional guaranty of the referendum is a valid exercise of the power."

(2) Section 57 of article 4 of the Constitution does not provide that an act of the legislative assembly shall be exempt from the referendum if the assembly shall declare it to be "necessary for the immediate preservation of the public peace, health or safety." On the contrary, the exemption is made to depend upon the fact that the act is so necessary. This, of course, is not and cannot be disputed. The argument is not that the Constitution provides in terms that the legislative finding shall be conclusive. The argument is, in substance, that the effect of such a legislative finding of fact is final and conclusive on the courts in the very nature of the case.

(3) If respondent is right in the position he takes on this question—i. e., that the inclusion of the peace, health, and safety clause in the acts now in question is conclusive on the question of fact whether the acts are necessary for the immediate preservation of the public peace, health, and safety, and bars all investigation of that question by the courts—it cannot be denied that the same thing must be true as to all acts in which that clause has been or may hereafter be included. If it is final as to one, it must be so as to all. Neither the language of section 57 nor the character of the rule contended for will admit of a classification of legislative acts with respect to the question of the finality of the legislative finding upon the question of exemptability from the referendum on the ground of necessity for the immediate preservation of the public peace, health, and safety. It is final in the case of every act, or it is final, in the sense contended for by respondent, with respect to none. This does not seem to be denied.

(4) If, as just pointed out, respondent's proposition must be true as to all acts in which the peace, health, or safety clause is incorporated, if true as to any, then it is proper, in the light of this, to examine the result of upholding respondent's contention. If the peace, health, or safety clause can be employed by a majority of the legislative assembly to exempt all acts (not otherwise exempted) from the referendum, then it may be employed to exempt laws passed in the exercise of the police power or pursuant to an attempt to exercise that power. The question is approached from this angle in order

to avoid an apparent conflict of authority upon the question whether the peace, health, or safety clause is designed solely to exempt from the referendum emergent exercise of the police power, or whether it is broader than that. For the purposes of what is now to be written it makes no difference which contention is sound.

The police power aims directly to promote the "public welfare, and it does so by restraint and compulsion." These are said by Mr. Freund, in his work on Police Power, § 3, to be the "two main attributes or characteristics which differentiate the police power." It is well settled that the police power has its limitations. Generally, it is—

"limited in its exercise to the enforcement of the maxim, 'Sic utere tuo ut alienum non lædas.' Tiedeman on Limitations of Police Powers, § 85, pp. 196, 197. For instance, 'in the exercise of the police power, personal liberty can be subjected to only such restraint as may be necessary to prevent damage to others or to the public.' *Id.*"

According to the same author, it is also well established that, while the exercise of a particular calling may be regulated or prohibited if it threatens damage to the public or other individuals, and while the Legislature has a discretion to impose regulations when a proper case arises, it is nevertheless—

"strictly a judicial question whether the trade or calling is of such a nature as to require or justify police regulations. The Legislature cannot declare a certain employment to be injurious to the public good, and prohibit it when, as a matter of fact, it is a harmless occupation."

The learned author quotes with approval from *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391:

"The position, however, is taken, on the part of the state that it is competent for the Legislature, whenever it shall deem proper, to declare the existence of any property and pursuit deemed injurious to the public, nuisances, and to destroy and prohibit them as such; and that such action is not subject to be reviewed by the courts. We deny this proposition. We deny that the Legislature can enlarge its power over property or pursuits by declaring them nuisances, or by enacting a definition of a nuisance that will cover them. Whatever it has the right by the Constitution to prohibit or confiscate, it may thus deal with, without first declaring the matter to be a nuisance; and whatever it has not a right by the Constitution to prohibit and confiscate, it cannot thus deal with, even though it first declare it to be a nuisance."

It is also pointed out that it is a judicial question whether a police regulation "extends beyond the threatened evil." For instance, the author says, in substance, a reg-

ulation which would attempt to go further than to exclude ignorant and dishonest men from the medical profession would be invalid, though a broad discretion may be used in the choice of means to accomplish that purpose. The point is that the power to restrain and compel, under guise of the exercise of the police power, is not unlimited. It must not overrun constitutional prohibitions or infringe constitutional rights. It can impose only such restraints as in fact bear some relation to the public good, in a general sense. A calling which involves the public health may be regulated (*State v. Smith*, 233 Mo. loc. cit. 267, 135 S. W. 465, 38 L. R. A. [N. S.] 179); but its free exercise cannot be hampered with burdensome restrictions and regulations which do not in any sense have in them anything tending to remove an actual, or ward off an apprehended, evil to the public, and the like. Freund on Police Power, § 492, p. 531. In this connection, in this state, as well as elsewhere—

"The question presented where the validity of such laws is called in question is no longer the power or authority of the Legislature to enact them [i. e., regulations affecting a calling which touches the public health], but whether the occupation, calling or business sought to be regulated, is one involving the public health and interests." *Ex parte Lucas*, 160 Mo. loc. cit. 283, 61 S. W. 218, quoted in *State v. Smith*, *supra*.

This is the rule not only in Missouri, but generally. If this means anything, it means that it is a judicial question whether the calling upon which the regulation is imposed is, as a matter of act, one which "touches the public health." This is one instance, and there are many others of like character. The authorities are in accord, generally speaking, upon the proposition that the question of fact whether a trade or calling is of such a nature as to render it subject to regulations or to particular regulations, under the police power, is strictly a judicial question. This has not yet been denied in this case. It therefore appears that there are acts which, upon the question of their validity, present to the court questions of fact. There are, in fact, many such acts. When such an act is presented, and the court finds that the calling is not such that it touches the public good in such a way as to justify regulation or the particular regulation attempted, this court and all courts hold such attempted regulations invalid. This is done in the face of the fact that the very enactment of the regulatory act involves a legislative finding that existing facts justify the regulation.

The purpose of what has been said is not to attempt to define the police power and cite all cases which come within it, or announce any comprehensive rule concerning it, but to show that there are instances in which questions of act are presented to and determined



by the courts, and in which the implied finding of act by the Legislature has no binding or conclusive force.

(5) Let us suppose the General Assembly, prior to the adoption of section 57 of article 4, had included in a regulatory act, which depended upon the police power for its validity, an express finding that a calling was subject to regulation under the police power, and that the particular regulation enacted was necessary to secure the public peace, health, or safety. Would this have bound the courts upon the question of fact which they would otherwise have determined for themselves, and have thereby rendered valid a regulation which otherwise would have been invalid? Would the courts then have been compelled to uphold the regulation, though neither the calling nor the regulation imposed in any way touched the public welfare in such sense as to bring such calling or regulation within the police power? To these questions the authorities cited above return negative answers. If the answers are to be in the affirmative then, by including in an act an express declaration, for instance, that a calling touched the public health, and that the regulation prescribed protected the public health, the Legislatures have always had the power to widen and enlarge the police power, and bind courts on questions of fact with respect to which text-writers, and courts agree they are not bound by the finding implied in every regulatory act which is passed, and thus evade most of the limitations on the police power found in the general language of Constitutions. It will hardly be claimed this could have been done prior to the adoption of section 57 of article 4. It is not necessary to discuss at length the character of the presumption of validity which attends legislative enactments. It is enough for this phase of the case that it is settled that such presumption is not conclusive.

(6) With the law in this condition and the police power so limited by provisions in both state and federal Constitutions, section 57 of article 4 was adopted. If respondent is correct, that section exempts from the referendum every legislative act in which the assembly includes a finding that such act is necessary for the immediate preservation of the public peace, health, or safety. With respect to restraints upon callings, which classes of acts have been selected to illustrate the argument, the finding that they are necessary for the immediate preservation of the public peace, health, or safety is necessarily a finding that the calling "touches" the public peace, health, or safety. In other words, it is a finding upon the exact question of fact which heretofore has been held to be a question for the court when they came to the question of validity of regulations under the police power. If the inclusion of the peace, health, and safety clause in an act is, as respondent contends, conclusive upon the

courts, then the result is that section 57 empowers the legislative assembly to widen and extend the police power to include callings and regulations to which it could not have been extended prior to the adoption of section 57, and this by the simple use of a form of words in acts it passed without regard to the character of the regulation, and despite the fact that the regulation is concededly unconstitutional, had not the peace, health and safety clause been included in the act imposing it. It would enable the legislative assembly to remove from the realm of judicial questions every question of fact such as that referred to in the quotation in *Ex parte Lucas*, supra, and thereby largely revolutionize the law concerning the scope and extent of the police power by virtue merely of a phrase which declares that to be true which is untrue. If this marked change in the law was intended to follow the adoption of section 57, is it unreasonable to think that the section would have been couched in language which would have at least given some hint of it? In the same article of the Constitution of which section 57 became a part upon its adoption appears section 36, which pertains to the emergency clause required to put an act of the legislative assembly into immediate operation. This section expressly provides that the declaration of an emergency shall be put into the act intended to be put into immediate force thereby. The effect of this clause has, so far as is discovered, never been doubted. The language of section 36 is markedly different from that of section 57. Is it likely that, with an intent that section 57 should, in effect, so far as the question here is concerned, have the same absolute force as section 36, those who framed and adopted section 57 would have so carefully abstained from the use of a formula at hand in the very instrument they were amending, which formula would have accomplished, so far as legally possible, the purpose they had in view? Is not the avoidance of the approved formula particularly significant in view of the rather revolutionary effect of their intent if it was that which respondent ascribes to them? The difference between the words used in these two sections is wide, and is inexplicable if respondent is right in his present contention.

Further, the purpose of the referendum is to "reserve to the people" the power to pass upon acts of the legislative assembly. That reservation is founded upon a belief that acts might be passed which would not be for the public good. In a sense, it evidences a disbelief in legislative omniscience. Is it reasonable to think the people meant to reserve to themselves the power to refer acts of the legislative assembly, because they feared that body might err in its enactments, and then intended to confer upon a bare majority of the same assembly, whose errors the referendum was designed to correct, full power to

defeat any and all references of any and every bill by the simple inclusion in such bills of a set form of words, even though these words so used were false on their face? It will not do to say the people would have their remedy at the polls, and could punish legislators by defeating them. This was true before there was a referendum section proposed and adopted. The remedy by referendum was added to that available at the polls.

Legislatures, like courts, sometimes err. The referendum has been thought designed to correct legislative errors. If respondent's position is tenable, then, if the legislative assembly shall err and pass a bad law (in the belief that it is a good law), the error in passing this bad law is not subject to the referendum, but is exempt from such correction upon condition only that the same legislative assembly shall commit one more error—I. e., find as a fact that the law is necessary for the immediate preservation of the public peace, health, or safety, and then put this erroneous finding into the bad law. Does one error plus one error equal no error for the purposes of this case? To ascribe such an intent to the people is to charge them with incorporating a remarkable absurdity in the organic law of the state. If the people desired that the same body whose enactments they wished to supervise by means of the referendum should have full power to prevent such supervision in every case, it seems reasonable to think they would have said so, and, particularly, would not have avoided so carefully a form of words already in the Constitution which would have been adequate to have effectuated this remarkable purpose.

(7) Further, if the section means that the people intended to bind the state courts with respect to the question of fact whether an act is necessary for the immediate preservation of the public peace, health, or safety, what did they intend concerning the same finding when a case was presented to the federal courts in which the validity of a police regulation was challenged because it in no wise affected or touched the public good, but was merely an arbitrary restraint? Will respondent contend that the power of the courts of the United States to wipe out arbitrary and excessive impositions and restraints on a finding of their own that they are so (*McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315) is defeated by such a finding as the legislative assembly has incorporated in the acts before us? Unless he so contends, what is there in the language of section 57 which indicates an intent in the state jurisdiction which was not designed to apply to the federal jurisdiction? The question suggested is not whether the respondent's construction of section 57 could not stand as to the state courts even though it should be denied by the federal courts. What is being examined is the question as to the intent of the people in adopting section 57. The lan-

guage of that section is quite general. On its face it applies to all cases in all courts. Ought it be given a construction which would clearly make it unconstitutional in some respects, when there is a more natural construction which gives effect to all of it? If it be conceded the legislative finding is not conclusive when an act is assailed as an invalid attempt to extend the police power beyond restrictions imposed by some of the provisions of the federal Constitution, it is thereby conceded that some cases fall outside the rule for which respondent contends. But, as already pointed out, that rule, in its very nature, applies to all acts or none.

(8) It might be argued that the Legislative finding is conclusive upon the question whether an act is exempt from the referendum, but not conclusive on the same question of fact when the courts shall be called upon to consider the validity of the same act. It is but fair to respondent to say he advances no such argument. He does not deny that an act, to be exempted from the referendum, must in fact be necessary for the immediate preservation of the public peace, health, or safety, as section 57 provides. What he contends is that when the legislative assembly puts the peace, health, and safety clause into an act it thereby conclusively determines that fact to be true, and no court or person can be heard to deny the truth of that finding. So far as his argument is concerned, we do not understand him to suggest the distinction referred to in the first sentence of this paragraph. We think that in refraining from doing so he exhibited sound judgment. If, when applied to an act of the class selected above to illustrate the case, the legislative assembly has found the act to be necessary for the immediate preservation of the public health, for instance, and if that finding necessarily includes a finding that the calling regulated "touches the public health," and if that finding binds the courts with respect to the matter of exempting the act from the referendum, it is difficult to see how it could be held that the people, in adopting section 57, intended that the conclusiveness of the same finding could be evaded when the validity of the same act was drawn in question in the courts. It is the same act or law, and it is the same finding. It is a finding that a particular fact in fact exists. It is not a finding that the legislative assembly is of opinion that the fact exists, nor a finding that it exists solely with reference to the power to exempt the act from the referendum. Section 57 requires the fact of necessity actually to exist before the exemptive power arises. The finding is that it does in fact exist. There is nothing in section 57 which suggests that whatever finding, if any, is authorized is one thing for one purpose and another thing for another purpose. Such an intent would have been well expressed by words which would have vested

directly in the legislative assembly power to declare the act exempt from the referendum whenever it thought proper to do so. No such words are found in the section. Did the people intend that the court should hold the same finding of fact conclusive in one breath, and inconclusive in the next? Unless they did so intend the argument first adverted to constitutes no obstacle to the application of what has been said in preceding paragraphs. An easily conceivable result of the acceptance of the argument as true would be that, with respect to the same act, the same court would be compelled to hold the act was not referable because (being bound by the legislative finding) in truth and fact the act was within the police power, and subsequently compelled to hold that the act was not within the police power because the fact found by legislative assembly was not a fact at all. Ought the people to be convicted of perpetrating such an absurdity unless they have made their intent to do so very clear? It is quite clear from the language they used that they intended nothing of the kind. The ease with which a purpose to permit the reference of laws to be defeated by a legislative declaration of something which might or might not be true could have been made evident, and the careful avoidance of any expression which would evidence such a purpose are worthy of consideration in this connection. We decline to hold that those who framed and adopted this amendment did not mean what they said, but meant something which is excluded by what was said.

II. *State ex rel. v. Hackmann*, 275 Mo. loc. cit. 646, 205 S. W. 161, and *Ex parte Renfrow*, 112 Mo. loc. cit. 594, 20 S. W. 682, are cited as supporting the proposition that the finding of the legislative assembly is conclusive. It will hardly be contended these decisions hold that a legislative finding such as those discussed in the preceding paragraphs with respect to the applicability of the police power to particular callings or activities is final. Those cases did not involve that question. This sufficiently distinguishes them so far as concerns what appears herein.

III. The contention that the acts in question are in fact necessary for the immediate preservation of the public peace, health, or safety is sufficiently considered in other opinions in this case. The argument that the courts would be without means to determine the question of fact alluded to, in case it be held that it is open to them to pass upon it, is made. No greater difficulty would be likely to be presented than those presented when the courts do pass upon questions of fact in determining whether police regulations are valid or invalid.

IV. The effect of the Oregon construction prior to our adoption is also well disposed of in other opinions in the case. The question upon which we followed such a construction in the case of *State ex rel. v. Sullivan* was

one which fell within the general rule. Upon such a question, one within the general rule, it is immaterial whether it is said that it is very persuasive, or that the adopting state is presumed to have adopted it, or that the courts of the adopting state are bound by it. In either case, on a question within the general rule, the previous construction is adopted. The question in this case falls within several exceptions to the general rule. This is too clear to require argument, and other opinions in the case make that fact plain. The insistence that the rule in the *Kadderly Case* must be adopted in this case because it preceded our adoption of section 57 assumes that the question in this case falls within the general rule upon the subject of the adoption of previous constructions, and that it does not fall within any of the exceptions thereto. That this assumption is contrary to the fact will be apparent from a reading of the rule and of the exceptions to it. The rule and its exceptions are discussed in one or more concurring opinions, and can be found there.

For these reasons, and others given in other opinions filed, the alternative writ should be made peremptory.

GRAVES and WALKER, JJ., concur.

ELDER, J. (concurring). While I concur in the result of the opinion filed herein by my learned associate, Judge WOODSON, I feel constrained to briefly express my individual views upon the question presented for determination.

As is provided in section 57 of article 4 of the Constitution of this state, the second power reserved by the people is the referendum, and, in the language of the said section—

"It may be ordered except as to laws necessary for the immediate preservation of the public peace, health or safety."

The mandate of the Constitution, coming directly from the people, is superior to the will of the Legislature. As to who shall be the judge of whether or not a law is "necessary for the immediate preservation of the public peace, health, or safety," the Constitution is silent. True, the Legislature, being invested with the lawmaking power, must in the first instance, be the judge of the necessity in a given case; otherwise it could not act. But, is that determination, if in fact without substantial basis, final and conclusive? I think not. The discretionary power initially lodged in the legislative department of the government should not be abused but should always be exercised in a manner consonant with the true intent of the framers of the Constitution and of the people who adopted it. If, therefore, a statute purports

to have been adopted to meet an emergency which palpably, from the face of the statute, does not exist, it becomes the duty of the courts to take jurisdiction and give effect to the constitutional intent and purpose. In such tribunal alone resides the power to determine whether or not the act of the Legislature conflicts with the provisions of the Constitution. *Baily v. Gentry*, 1 Mo. 164, 13 Am. Dec. 484; *Justices' Answers*, 70 Me. loc. cit. 599; *People v. Rafferty*, 77 Misc. Rep. 258, 136 N. Y. Supp. 4; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; 6 R. C. L. 69.

[7] It has been ably suggested by my learned brother HIGBEE that the initiative and referendum amendment under review was taken from the Constitution of Oregon and that we are bound by the construction placed upon it by the Supreme Court of that state, which court ruled that the declaration of the Legislature upon the question of necessity was conclusive. While it may be conceded that the general rule is as stated, nevertheless that rule is not absolute or imperative and has its exceptions. One of those exceptions is that where the courts of the adopting state are of the opinion that the foreign construction is erroneous, the borrowed law does not carry with it the prior construction in the originating state. *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 74 Pac. 197, 64 L. R. A. 128, 101 Am. St. Rep. 533; *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203; *Whitney v. Fox*, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed. 1145. While the interpretation put upon statutes or constitutional provisions by the state from which they were taken are persuasive and are entitled to respectful consideration, nevertheless that interpretation should be founded on right reasoning. Because the Supreme Court of the state of Oregon may have ruled that the Legislature alone can determine whether or not an emergency exists, that ruling should not bind this court if, for instance, our Legislature should enact a law designating a certain flower as the official state flower and containing an emergency clause reciting that the measure was for the immediate preservation of the public peace, health and safety. Would any one argue that such an absurd and arbitrary dictum, declaring such a law necessary for the immediate preservation of the public peace, health and safety, was rightfully intended to have the effect of withholding the right of referendum should an attempt be made to invoke it? And yet such would be the consequence if the reasoning of the Supreme Court of Oregon is to be followed. Such a doctrine would be totally destructive of the referendum, for, by the mere ipse dixit of the Legislature, without cause in truth or fact, any measure could be withheld from ratification or rejection by the people at the polls.

[8] In the instant case, to say that the preservation of the public peace, health and safety demands the immediate abolition, in one certain township, of the offices of eight justices of the peace and constables (who from the record before us are to be presumed to be properly and efficiently discharging their respective duties), and the immediate appointment of new justices and constables, is asking us to go far afield from the true intent of the constitutional provision invoked by respondents.

Entertaining the views above indicated, I am of the opinion that the writ of mandamus should be made permanent.

JAMES T. BLAIR, C. J., and GRAVES and WALKER, JJ., concur.

HIGBEE, J. (dissenting). I respectfully dissent from the opinion filed in this case by our learned Brother WOODSON. It is based solely upon the opinion of Judge Graves in *State ex rel. Westhues*, Prosecuting Attorney, v. Sullivan, 224 S. W. 327. That was an action instituted by the prosecuting attorney of Cole county, against the Secretary of State and the Attorney General of the State, restraining them from submitting the Workmen's Compensation Act under the referendum amendment (section 57, art. 4, of the Constitution). All of the judges were agreed on certain points: (1) That the prosecuting attorney had no authority to bring the action to restrain the state officials; (2) the referendum petitions not having been filed in the office of the Secretary of State, the action was premature; (3) the emergency clause to the act sought to be referred did not declare that the measure—

"is 'necessary for the immediate preservation of the public peace, health, or safety.' " \* \* \* But for our present purpose it suffices to say that the emergency clause does not bring the measure within the excepted class named in the Constitution." 224 S. W. loc. cit. 334.

Judge Graves, however proceeded in a learned and interesting opinion in view of the fact that the question might arise in futuro. Judge Woodson concurred. Judge Walker did not concur in the reasons or conclusion of Judge Graves. What the other judges said will be noted later in this opinion.

Judge Graves (224 S. W. at page 334) said:

"As said by Faria, J., in *State ex rel. v. Carter*, 257 Mo. loc. cit. 70 et seq., 165 S. W. 773, we borrowed our referendum provision from Oregon, and borrowed it after the ruling in the *Sears' case*, supra."

The initiative and referendum amendment was adopted in this state at the November election in 1908. It was taken almost literally from the Constitution of Oregon. State

ex rel. Carter, 257 Mo. 52, 68, 165 S. W. 773. In the year 1904, the Supreme Court of Oregon, in *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, in passing on the question raised in this case, expressly ruled that the action of the Legislature declaring that an enactment is necessary for the immediate preservation of the public peace, health, and safety, etc., is final and conclusive, and cannot be questioned in any judicial proceeding. We quote in part from the opinion:

"The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The Constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the Legislature alone must be the judge, and when it decides the fact to exist, its action is final. *Biggs v. McBride*, 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115); *Umatilla Irrig. Co. v. Barnhart*, 22 Or. 389 (30 Pac. 37); *Gentile v. State*, 29 Ind. 409; *Wheeler v. Chubbuck*, 16 Ill. 361; *Sutherland*, Stat. Const. 108. In this view we are supported by the Supreme Court of South Dakota. In 1898 an amendment to the Constitution of that state was adopted by the people, similar in many respects to the amendment now under consideration; and, so far as the laws exempted from its operation are concerned, the language of the two amendments is identical. In *State ex rel. v. Bacon*, 14 S. D. 394, 404 (85 N. W. 225), the court say in referring to this amendment: 'It will be observed that the law of 1901 which we are considering not only declares that an emergency exists, but also that the "provision is necessary for the immediate preservation and support of the existing public institutions of this state." It seems to have been uniformly held under Constitutions containing an emergency clause, and providing that laws containing such a clause shall take effect as therein directed, that the action of the Legislature in inserting such a clause is conclusive upon the courts (citing authorities). No reason occurs to us why the same rule should not apply to the act in question. The Legislature having declared that the provisions of that act are necessary for the immediate preservation and support of the existing public institutions of the state, that declaration is conclusive upon this court, and brings this class clearly within the exception contained in section 1 (as amended) of article 3 of the Constitution.'

"But, it is argued, what remedy will the people have if the Legislature, either intentionally or through mistake, declares falsely or erroneously that a given law is necessary for the purposes stated? The obvious answer is that the power has been vested in that body, and its decision can no more be questioned or reviewed than the decision of the highest court in a case over which it has jurisdiction. Nor should it be supposed that the Legislature will disregard its duty, or fail to observe the mandates of the Constitution. The courts have no more right to distrust the Legislature than it has to distrust the courts. The Constitution has wisely divided the government into three

separate and distinct departments, and has provided that no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in the Constitution expressly provided. Const. Or. art. 3, § 1. It is true that power of any kind may be abused when in unworthy hands. That, however, would not be a sufficient reason for one co-ordinate branch of the government to assign for attempting to limit the power and authority of another department. If either of the departments, in the exercise of the powers vested in it, should exercise them erroneously or wrongfully, the remedy is with the people, and must be found, as said by Mr. Justice Strahan in *Briggs v. McBride*, 17 Or. 640 (5 L. R. A. 115, 21 Pac. 878), in the ballot box. We are of the opinion, therefore, that the findings and declarations of the Legislature that the act of 1903 for the incorporation of the city of Portland was necessary for the immediate preservation of the public peace, health, and safety are conclusive on the courts, and consequently the charter was not subject to the referendum power, and was in force and effect from and after its approval."

When we adopted the referendum amendment from the Constitution of Oregon, we adopted the construction given it by the Supreme Court of that state as much as if that construction had been written into the body of the amendment. *State ex rel. v. Carter*, supra, 257 Mo. loc. cit. 69, 165 S. W. 773; *State ex rel. Guion v. Miles*, 210 Mo. 127, 146, 109 S. W. 595, 16 L. R. A. (N. S.) 699.

Judge J. T. Blair filed an opinion in the *Sullivan Case* in which Williams, Goode, and Williamson, JJ., concurred. It is as follows:

"I concur in paragraphs I, II, and III. In paragraph IV I concur because we are bound by the construction given the Oregon Constitution by the Supreme Court of that state prior to our adoption of its provisions. With respect to paragraph V, it is enough to say that the expressions in section 81, therein referred to, do not indicate any intent to put the act in force under the 'public peace, health, or safety' clause of the referendum section of our Constitution. As to the 'broader question,' I express no opinion. It cannot be involved in this case. In the remaining paragraphs I concur."

So it appears that the propositions decided in that case are that the prosecuting attorney could not institute the proceedings against the state officials, that the action was premature, and that the act did not declare it was necessary for the immediate preservation of the public peace, health, or safety, and there was no question before the court for determination. Nevertheless, Judge Graves proceeded to discuss a supposititious case. His rulings were clearly obiter dicta. Five of the judges disagreed with his conclusions. Four of the judges held that we are concluded by the interpretation given the act by the Supreme Court of Oregon. The decision is, therefore, a direct authority in favor of our

contention that we adopted the referendum act with the construction given it by the Supreme Court of the state of its origin.

But it is said: Suppose the Legislature should declare a legal holiday and embody in the act the "peace, health or safety" clause. Would this court be concluded by the declaration? The answer is: We have no such case before us. The Constitution has solemnly vested the legislative power of this state in the General Assembly of the state of Missouri. That body is an independent, co-ordinate department of our government, answerable only to the people of the state for the execution of the powers delegated to it by the Constitution. Moreover, the measure may be submitted to a direct vote of the people by an initiative petition, so that there is no foundation for the suggestion that the Legislature may, by fraud or trickery, prevent legislation by the people.

As was well said in *Oklahoma City v. Shields*, 22 Okl. 265, 305, 100 Pac. 559, loc. cit. 576:

"To determine under a state Constitution what can be accomplished by general or special legislation, has been, with but few exceptions, held to be a question solely for the Legislature. [Citing cases.]

"We conclude that the judgment of the Legislature in determining whether or not an emergency existed—that is, whether or not a measure is immediately necessary for the preservation of the public peace, health or safety—rests solely with the Legislature. It is not subject to review by the courts, or any other authority except the people, under the reserved power of the initiative and referendum, after the declaration of an emergency when not referred to the people for their judgment in such measure it still remains with the people, if they are dissatisfied with a measure, by an initiative petition to cause the same to be submitted to the people at the next general election for determination as to whether or not such act shall be repealed."

In *State v. Moore*, 103 Ark. 48, 54, 145 S. W. 199, loc. cit. 202, the court said:

"It was a question exclusively for legislative determination, and such determination alone could bring it within this exception and power of the Legislature to make it immediately effective, and thereby remove it from the general class of laws upon which the people reserved the right to order the referendum. *Stevens v. Benson*, supra; *Kadderly v. Portland*, [44 Or. 118]. 74 Pac. 720; *Sears v. Multnomah County* [49 Or. 42], 88 Pac. 522."

See, also, *Van Kleeck v. Ramer*, 62 Colo. 4, 156 Pac. 1108.

"But it belongs to the political, not to the judicial, department of the government to determine these interesting and important questions of civic policy, as its wisdom shall deem for the best interests of the people." *State ex rel. v. Bacon*, 14 S. D. 284, 297, 85 N. W. 225, 228.

Being of the opinion reached by the majority of the court in the *Sullivan Case*, supra, that we are concluded by the interpretation given to the referendum amendment in the *Kadderly Case*, and that we are without power to question the finding of the Legislature in the premises, my conclusion is that the writ should be denied.

DAVID E. BLAIR, J. (dissenting). I am unable to concur in the views expressed or the result reached in the opinion filed by my learned Brother WOODSON. In the first place, the case of *State ex rel. v. Sullivan*, 224 S. W. 327, relied on as the sole authority for said opinion, does not even purport to decide the question involved in this case, and the expression of opinion on the question here involved made in that case does not even rise to the dignified status of obiter dicta. In passing on the questions really involved in the *Sullivan Case*, supra, Graves J., expressed as his view that the legislative declaration that an act passed by the General Assembly is necessary for the immediate preservation of the public peace, health, and safety is not binding on the court, and whether such act may be submitted to the people under the provisions of our Constitution in relation to the referendum is subject to judicial review, and such declaration is not binding on the courts. Woodson, J., concurred in those views. In that case the views as expressed were obiter because no question of that sort was in the *Sullivan Case*. Walker, O. J., expressly dissented to that view, and Williamson, Goode, Blair, and Williams, JJ., made it very clear in their separate concurrence that they expressed no opinion on the question, because that question was not in that case for decision. That case is, therefore, utterly valueless as an authority in the case before us.

It is settled beyond any question that when one state borrows a statute or a constitutional provision from another state, and the highest court in that state has authoritatively construed said statute or constitutional provision prior to its adoption in the second state, such statute or constitutional provision is held to have been adopted together with such construction by such highest court. *Skouten v. Wood*, 57 Mo. 380; *State ex rel. v. Miles*, 210 Mo. loc. cit. 146, 109 S. W. 595, 16 L. R. A. (N. S.) 699; *State ex rel. v. Sullivan*, 224 S. W. 327. There appears to be no question that the referendum provision to our Constitution was borrowed from the state of Oregon. See opinion of Graves, J., in *State ex rel. v. Sullivan*, 224 S. W. 327.

In the case of *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, it was squarely decided by the Supreme Court of Oregon, on January 11, 1904, and more than four years before the referendum amendment was add-

ed to our Constitution, that the declaration of the Legislature that a given act is necessary for the immediate preservation of the public peace, health, and safety is final, and that such declaration is conclusive on the court. That construction was part of the provision when we borrowed it from the state of Oregon, and, if not absolutely binding on this court, is persuasive authority of the highest character.

In addition, the highest courts of the states of Oklahoma, South Dakota, Arkansas, and Colorado have ruled on very similar constitutional provisions as has the Supreme Court of Oregon.

While it is true the conclusion reached by my Brother WOODSON is the same as that of the Supreme Courts of California, Washington, and Michigan, I note that it is pointed out in respondent's brief as follows:

"Out of 12 cases determined by the various Supreme Courts, 8 were decided by an undivided court; of these 8, 6 determined the

question of final determination in favor of the Legislature, and 2 determined that question in favor of the courts. Of the cases determined by a divided court, 2 determined the question in favor of the Legislature and 2 in favor of the courts. Of the cases decided by a divided court 28 judges gave their opinion on the question, 15 deciding in favor of legislative determination and 13 in favor of judicial determination. In the 12 courts passing on this question, 68 judges participated, 43 of whom decided the question in favor of the legislative determination and 25 in favor of judicial determination."

Thus it is seen that the weight of authority is decidedly against the conclusion that this is a matter for determination by the court.

On principle, and independent of the decided cases, I am of the opinion that the courts are and should be bound by the declaration of the Legislature, and for these reasons I dissent.

**STEINHAGEN et al. v. EASTHAM et al.**  
(No. 720.)

(Court of Civil Appeals of Texas. Beaumont.  
June 2, 1921. Rehearing Denied  
June 23, 1921.)

1. Constitutional law §31—Municipal corporations §29(1)—Special charter provision for charter amendment or annexation of territory repealed by Enabling Act.

The Home Rule Amendment (Const. art. 11, § 5) and the Enabling Act (Acts 33d Leg. c. 147), approved April 7, 1913 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1096a-1096i), together constitute a self-executing law that must be applied whenever a city of over 5,000 population adopts a new charter or amends an existing one; hence section 3 of the 1909 charter of the city of Beaumont, respecting annexation of adjoining territory, was repealed by article 1096b, prescribing a different and inconsistent procedure for annexation.

2. Statutes §162—Special repeals general one if intent appear.

The general rule that a general law does not by implication repeal a special one, although both relate to the same subject-matter, is inapplicable when the language of the general act clearly manifests the legislative intention to make such change.

3. Municipal corporations §46—Prohibition against amendment oftener than every two years cannot be invoked where prior amendments relied on were under superseded procedure.

An election under the Enabling Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1096a-1096i), changing a city charter by adopting a new one, was not invalidated, under the inhibition of the Home Rule Amendment (Const. art. 11, § 5), forbidding alteration, amendment, or repeal of a city charter oftener than every two years, by attempted charter amendments within two years previous thereto, where such attempted amendments were invalid because they followed the procedure prescribed by the city charter as to amendments which had been superseded by the provisions of the Enabling Act (art. 1096b) as to city charter amendments.

4. Municipal corporations §27—Cities have plenary power to annex territory under Home Rule Amendment.

The plenary power of the Legislature to extend the boundaries of cities was by the Home Rule Amendment (Const. art. 11, § 5) taken from the Legislature and conferred on cities of over 5,000 population, except that in making changes such cities are limited to the procedure prescribed by the Enabling Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1096a-1096i).

Appeal from District Court, Jefferson County; E. A. McDowell, Judge.

Suit by C. S. Eastham and others against B. A. Steinhagen and others. From judgment granting plaintiffs an injunction, de-

fendants appeal. Reversed, and injunction dissolved.

Chas. D. Smith and Gordon, Lawhon & Pool, all of Beaumont, for appellants.

E. B. Pickett, Jr., of Liberty, for appellees.

FOSTER, Special Judge. This is an appeal from a judgment of the district court of Jefferson county granting plaintiffs a temporary injunction restraining defendants, the mayor, city manager, commissioners, and tax collector of the city of Beaumont, from enforcing, or attempting to enforce, any ordinance of said city within the territory designated as the "French district" and the "South Park district," and from levying, collecting, or attempting to collect, any taxes against or upon any property, real or personal, situated therein. Plaintiffs (appellees here) are residents of said districts, and own property therein.

[1] The territory of the two districts named was not embraced within the boundaries of the city as fixed by, or in pursuance of, the provisions of the charter of 1909, which charter was granted by special act of the Legislature (chapter 92), and under which the city existed as a corporate municipality until December 30, 1919. On said date a charter, framed by a commission, was adopted by a vote of the qualified voters residing within the limits of the city as fixed by the old charter (1909). Beaumont at said time was a city of more than 5,000 inhabitants, and the new charter (of December 30, 1919) was framed, and the election held, under and in conformity with chapter 147, General Laws of the Thirty-Third Legislature. This is the Enabling Act, approved April 7, 1913, which put into effect the "Home Rule Amendment" to our state Constitution, and constitutes articles 1096a to 1096i, inclusive, Vernon's Sayles' Texas Civil Statutes. The qualified voters of the French district and the South Park district, including plaintiffs, were not permitted to vote at said election. The boundaries of the city as fixed by the new charter, adopted in 1919, included the territory of the two districts mentioned, and excluded the "Chalson tract" of 49 acres, which was a part of the city as defined in the charter of 1909.

Plaintiffs alleged that the charter of 1919, adopted under the Home Rule Amendment and the Enabling Act, could not, when adopted, embrace territory other than that defined in the then existing charter, and that the attempt to include the French and South Park districts was void; that no new territory could be annexed except in conformity with the old charter. Here it may be stated that the procedure prescribed by the old



charter for changing the city's boundaries is materially different from the method provided in the Enabling Act.

Another ground of attack by plaintiffs asserts that the election of December 30, 1919, was void, as an attempt to alter the city charter in violation of the Home Rule Amendment, which provides "that no city charter shall be altered, amended, or repealed oftener than every two years;" and it was alleged that the city of Beaumont had on three occasions, within two years prior to December 30, 1919, amended its charter—twice by elections, that each resulted in the city levying an increased school tax, and once by annexing to and including within the city's boundaries "block 1 of the Oaks Addition." The tax elections were held in 1918 and 1919, respectively, and block 1 of the Oaks Addition was annexed in October, 1919. Its annexation was attempted in pursuance of the method provided in the charter of 1909.

These contentions present the questions that we regard as decisive of this appeal, and the argument of appellees may be briefly summarized thus: (a) That the charter of 1909, including section 3 thereof, providing the procedure for annexing territory to the city, remained in full force until the result of the election of December 30, 1919, was ascertained, and that, since such procedure was not followed in annexing the French and South Park districts, their status was unaffected by said election, and they are therefore not a part of the city; (b) that the city could not adopt a new charter at said election, and at the same time enlarge its territorial limits, in the manner provided by the Enabling Act, because, it is asserted section 3 of the charter of 1909 was unaffected by said act until the new charter was adopted by the election of December 30, 1919; and (c) that the election for adopting a new charter was within the inhibition of the Constitution forbidding alteration, amendment, or repeal of a city charter oftener than every two years.

The contentions and argument of appellees, as stated, may, we think, properly be said to raise but a single question of law—the construction of the Home Rule Amendment and the Enabling Act. If the provisions of said act in reference to amendment of charters were applicable to the city of Beaumont from the time it became a law on July 1, 1913, and did not depend for their vitality (as applied to said city) upon the election of December 30, 1919, then it follows that the tax elections and the annexation of block 1 of the Oaks Addition were not valid amendments to the city charter, and they interposed no obstacle to the adoption of the new charter, since it is admitted that the procedure to amend prescribed by the

Enabling Act was not attempted to be applied. In this we do not mean to indicate that we regard said elections and annexation as amendments to the charter, aside from the question with which we are here concerned. Such a consideration suggests questions that it is not necessary now to decide, though the Court of Civil Appeals of the Third District recently held that the addition of new territory to the city of Waco constituted an amendment or alteration of the city charter. *City of Waco v. Higginson*, 228 S. W. 1084.

The Home Rule Amendment was adopted November 5, 1912. It constitutes section 5 of article 11 of the Constitution, and reads as follows:

"Cities having more than five thousand (5,000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the state, or of the general laws enacted by the Legislature of this state; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and provided, further, that no city charter shall be altered, amended or repealed oftener than every two years."

The first article of the Enabling Act, except for slight differences in punctuation and the use of the word "providing" where "provided" occurs in the amendment, is identical with said amendment. The next article of said act, being article 1096b of the statute reads:

"The legislative or governing authority of any incorporated city, having more than five thousand inhabitants may, by a two-thirds vote of its members, or upon petition of ten per cent. of the qualified voters of said city, shall provide by ordinance for the submission of the question, 'Shall a commission be chosen to frame a new charter?' The ordinance providing for the submission of such question shall require that it be submitted at the next regular municipal election, if one should be held, not less than thirty nor more than ninety days after the passage of said ordinance; otherwise it shall provide for the submission of the question at a special election to be called and held not less than thirty days, nor more than ninety days, after the passage of said ordinance and the publication thereof in some newspaper published in said city. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the city at large of a charter commission

of not less than fifteen members or more than one member for each three thousand inhabitants, provided, that a majority of the qualified voters, voting on such question shall have voted in the affirmative. The charter so framed by said commission shall be submitted to the qualified voters of said city at an election to be held at a time fixed by the charter commission not less than forty days nor more than ninety days after the completion of the work of the charter commission; provision for which shall be made by the legislative or governing authority of the city in so far as not prescribed by general law. Not less than thirty days prior to such election the legislative or governing authority of said city shall cause the city clerk or city secretary to mail a copy of the proposed charter to each qualified voter in said city as appears from the tax collector's rolls for the year ending January 31st, preceding said election. If such proposed charter is approved by a majority of the qualified voters, voting at said election, it shall become the charter of said city until amended or repealed; provided, that in preparing the charter, the commission shall, as far as practicable, segregate each subject so that the voter may vote 'Yes' or 'No' on the same. Provided, that where the legislative or governing authority of any city, or where any mass meeting has selected a charter committee, or charter commission, or where the mayor of any city has appointed a charter committee which has proceeded with the formation of a charter for said city, the provisions of this section as to the selection of the charter commission shall not apply to the first charter election to be held in said city under the terms of this act. No charter shall be considered adopted until the votes have been counted and an official order entered upon the records of said city by the legislative or governing authority of such city declaring the same adopted. When the legislative or governing authority of any city of more than five thousand inhabitants deems it preferable to submit amendments to any existing charter and in the absence of a petition hereinbefore provided for, said legislative or governing authority may, on its own motion, and shall upon the petition of at least ten per cent. of the qualified voters of said city submit any proposed amendment or amendments to such charter; provided, that the ordinance providing for the submission of any proposed amendment or amendments shall require that it, or they, be submitted at the next regular municipal election, if one shall be held, not less than thirty nor more than ninety days after the passage of said ordinance; otherwise it shall provide for the submission of the amendment or amendments at a special election to be called and held not less than thirty nor more than ninety days after the passage of said ordinance, and the publication thereof in some newspaper published in said city. The legislative or governing authority of said city shall cause the city clerk or city secretary to mail a copy of the proposed amendment or amendments to every qualified voter in said city as appears from the tax collector's rolls for the year ending January 31st, preceding said election. Every such proposed amendment or amendments, if approved by the majority of the qualified voters voting at said election, shall become a part of the charter of said city.

Each and every amendment or amendments submitted must contain only one subject and in preparing the ballot for such amendment or amendments, it shall be done in such a manner that the voter may vote 'Yes' or 'No' on any one amendment or amendments, without voting 'Yes' or 'No' on all of said amendments; and provided that no amendment or amendments shall be considered adopted until the votes have been counted and an official order has been entered upon the records of said city by the legislative or governing authority of such city, declaring the same adopted. Provided that no ordinance shall be passed submitting an amendment or amendments until twenty days' notice has been given of such intention by publication for ten days in some newspaper published in said city. By 'twenty days' is meant from the first date said notice is published.

"Provided, that nothing in this act shall prevent the qualified voters of any city of over five thousand inhabitants from adopting any charter or amendment thereto, and at the same time electing officers under such charter or amendment."

In the enactment of article 1096b, the Legislature was dealing with the amendment of existing charters, as well as the adoption of new charters, by incorporated cities of more than 5,000 inhabitants, and a detailed and comprehensive procedure was prescribed for the accomplishment of either object. The constitutional license to cities permits them to "adopt or amend" their charters "subject to such limitations as may be prescribed by the Legislature." By the Enabling Act, especially article 1096b, the Legislature clearly and positively supplied the limitations applicable where either is attempted. But it was said in argument that the amendment is permissive only, and that cities thereunder may adopt or amend their charters. This is true in a qualified sense. The meaning is that such cities may continue their corporate existence under the same charter that was in force when the Enabling Act became a law. That much is permitted, but when a new charter is sought or an amendment to an existing charter is desired the "limitations" prescribed by the Legislature, which clearly are authorized by the amendment, must be found in the Enabling Act. A detailed procedure is there prescribed, and there is nothing in either the amendment or the law itself to indicate that such procedure need not be applied in effectuating such adoption or amendment. On the contrary, the provisions are found to be applicable alike in either case. There is nothing in the law to suggest that any provision in an existing charter in reference to amendment thereof must be followed instead of the procedure prescribed by the law itself. Certain it is, it seems to us, that the terms of the law furnish a legislative construction of the amendment, and in our opinion a construc-

tion that is commanded by the language of the amendment itself. The amendment and the Enabling Act, in connection therewith, together constitute a self-executing law that must be applied whenever a city of the class dealt with adopts a new charter or amends an existing one. We therefore hold that section 3 of the charter of 1909 (Loc. & Sp. Acts 31st Leg. c. 92) was repealed and superseded by article 1096b of the Enabling Act. Said section 3 which was so removed from the old charter reads:

"Any territory adjoining the present or future boundaries of said city may from time to time, in any size or shape, be admitted and become a part thereof, on application made or written consent given to the city council by the owner or owners of the land, or, as the case may be, by a majority of the legal voters resident on the land sought to be added."

In the annexation of additional territory by an amendment of the charter the method provided by the quoted section of the 1909 charter is different from, and entirely inconsistent with, the procedure prescribed by the Enabling Act. It therefore was repealed thereby. *Cohen v. Houston*, 176 S. W. 809; *East St. Louis v. People*, 124 Ill. 655, 17 N. E. 447; *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. Ed. 798; *Buford v. State*, 72 Tex. 182, 10 S. W. 401; 28 Cyc. pp. 238 to 242, inclusive; *Mayor, etc., of Mobile v. Dargan*, 45 Ala. 310.

[2] We do not question the general rule of statutory construction quoted by appellees that "a general law does not by implication repeal a special one, although both relate to the same subject-matter," but it has no application when the language of the general act clearly manifests an intention on the part of the Legislature to make such change. The principle applicable to the facts here is thus stated in 28 Cyc. p. 242:

"Where the Constitution prescribes the mode of adoption of an amendment or new charter by a municipality, such mode is generally exclusive, and must be strictly pursued. So when the mode of municipal action to amend or reorganize is prescribed by statute, an amendment or reorganization attempted in any other mode or without substantial compliance with mandatory requirements of the statute is null and void."

In *East St. Louis v. Amy*, supra, the city charter authorized the city council to borrow money, but the power of special taxation to pay interest and provide a sinking fund was limited to three mills on the \$1 upon each annual assessment. Subsequently the state of Illinois adopted a new Constitution, in which it was provided that no municipal corporation should become indebted above a named percentage of the value of taxable property therein, and further that, at the time of incurring any indebtedness, it should provide for the collection of a direct annual

tax sufficient to pay the interest on such debt, and to discharge the principal within 20 years. In a contest wherein plaintiffs, under and in pursuance of the constitutional provisions, sought to enforce a higher rate of taxation than was permitted by the charter, it was said by Chief Justice Waite:

"In our opinion the Constitution removed from the charter the limitation upon the power of the council to tax for the payment of any bonded indebtedness which might thereafter be incurred, and gave authority to levy and collect enough to meet the interest as it fell due, and the principal within 20 years."

A like construction was applied by the Supreme Court of Illinois in *East St. Louis v. People*, supra. There authorities are merely special applications of the principle we have applied to the facts of this case.

In *Spears v. City of San Antonio* (Sup.) 223 S. W. 167, while the question was not decided, Justice Greenwood clearly intimated a view of the constitutional amendment and the Enabling Act that is in consonance with the opinion we have expressed. The city of San Antonio had voted to accept the benefits of chapter 11, tit. 22, Revised Statutes of 1911, in reference to street improvements. After stating that the question presented involved the constitutionality of the law as a delegation of legislative power, it was said:

"The election provided for in the act was held in San Antonio on the very day the law became operative putting the Home Rule Amendment to the Constitution into effect, and therefore there could be no compliance at the election with the terms of said law. Hence the question stated must be determined without reference to the power conferred on cities of more than 5,000 inhabitants by said amendment, with regard to the adoption and amendment of charters."

[3] We have thus far assumed that the tax elections and the annexation of block 1 of the Oaks Addition would have constituted amendments to the city charter had the provisions of the Enabling Act been applied. Whether they could properly be regarded as amendments if the procedure prescribed by the Enabling Act had been followed, as indicated heretofore, it is unnecessary to decide. If that question were before us, and were answered in the negative, the result would be the same, since appellees would not then be in position to invoke the prohibitive proviso against alteration, amendment, or repeal of a charter oftener than every two years.

[4] Prior to the adoption of the Home Rule Amendment, the power of the Legislature to fix the boundaries of an incorporated city, or to alter such boundaries by the annexation or elimination of territory, was plenary, unless restricted by constitutional limitations, and it was held in *Graham v.*

City of Greenville, 67 Tex. 62, 2 S. W. 742, that the power of the Legislature to extend the boundaries of a city so as to include additional territory was not restrained by the Constitution. Such was the authority of the Legislature when the Home Rule Amendment was adopted. The amendment divested the Legislature of this power, and conferred it upon all cities of more than 5,000 inhabitants. Thereafter the authority of the city of Beaumont in reference to enlarging or otherwise altering its territorial limits was the same as that which the Legislature had previously possessed, except only that in making changes it must observe the procedure prescribed in the Enabling Act. The authority with which the city was thus clothed extended to the city as then territorially constituted, and when the city, in connection with the adoption of a new charter, annexed the French and South Park districts, and eliminated the Chaison tract, it was clearly acting within such authority. This was ruled in the Cohen Case, supra, and we think that authority clearly applicable to the facts of this case.

It follows, therefore, from what we have said, that the facts relied on as amendments to the charter of 1909 were not such, because the procedure of the Enabling Act was not followed in the tax elections or the annexation of block 1 of the Oaks Addition, and that the prohibition of the amendment against alteration, amendment, or repeal of a charter oftener than every two years was not violated when the new charter was adopted. It also appears that the objections made to the changes of territory in the adoption of the new charter cannot be sustained.

In view of the disposition that we have made of the case, it becomes unnecessary to discuss the other questions raised.

In our opinion the judgment of the lower court was erroneous, and should be reversed, and the injunction dissolved; and it is so ordered.

STRONG, Special Chief Justice, and O'QUINN, J., concur.

HIGHTOWER, C. J., and WALKER, J., disqualified, and not sitting.

**MAGRUDER v. JOHNSTON et al.**  
(No. 2365.)

(Court of Civil Appeals of Texas. Texarkana.  
July 1, 1921. Rehearing Denied July 2,  
1921.)

**1. Tenancy in common §19(4) — Cotenant buying at foreclosure sale takes title as trustee.**

A cotenant buying at a foreclosure sale takes title for himself and as trustee for the other cotenants.

**2. Tenancy in common §19(5)—Duty to contribute begins with disbursement of funds for benefit of joint estate.**

The duty of cotenants to contribute their proportionate part to the discharge of a common debt paid by one of them only begins with the disbursement of funds for the benefit of the joint estate.

**3. Subrogation §3(4), 41(1) — Tenant in common, acquiring incumbrance, is subrogated to rights of lienholder, and may foreclose, if other cotenants fail to contribute.**

A tenant in common, who acquires an outstanding incumbrance against the common property, becomes subrogated to the rights of the lienholder whose claim he discharges, and may foreclose such lien in the event the other cotenants fail or refuse to contribute their proportionate part to the discharge of the common debt.

**4. Tenancy in common §19(5) — Purchaser from cotenant, who had purchased mortgage and foreclosed against cotenants, held entitled to oust them.**

Where one of several tenants in common purchased a mortgage against the property, and on the failure of the other cotenants to reimburse him foreclosed it, and purchased the property for the joint benefit of himself and one of such cotenants, to whom was assigned a portion of such property, on recovery by him of a judgment for an undivided one-half interest therein, a purchaser of such portion was entitled to recover possession thereof from the remaining cotenants, by whom he had been ejected; their offer of contribution, first made in the proceeding to oust them from possession, coming too late.

Appeal from District Court, Cherokee County; L. D. Gulin, Judge.

Suit by E. G. Magruder against Dave Johnston and others for the recovery of land. From a judgment awarding title to plaintiff, with right of redemption to defendants, plaintiff appeals. Reversed, and judgment rendered for plaintiff for title and possession.

Norman, Shook & Gibson, of Rusk, for appellant.

Perkins, Perkins & Shearon, of Rusk, for appellees.

HODGES, J. This suit involves the title to 30 acres of land, a part of a 70-acre tract formerly owned by W. S. Johnston, who died about the year 1913. It is agreed that W. S. Johnston is the common source of title. Prior to his death Johnston had mortgaged the entire tract to secure a debt of \$250. He died leaving the debt unpaid. The title descended and vested in his five brothers, E. B. Johnston, D. J. Johnston, Tom Johnston, Jack Johnston, and Dave Johnston. In 1914 E. B. Johnston, one of the brothers, purchased the debt and lien, which at that time amounted to \$307.85. Some time later he instituted suit thereon, making his four brothers parties defendant. In that suit he sought and obtained judgment establishing his debt, and an order foreclosing his lien and directing a sale of the land. In due time the land was sold by the sheriff, and was purchased by E. B. Johnston. The other brothers knew the judgment had been rendered, and knew of the sale, and of the purchase by E. B. Johnston. Each one of them had been legally cited, but none of them made any appearance in the case, nor did they make any objection to the sale.

After the purchase by E. B. Johnston at the sheriff's sale, a controversy arose between him and his brother D. J. Johnston. The latter claimed the existence of an agreement between him and his brother, E. B. Johnston, by which E. B. Johnston was to purchase the property for their joint benefit, and to give him (D. J. Johnston) an opportunity to pay his half of the purchase price when he became able. In the litigation which followed between those two, D. J. Johnston recovered a judgment for an undivided one-half interest in the 70-acre tract, upon the ground that a trust to that extent had arisen in his favor by virtue of the agreement above mentioned. See *Johnston v. Johnston*, 204 S. W. 469. A partition of the 70 acres was thereafter made between E. B. and D. J. Johnston; 30 acres being assigned to the latter. The report of the commissioners appointed for the purpose of making partition was approved and entered on January 23, 1920. On the same date D. J. Johnston sold and conveyed the 30 acres which had been set apart to him to the appellant, Magruder. The latter went into possession, but was thereafter forcibly ejected from the premises by Dave Johnston, one of the appellees in this appeal. In February following Magruder filed this suit for the recovery of the land, naming as defendants Tom Johnston, Dave Johnston, and Jack Johnston. At the same time he applied for and secured a writ of sequestration, which was levied upon the land. Later the appellees regained possession by the execution of a replevin bond.

The defendants answered by a plea of not guilty, and specially pleaded, in substance, that D. J. and E. B. Johnston entered into a conspiracy to defeat the equity of the defendants in the 70-acre tract of land, and in pursuance of that conspiracy E. B. Johnston purchased the note and deed of trust from the original holder in April, 1914, filed a suit of foreclosure against the defendants, and obtained a judgment thereon, and an order of sale directing the sale of the land, at which sale E. B. Johnston became the purchaser, for the benefit of himself and D. J. Johnston. They further state the facts, detailing, in substance, the history of the litigation which followed between E. B. and D. J. Johnston and the judgment rendered in that suit. They also allege that E. B. Johnston had agreed to pay each one of them \$40 for his interest in the land. The answer then continues as follows:

"These defendants say that by reason of the repudiation on the part of E. B. Johnston of his agreement to pay these defendants \$40 each for their equity in said land, these defendants are no longer bound by said agreement, and are entitled to a three-fifths undivided interest in said land, subject to an adjustment of equities between these defendants, and D. J. Johnston; that by reason of said secret trust in favor of D. J. Johnston, raised by the conspiracy between D. J. Johnston and E. B. Johnston above alleged, D. J. Johnston took five-tenths interest in said land in trust—that is to say, one-tenth for himself, one-tenth for E. B. Johnston, and three-tenths for defendants—and after partition held the land sued for in trust for himself and these defendants, viz. two-fifths for himself, and three-fifths for these defendants.

"Defendants come now and tender to plaintiff the sum of \$167.58, to wit, three-fifths of the amount paid D. J. Johnston to E. B. Johnston, as settled, and adjusted by this court, and interest thereon from January 2, 1920, and as to any further amounts paid by D. J. Johnston these defendants say that they are ready, able, and willing to pay plaintiff such amount as they may in equity be adjudged to pay."

Supplemental pleadings were filed by both parties, but they present no facts necessary to be discussed in this appeal. The court gave the following charge:

"You will return a verdict for the plaintiff, E. G. Magruder, for the land described in plaintiff's petition, and you will return a verdict in favor of the defendants, that the defendants shall pay to the plaintiff or into the hands of the district clerk of Cherokee county, within ten days from this date, three-fifths of the amount of the deed of trust given by E. S. Johnston to N. A. Slover, together with 10 per cent. interest on same from date of judgment to this date, three-fifths the amount of taxes paid by the plaintiff, or those under whom he holds, with 6 per cent. interest from the date of payment of same, and two-fifths of the rent for the place for the land for the year 1920,

together with three-fifths of the amount of partition suit or cost in case of D. J. Johnston v. E. B. Johnston, with interest on same from date at the rate of 10 per cent. from date of payment."

A judgment was rendered awarding the appellant, Magruder, title to the land, but adjudging that the appellees Dave, Tom, and Jack Johnston have the right of redemption. It is ordered that if they shall, within 10 days from the date of the judgment, pay into the registry of the court the sum of \$452, which includes two-fifths of \$150 (the value of the rents), then that they have title to an undivided three-fifths interest. Magruder appeals, and contends that under the facts the court should have peremptorily instructed a verdict in his favor for title to all of the land and the rents for one year.

[1-3] In support of the charge counsel for appellees state the following proposition: (1) A cotenant buying at a foreclosure sale takes title for himself and as trustee for the other cotenant. (2) The duty of cotenants to contribute only begins with the disbursement of funds for the benefit of the joint estate. Conceding the correctness of the legal propositions above stated, it by no means follows that the appellant was not entitled to recover all that he sued for. A tenant in common, who acquires an outstanding incumbrance against the common property, becomes subrogated to the rights of the lienholder whose claim he discharges. If he had a lien, he may foreclose it in the event the other cotenants fail or refuse to contribute their proportionate part to the discharge of the common debt. *Niday v. Cochran*, 42 Tex. Civ. App. 292, 93 S. W. 1027; 7 Ruling Case Law, p. 873, and numerous cases cited in notes.

[4] The facts in this case upon the material issues are undisputed. E. B. Johnston acquired the mortgage, for which he paid \$307.85. There is nothing in the evidence to indicate that he did this unfairly or for an improper purpose. While a conspiracy is alleged, none was proven. He then held a valid claim for four-fifths of that amount against the four-fifths of the land owned by his four brothers. Upon their failure to reimburse him for the sums which he had expended for the common benefit, he had the right to subject their interests to the payment of the debt. This he did in the suit filed in 1914. There is nothing in the record to indicate that the judgment procured in that suit was irregular or invalid. At the sale which followed E. B. Johnston had a legal right to purchase the property. Any other joint owner might have exercised the same privilege, and the purchaser, whoever he might be, would take the property free from the claims of the former owners, who held by inheritance from their deceased

brother. Their right of redemption had been foreclosed. Whatever right any of them might thereafter assert would depend upon some appropriate agreement regarding the sale and purchase under the judgment rendered in favor of E. B. Johnston. While there is some reference in the pleadings to an agreement, there is no evidence of any which could legally form the basis of a trust in favor of the appellees. The offer of contribution made in this proceeding comes too late.

Whether E. B. Johnston purchased for himself alone, or for himself and his brother D. J. Johnston, the result would be the same in so far as the interests of the other joint owners are concerned. Whatever title E. B. Johnston acquired by his purchase he shared

with D. J. Johnston. Each title rested upon the same judicial proceedings. Counsel for the appellees concede that the title of E. B. Johnston to his portion of the land is valid. The same legal basis also supports the title of D. J. Johnston. The title of D. J. Johnston passed to the appellant without any qualification, and is equally free from assault in his hands.

We are of the opinion that the appellant's assignments should be sustained, and the judgment should be reversed, and here rendered in his favor for the title and possession of the entire 30-acre tract, and for \$150, the agreed value of the rents for one year. It is further ordered that the appellees pay all costs, both of this court and of the court below.

**BANK OF COMMERCE & TRUST CO. v.  
BUCKINGHAM et al.**

(Supreme Court of Tennessee. May 28, 1921.)

**Appeal and error 1013—Allowance by chancellor of attorney's fee not disturbed.**

Where a chancellor allowed an attorney's fee of \$2,000 for services performed in an action to have a will construed and an estate settled, and where the services were performed under the eye of the chancellor, who is in a position to appraise the worth of a lawyer's services, and there is a difference of opinion among the lawyers testifying, the allowance by the chancellor will not be disturbed.

Appeal from Chancery Court, Shelby County; I. H. Peres, Chancellor.

Suit by the Bank of Commerce & Trust Company against Miles G. Buckingham and others. From a decree of the chancellor fixing the attorney's fee, the executor of Miles S. Buckingham appeals. Affirmed.

G. J. McSpadden, of Memphis, for Bank of Commerce & Trust Co.

A. H. Murray, of Memphis, for Buckingham.

GREEN, J. This case comes before us on the appeal of the executor of Miles S. Buckingham from a decree of the chancellor fixing the fee of the executor's counsel.

The chancellor allowed a fee of \$2,000. The executor and its counsel insist that a fee of \$4,000 should be allowed. We have discussed the facts of the case in an oral opinion, and it is not necessary to detail them here. It is sufficient to say that counsel rendered valuable services to the estate and that the proof shows a difference of opinion among the law-

yers examined as witnesses as to what a proper fee would be.

A bill was filed in the chancery court of Shelby county for a construction of the will of Miles S. Buckingham and to have the estate settled in that court. Most of the services for which compensation is claimed were performed in that case. The chancellor took up the question of the amount of counsel's fee in open court, and the various parties and the lawyers testifying were examined before the chancellor and their testimony preserved in a bill of exceptions.

In *Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31, we said:

"We are not disposed to interfere with the allowance of attorneys' fees in the lower court, unless we can see that some injustice has been perpetrated. Such matters are to a great extent within the discretion of the [lower] court, and we will not interfere with the exercise of that discretion unless we think the allowance made is materially wrong."

As stated above, the work of the executor's counsel was chiefly done in this case while pending in the court below. It was done under the eye of the chancellor. He was in a position to more accurately appraise the worth of counsel's endeavors than are we.

The proper amount of professional compensation is always more or less a matter of opinion. The proof in this case develops nothing more than a difference of opinion among able lawyers.

We do not think this is a case in which we would be justified in interfering with the allowance fixed by the chancellor. On the contrary, it seems to us a case in which the general rule should be applied and the chancellor's decree allowed to remain undisturbed.

Let the decree of the chancellor be affirmed.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



**LLOYD THOMAS CO. v. GROSVENOR.**

(Supreme Court of Tennessee. June 29, 1921.)

1. Corporations  $\S$ 661(2)—Foreign corporation cannot sue until it complies with statutes; "doing business."

Although Acts 1877, c. 81, Acts 1891, c. 122, and Acts 1896, c. 81, concerning terms on which corporations can carry on business in the state, were passed as a matter of public policy, and not for the benefit of parties sued, before a foreign corporation can sue on a contract made and performed while it was unauthorized to do business in the state in the courts of the state, it must comply with the statutes concerning transaction of business within the state by foreign corporations.

2. Corporations  $\S$ 642(1)—"Doing business" is transaction of ordinary business continuous in character.

A corporation is "doing business" in a state when it transacts therein some substantial portion of its ordinary business, continuous in character, as distinguished from merely casual or occasional transactions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

3. Courts  $\S$ 97(1)—Whether transaction is interstate commerce held a federal question.

Whether a transaction by a foreign corporation is interstate commerce, as distinguished from business done in the state, is a federal question, on which decisions of the federal Supreme Court are conclusive.

4. Corporations  $\S$ 642(4)—Contract made in one state, subject to approval by one party in another, held interstate business.

Where contract to appraise property in Tennessee was made in Tennessee by an Illinois corporation, and before becoming valid had to be approved at the office of the Illinois corporation in Chicago, the transaction was interstate business and was not a transaction of business in the state of Tennessee within the statutes respecting foreign corporations.

5. Corporations  $\S$ 661(2)—Transaction of interstate business in other matters without complying with statutes held not to prevent suit on interstate business.

Although a foreign corporation is guilty of carrying on business within the state without complying with the statutes, it is not precluded by this from suing in the state courts on a contract constituting interstate business.

6. Contracts  $\S$ 28(3)—Evidence held to show a meeting of minds concerning appraisement of property.

In an action for the agreed price of services under a contract for the appraisement of certain property, evidence held to show that the minds of the parties met concerning the appraisement of all the property involved.

7. Contracts  $\S$ 28(3)—Evidence held to show sufficient meeting of minds on nature of services to be performed.

In an action on a contract for the appraisement of certain property, evidence held to show a sufficient meeting of the minds of the parties on the nature and character of the service to be performed.

Appeal from Chancery Court, Shelby County; I. H. Peres, Chancellor.

Suit by the Lloyd Thomas Company against C. N. Grosvenor. From decree in favor of defendant, complainant appeals. Reversed and decree entered for complainant.

Banks & Harrelson, of Memphis, for Lloyd Thomas Co.

Randolph & Randolph, of Memphis, for Grosvenor.

HALL, J. The bill in this cause was filed by complainant against defendant to recover the sum of \$2,290.93. Complainant is a foreign corporation with its general offices located in the city of Chicago, state of Illinois, and is engaged in the business of appraising property.

On January 18, 1919, the complainant entered into a contract with the defendant, Grosvenor, who is a resident of Memphis, Tenn., by the terms of which complainant agreed to appraise for Grosvenor certain real estate belonging to the estate of the late Napoleon Hill, situated at Mammoth Springs, Ark. The contract was solicited by the traveling representative of complainant from Grosvenor at Memphis. It was agreed and understood between the defendant and complainant's representative, at the time the contract was reduced to writing and signed by the defendant, that it was not to be binding upon complainant until it had been duly approved and accepted by it at its general office in the city of Chicago; in fact, it is so stipulated in the face of the contract. After being reduced to writing and signed by the defendant, it was forwarded by complainant's representative to its general office at Chicago, and on January 20, 1919, was duly accepted and approved by complainant and defendant notified of its acceptance.

The reason which prompted the defendant to have an appraisal made of said property was that there was to be a sale of said property for division among the heirs of Napoleon Hill, deceased, and defendant, being a son-in-law of Hill, was contemplating bidding on the property at the sale, and being unfamiliar with its value, contracted with the complainant to make an appraisal of the property to guide him in bidding on the same. The property of the Hill estate at Mammoth Springs consisted of a roller mill, hotel, a number of storehouses, gin, cotton mill warehouse, and some residences. The contract

expressly provided for the appraisal of the roller mill, and it was agreed between the parties that such other property belonging to the estate, and located at Mammoth Springs, should be appraised by complainant, as defendant might desire appraised, and it was agreed that defendant would have such other of the property as he might desire appraised pointed out to complainant's engineer upon his arrival at Mammoth Springs to secure the necessary data to be used in appraising the roller mill. It was agreed that complainant should have 65 cents for each \$100, "new replacement" value put on the property by complainant, which should be paid by defendant within five days after the delivery of the appraisement to him. The "new replacement" value is the amount it would cost to replace the property new at the date of the appraisal. Complainant was also to put on the property a "sound" value, which is its actual fair cash value, after making necessary allowances for depreciation, and also a "prewar" value, which was its actual fair cash value as of date March 1, 1913. In the event the values exceeded \$200,000, then complainant should have 60 cents on each \$100, "new replacement" value. It was further stipulated that complainant should make the appraisal and deliver its report to defendant on or before March 5, 1919.

It is not disputed that the appraisement was made by complainant according to the terms of the contract, except in one particular to be hereinafter mentioned; and that the appraisement was delivered to defendant in April, 1919, which was after the time specified in the contract for delivery, but no question is made by the defendant on account of complainant's failure in this regard.

The two defenses set up by defendant to complainant's right to recover upon said contract are: (1) That complainant, at the time said contract was entered into, was a foreign corporation doing business in the state without having complied with the provisions of chapter 31, Acts of 1877, chapter 122, Acts of 1891, and chapter 81, Acts of 1895, respecting foreign corporations, and was therefore not entitled to enforce said contract in the courts of the state; and (2) that if complainant could recover at all, it could only recover upon a quantum meruit, as the minds of the parties to the contract did not meet as to the work to be performed by complainant.

The chancellor decreed that complainant was not entitled to recover of the defendant, because it had not complied with the provisions of the statutes hereinbefore referred to respecting foreign corporations at the time the contract with defendant was entered into and the service performed, and dismissed complainant's bill. From this decree complainant has appealed to this court, and has assigned the action of the chancellor for error.

The evidence shows that after the contract was received, approved, and accepted by complainant at its home office in the city of Chicago, it sent one of its appraising engineers, Henry P. Mollarus, to Mammoth Springs, to secure data, notes, diagrams, and other information necessary to enable complainant to make a report as to the value of said property. Mollarus performed this service by measuring the buildings, making drawings of them, counting and estimating the various kinds of material in them, and the quantity of same, including the excavations, masonry work, number of brick in the walls, carpentry work, mill work, plumbing, etc.; and after this was done he sent this data to complainant's office at Chicago, where the same was assembled, the valuations of the property worked out, and a report of said values formulated, which was then forwarded to the defendant at Memphis. It is not controverted that in order to make the appraisal it was necessary for complainant to send one of its engineers to the situs of the property to secure this data. It is further undisputed that no part of the work necessary to make said appraisal was done in the state of Tennessee. It appears, however, that in the year 1919 the complainant entered into 11 other contracts with parties in Tennessee, and made 11 similar appraisals of property situated in Tennessee, during said year, 5 of which were made in the city of Memphis, and during the 10 years of its corporate existence it has made about 100 appraisals of property in Tennessee. It is further undisputed that complainant had not complied with the statutes of this state respecting foreign corporations at the time these contracts were made and performed, including the one now involved.

[1] It is well settled in this state that a foreign corporation which has not complied with its statutes prescribing the terms upon which said corporation may do business in the state cannot enforce any contract in the courts of the state made and performed while such corporation is unauthorized to transact business therein. *Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Harris v. Light Co.*, 108 Tenn. 245, 67 S. W. 811; *Lumber Co. v. Moore*, 126 Tenn. 313, 148 S. W. 212; *Cunningham v. Shelby*, 186 Tenn. 176, 188 S. W. 1147, L. R. A. 1917B, 572; *Association v. Cannon*, 99 Tenn. 344, 41 S. W. 1054; *Insurance Co. v. Kennedy*, 96 Tenn. 711, 36 S. W. 709; *Property Co. v. Nashville*, 114 Tenn. 213, 84 S. W. 810; *Heating Co. v. McKnight*, 140 Tenn. 564, 205 S. W. 419.

The statutes respecting the terms upon which foreign corporations may do business in the state were passed as a matter of public policy, not so much for the benefit of the parties sued, as in the interest of the people at large.

[2] A corporation is doing business in a

state when it transacts therein some substantial portion of its ordinary business, continuous in character as distinguished from merely casual or occasional transactions. *Amusement Co. v. Albert*, 128 Tenn. 417, 161 S. W. 488.

In the instant case it is insisted that the ordinary business of the complainant was the making of appraisals on property, and the sending of its representative into Tennessee to solicit contracts, and later other representatives to gather the data necessary for making said appraisals, was the doing of a substantial portion of its ordinary business within the state. This is the question presented for determination.

In the case of *Holder v. Aultman, Miller & Co.*, 169 U. S. 81, 18 Sup. Ct. 269, 42 L. Ed. 669, it was held that under a statute of the state of Michigan making void all contracts made in that state by any foreign corporation, which had not filed its articles of association and paid its franchise tax, a contract made elsewhere than in Michigan is valid, although it was to be performed in that state. It was also held in that case that a contract is made when, and not before, it has been executed and accepted by both parties, so as to become binding upon both, and that a contract signed in the state of Michigan by the parties (one of whom was a foreign corporation which signed by its agent) stipulating that it should not be valid until approved at the principal office of the corporation in Ohio was not, when so approved in Ohio, a contract made in Michigan, within its statute invalidating contracts by foreign corporations which had not filed their articles of association and paid a franchise tax. The court held that the plaintiff's business, as carried on in pursuance of such a contract, was an interstate commerce business, and that the plaintiff was not subject to the aforesaid statute; and the statute, in so far as it applied, or purported to apply, to foreign corporations like the plaintiff, which were doing an interstate commerce business, was in conflict with the provisions of the Constitution of the United States authorizing Congress to regulate interstate commerce.

[3] It was held by this court in *Heating & Ventilating Co. v. McKnight & Merz*, 140 Tenn. 563, 205 S. W. 419, that whether a transaction by a foreign corporation is interstate commerce, as distinguished from doing business in the state, is a federal question, on which decisions of the federal Supreme Court must be followed by the state courts.

[4] It is clear, therefore, that under the holding of the Supreme Court of the United States in the case of *Holder v. Aultman, Miller & Co.*, supra, the contract sought to be enforced in the instant cause was not a Tennessee contract, but an Illinois contract.

This being true, the service to be performed by complainant was not an intrastate transaction, but an interstate transaction, and our statutes respecting foreign corporations have no application to it. Congress alone has the power to regulate interstate commerce. This case is clearly distinguishable from *Amusement Co. v. Albert*, supra. The contract involved in that case was made in the state and was performed in the state.

[5] But it is said that complainant, having entered into other contracts with parties in Tennessee for the appraisal of property situated in said state, and actually sent its agent into the state to gather data necessary to enable it to make said appraisals, was, as to such contracts, engaged in carrying on business in the state in violation of its statutes respecting foreign corporations, and therefore cannot enforce the contract in question in the courts of the state.

We do not think this contention is well grounded. If it be conceded that the other contracts entered into by complainant with parties in the state for the appraisal of property situated in the state, and the sending of its agent here to gather data necessary to enable it to make such appraisals, amounted to a carrying on of a portion of its ordinary business in the state, that fact could not operate to prohibit complainant from enforcing the contract in question, since such contract was an interstate transaction and is protected by the interstate commerce clause of the federal Constitution. *Mertins v. Hubbell Publishing Co.*, 190 Ala. 311, 67 South. 275.

[6] As to the contention of defendant that in no event can complainant recover for the entire service performed, but only upon a quantum meruit, because the minds of the parties did not meet on the service to be performed, we are of the opinion that this contention is not sustained by the proof.

It is insisted by defendant that it was not within the contract that complainant should appraise the cotton mill warehouse, and that complainant cannot recover for its appraisal, and the decree of the chancellor should be modified accordingly.

It is shown by the testimony of Mr. Kirberg, the representative of the complainant, who negotiated the contract with defendant, that it was agreed that defendant would have his manager at Mammoth Springs to point out the property he wanted appraised, in addition to the roller mill, when complainant's engineer arrived on the ground to secure data for appraising the roller mill. This is not denied by the defendant.

Mr. Mollarus, complainant's engineer, testified that when he had about finished securing the necessary data for the appraisement of the roller mill, he went to Memphis and saw defendant in regard to the appraisement of the remainder of the property. He says

that defendant told him that he would communicate with his manager at Mammoth Springs, and have him to show him (Mollarus) the other property he wanted appraised, and Mollarus says that Mr. Bellamy (defendant's manager) did, on his return to Mammoth Springs, point out to him the other property, which the defendant wanted appraised, including the cotton mill warehouse. Mr. Bellamy was not offered as a witness to contradict the statement of Mr. Mollarus on this point. Mr. Mollarus further testified that defendant came to Mammoth Springs while he was securing the necessary data for the appraisal of the storehouses and cotton mill warehouse, and that he (Mollarus) had a conversation with him in his room at the hotel pertaining to the appraisal of the property, and that defendant told him that he wanted the property appraised as low as it was possible, as he wanted to bid on it at the sale; that with regard to the cotton mill warehouse defendant stated that that property was not of great value, but he wanted a value placed on it so that he would know how to bid on it.

Mr. Kirberg testified that he saw the defendant in Memphis in May, 1919, after the appraisal was completed in April of that year, and that the only complaint defendant made, at that time, of the appraisal was that the appraiser's fee was larger than he expected and thought some reduction should be made. He offered to pay the complainant \$1,800 in settlement of its fee. Kirberg says that in that conversation defendant admitted that he instructed Mr. Mollarus to include the cotton mill warehouse in the ap-

praisement, but that complainant had placed a higher value on it than he thought was fair.

[7] It is also insisted by defendant that the minds of the parties did not meet on the nature and character of the service to be performed, because he did not understand that he was to pay complainant for making the appraisal on the basis of a "new replacement" valuation. He says he only wanted a "sound" value placed on the property, and that he understood that complainant's compensation was to be based on such a value.

We do not think this contention is sustained by the proof. The contract expressly stipulated that complainant's compensation for making the appraisal was to be based on the "new replacement" value. Furthermore, notwithstanding the appraisal was made and report thereof was sent to the defendant by complainant in April, 1919, he never made any complaint that he did not understand the terms of the contract as to the compensation which complainant should receive for the work; in fact, he made no complaint whatever until some time in May, 1919, and then only insisted that complainant's bill for the service exceeded his expectations, and that too high a valuation had been placed on the cotton mill warehouse. The proof, however, fails to show that the valuation placed on the cotton mill warehouse was exorbitant.

It results that the decree of the chancellor will be reversed, and a decree will be entered here in favor of complainant for the amount sued for, with interest and costs.

**TERRY et al. v. STATE. (No. 84.)**

(Supreme Court of Arkansas. July 4, 1921.  
Rehearing Denied Sept. 23, 1921.)

**1. Indictment and information §85 — Accessory after the fact sufficiently charged.**

Within Crawford & Moses' Dig. § 2310, defining accessory after the fact, *held*, active concealment from magistrate of commission of murder was sufficiently charged by indictment, though merely alleging that, with full knowledge that another had committed the crime, defendant did willfully, unlawfully, and feloniously harbor, protect, and conceal the crime.

**2. Indictment and information §85 — Facts constituting concealment of crime need not be recited.**

Under Crawford & Moses' Dig. § 3013, stating the requisites of an indictment, an indictment of one for being an accessory after the fact need not recite the facts constituting the concealment of crime charged.

**3. Criminal law §82—Judgment of conviction of principal immediately admissible against accessory after the fact.**

On trial of one for being accessory after the fact to the crime of murder, judgment of conviction of another for the murder is admissible as *prima facie* evidence of the truth of its recital, though time for appeal or for motion for new trial has not expired.

**4. Criminal law §82—Finding of criminal purpose of alleged accessory after the fact warranted.**

Evidence on prosecution for being accessory after the fact to the crime of murder *held* to warrant finding that it was defendant's purpose to shield the principal from detection and arrest.

**5. Jury §33(3)—Right of accused to trial by jury of county not violated.**

There is no violation of the guaranty of Const. art. 2, § 10, that accused shall enjoy right to a trial before a jury of the county of the crime, because of Acts 1885, p. 219, § 6, which divided a county into two districts, and provided that the circuit courts established in the respective districts shall be as distinct from, and have the same relation to, each other as if they were in different counties, being amended by Acts 1921, No. 282, by addition of the proviso that in selecting juries in special venires in said circuit courts in either of said districts of said county the judge may direct the selection of the venire from either or both districts.

**6. Criminal law §1035(6)—Objection to absence of order for special venire not available for first time on appeal.**

Objection that under Act 1921, No. 282, before a special venire can be summoned from one district of a county to serve in another, the judge must have ordered it, is not available for the first time on appeal.

**7. Homicide §300(1)—Self-defense in resisting arrest not made out.**

Statement that the officer whom one killed while resisting arrest for commission of felony

was bringing his gun to his shoulder did not make a case of self-defense requiring instruction thereon.

Appeal from Circuit Court, Prairie County; Geo. W. Clark, Judge.

S. A. Terry and Tom Cornall were convicted of being accessories after the fact to the crime of murder, and appeal. Affirmed.

Brundidge & Neelly, of Searcy, for appellants.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

SMITH, J. Appellants were separately indicted and tried. The indictments are identical, and charge each appellant with the crime of being an accessory after the fact to the crime of murder in the first degree. They were convicted, and the punishment of each fixed at 10 years in the penitentiary. The proceedings at the trial below are so nearly identical that the appeals have been briefed together as a single case.

The indictment against the appellant Terry reads as follows:

"The grand jury of Northern district of Prairie county, in the name and by authority of the state of Arkansas, accuse S. A. Terry of the crime of accessory after the fact to murder in the first degree committed as follows, to wit: The said Robert Long, in the county, district and state aforesaid, on the 14th day of February, A. D. 1921, unlawfully, feloniously, and with malice aforethought, with deliberation and premeditation did kill and murder one Alfred Oliver, by shooting him, the said Alfred Oliver, with a gun then and there loaded with gunpowder and leaden bullets, and had and held in the hands of him, the said Robert Long, and that the said S. A. Terry, after said crime of murder had been committed, and with full knowledge that the said Robert Long had committed said crime of first degree murder as aforesaid, did then and there willfully, unlawfully, and feloniously harbor, protect, and conceal said crime as aforesaid, against the peace and dignity of the state of Arkansas."

The sufficiency of this indictment is questioned both on demurrer and by a motion in arrest of judgment.

The indictment against appellant Cornall is identical except the use of his name instead of that of appellant Terry.

At each trial the record of the conviction of Long was read in evidence. The trial of the appellant Terry was had the day after that of Long. Objection was made to the introduction of the judgment of conviction against Long for the reason that Long had 3 days within which to file a motion for a new trial and 60 days within which to appeal, and that the judgment could not become final until the expiration of that time. Objection was also made and exceptions saved

to the action of the court in permitting the attorney who defended Long to testify that there would be no appeal in Long's case. Long was convicted of murder in the first degree and given a life sentence in the penitentiary.

The trial occurred in the Northern district of Prairie county, and in making up the jury jurors residing in the Southern district of the county were accepted. Exceptions were saved to the action of the court in holding these jurors competent.

After the introduction of the record of Long's conviction the first witness to testify was Long himself. Long was asked if he knew what had become of Alfred Oliver, the person alleged to have been killed by him. Objection was made to this question "because the same is a matter of record evidence, and the record is the best evidence of that fact." In passing upon this objection the court said:

"I am going to instruct the jury, gentlemen, when we reach that, that the introduction of that record constitutes a prima facie case of murder in the first degree as against Robert Long, and, unless there be testimony contradictory of that record, that that is sufficient to establish that allegation in the indictment of the murder of Oliver by Long, the witness now on the witness stand. What else do you want now at this time?"

The state asked witness Long nothing about the circumstances of the killing, but had him relate what had happened after the killing occurred, and a most gruesome story was told. Long was engaged in the illicit manufacture of moonshine whisky, and after killing Oliver—to whom he referred as the "detective"—he loaded the corpse into a wagon, covered it with quilts and bales of hay, and left his home, where the killing occurred, about dark. He drove to the home of Terry, a distance of about 17 miles, where he arrived about 11 p. m. He awakened Terry, and as soon as Terry came out where the wagon was advised him that "We have got a detective out here, and I want you to help me secrete him." Appellant Cornall was called on by Terry to assist, and the corpse was loaded into a boat and carried out into a creek and thrown into the water after a large rock had been fastened to the body. Other details were related by Long which, if true, fully warranted the jury in finding that both Terry and Cornall had consciously assisted in the attempt to cover up the evidence of Long's crime. They admit this to be true, but attempt to excuse their conduct by stating that they were coerced and intimidated by Long; that they were asked by members of searching parties if they knew anything about the disappearance of Oliver, and denied that they did. This they also admit, but explain that conduct by saying that they kept silent and denied their knowledge of the crime because Long had stated he would kill them both if

they told what they knew, and that his partner Bridges would kill them if he failed to do so. They stated that as soon as Bridges and Long were taken into custody and they no longer feared for their safety they told what they knew and carried the searching party to the creek where the body of Oliver was found. Bridges himself testified. He was present at the killing, and stated that after the corpse was put into the wagon Long got a tow sack, into which he put the blood and brains of the deceased which had been scattered over the floor. This sack and the bloody blankets were burned at Terry's home.

Just before the conclusion of the cross-examination of the witness Long counsel for appellant Terry asked the witness if he killed Oliver in self-defense. The court sustained an objection to this question, holding that the witness could not express his opinion as to what constituted self-defense, but that he might tell what was done. Thereupon counsel asked the witness, "What was Oliver doing when you shot him?" The following questions and answers then appear in the bill of exceptions:

"A. Raising his gun. (The witness then made a motion with both of his hands showing Oliver bringing his shotgun up to his shoulder or bringing it up in a shooting position.) Q. Who? A. Alfred Oliver. Q. Who on? A. Me."

This concluded the cross-examination of the witness, and there was no other effort made to show that the killing of Oliver was justifiable.

Exceptions were saved to the action of the court in giving and in refusing to give a number of instructions.

[1] The objections to the indictment are that it does not charge the appellants with concealing the commission of the offense of murder from a magistrate, nor does it allege that appellants harbored and protected Long, the person charged with its commission, and further that the indictment is indefinite in its allegations as to the acts of appellants which constituted the concealment of the crime.

The statute under which the prosecutions were conducted reads as follows:

"An accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime." Section 2310, C. & M. Digest.

This court has had frequent occasion to consider this statute and a number of the cases are cited in the briefs of respective counsel. In the case of *Stevens v. State*, 111 Ark. 299, 163 S. W. 778, we considered what affirmative action would be required to constitute one as an accessory after the fact. We there quoted from the case of *Davis v. State*,

96 Ark. 7, 130 S. W. 547, the following statement of the law:

"The mere passive failure to disclose the commission of the crime would not make one an accessory under our statute. There must be some affirmative act tending toward the concealment of its commission or a refusal to give knowledge of the commission of the crime when same is sought for by the officials of the person having such knowledge. It has been held by this court that the fact that the person knowing of a crime conceals his knowledge of its commission for his own safety does not raise a presumption that he is an accomplice."

We think the indictments under review meet the requirements of the case cited. The indictments allege that, with full knowledge that Long had committed the crime of murder in the first degree, the appellants "did then and there willfully, unlawfully, and feloniously harbor, protect, and conceal said crime as aforesaid."

The indictments do not allege that the crime was concealed from a magistrate. Its allegations are broader; the fair and reasonable interpretation thereof being that the crime was concealed from all persons. As has been said, we have held that mere silence in the presence of crime, or the mere failure to inform the officers of the law when one has learned of the commission of a crime, does not make one an accomplice. *Stevens v. State*, supra, and cases there cited. But appellants are charged with the affirmative act of harboring, protecting, and concealing said crime, and, when this language is read in connection with that which immediately precedes it in the indictment, as it should be, we think it fairly charges appellants with concealing the crime of Long after full knowledge of its commission.

[2] Cases are cited from the courts of other states which hold the pleader to greater strictness and require the recital of the facts which constitute the concealment of the crime. We do not follow these cases, as they do not comport with our statute, which provides that an indictment is sufficient if it can be understood therefrom: (a) That it was found by a grand jury impaneled in a court having authority to receive it; (b) that the offense was committed within the jurisdiction of the court, and at some time prior to the finding of the indictment; and (c) that the act or commission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case. Section 3013, C. & M. Digest.

[3] No error was committed in permitting the judgment in Long's trial to be admitted. It is true the time for filing a motion for a new trial had not then expired, and, of course, the time for appeal had not expired; but the judgment showed the disposition of the charge against Long. He had been con-

victed of murder in the first degree, and the judgment recited that fact. It was not conclusive of Long's guilt so far as Terry and Cornall were concerned, nor would it have been had the time for appeal, or for filing a motion for a new trial have expired, as the court properly held; but that judgment was prima facie evidence of the truth of its recital against Long so long as it remained in force and effect. 1 R. C. L. p. 154, § 35, of the article on Accessories.

[4] It is insisted that the proof conclusively shows that appellants acted under the coercion of the threats of Long. But at appellant's request the court charged the jury that, if the failure of appellants to disclose the information possessed by them was not for the purpose of shielding Long, to find them not guilty. An instruction more favorable could not have been asked, and we think the testimony warranted the jury in finding that it was the purpose of appellants to shield Long from detection and arrest.

[5] The court committed no error in permitting jurors to serve who resided in the Southern district of the county. The insistence of appellants in this respect is that by Act 133, p. 217, of the Acts of the General Assembly of 1885 Prairie county was divided into the Northern and Southern districts. By section 6 of this act it is provided:

"That the circuit courts, hereby established in the respective districts of Prairie county shall be as distinct from each other and have the same relation to each other as if they were circuit courts of different counties, and may change the venue of any case from one district to another, or to any other county in the judicial circuit, in like manner as changes of venue are granted in this state."

By section 10 of article 2 of the Constitution it is provided that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed. Counsel say that, when section 6 of the act of 1885 is read in connection with section 10 of article 2 of the Constitution, the right existed to demand a jury coming from the body of the Northern district of the county, where the crime was committed and where the trial occurred.

It appears, however, that by Act 282 of the Acts of the General Assembly of 1921 section 6 of the act of 1885 has been amended by the addition of the following proviso:

"Provided, however, that in selecting juries in special venire in said circuit courts in either of said districts of said county, the circuit judge presiding may direct that said venire be selected from the district in which the court is sitting, or from either or both of said districts of said county."

We see no constitutional objection to this amendment. The General Assembly of 1921 had the right to amend the act of 1885. It

had the authority to prescribe the practice of the courts of that county, and the authority of the General Assembly was limited only by the restrictions of the Constitution. The guaranty of the Constitution is that the accused shall enjoy the right to a trial before a jury of the county in which the crime was committed, unless the venue is changed. The Northern district of Prairie county and the Southern district of Prairie county are, alike, parts of that county, and the guaranty of the Constitution is met when jurors are selected from either division of the county.

[6] It is now objected that the act of 1921 requires that the presiding judge shall first make an order for a special venire from the district other than the one in which the trial is had before such venire can be summoned. This, however, was not the ground of the objection in the court below. Counsel expressly stated that it was his purpose to raise the question of the constitutionality of the act of 1921, and, if he had also then raised the question now raised, it might have been made to satisfactorily appear that the court had ordered a special venire from the other district of the county.

The court gave an instruction numbered 1, reading as follows:

"You are instructed that the record read to you by the clerk of this court makes a prima facie proof of the charge contained in the indictment that Robert Long killed Alfred Oliver in the form and manner charged in the indictment, and in the killing thereof it is prima facie proof by such record that he was guilty of murder in the first degree, and that the state is not required, unless such record be contradicted, to produce additional proof upon this issue."

[7] As we have said, this is a correct statement of the law. But, after giving this instruction, the court refused instructions requested by appellants defining the law of self-defense. It is very earnestly insisted that the refusal to give these instructions constituted reversible error, as the cross-examination of Long, set out above, tended to show that Long had killed Oliver in self-defense. We do not think the testimony presents that issue. The court gave appellants permission to show that the killing of Oliver by Long was justifiable; but no other effort was made to show that such was the case. Long was not asked to detail the circumstances leading up to the killing. It is fairly inferable—and the jury no doubt found—that while resisting arrest for the commission of a felony Long killed an officer of the law who was in the discharge of his duties in making an arrest. *Coats v. State*, 101 Ark. 51, 141 S. W. 197. The statement that Oliver was bringing his gun to his shoulder does not, under the circumstances detailed by the witness, make a case of self-defense,

and the court did not err in refusing to submit that question to the jury.

Numerous errors are assigned in giving and in refusing to give instructions. We do not discuss these instructions in detail, as the questions raised here have been many times considered by this court, and a discussion of these assignments of error would unduly protract this opinion.

The court gave a very elaborate charge, included in which were a number of instructions requested by appellants which submitted their theory of the case to the jury. These instructions, as a whole, fairly and fully submitted the case, the evidence is legally sufficient to support the verdict, and, as no error of law appears, the judgment in each case is affirmed.

### MARKHAM et al. v. STATE. (No. 96.)

(Supreme Court of Arkansas. July 11, 1921.  
Rehearing Denied Sept. 26, 1921.)

1. Criminal law  $\S$  829(12)—Instruction as to sufficiency of evidence held properly refused as argumentative, where covered by other instruction.

In a prosecution for manufacturing intoxicating liquors, court did not err in refusing a requested instruction that the fact alone that defendants were at the still and drank beer was not of itself sufficient to warrant the jury in finding them guilty, being argumentative; such matter being covered by an instruction that the fact that the defendants visited the still frequently was only a circumstance that the jury might consider in arriving at their verdict.

2. Criminal law  $\S$  822(4)—Instruction not erroneous as directing verdict of guilty, when construed as a whole.

In a prosecution for manufacturing intoxicating liquors, an instruction that "the fact that the parties, if it is a fact, visited the still frequently, or any at all, are only circumstances that the jury may consider in arriving at their verdict," construed as a whole and in connection with the court's remarks, was tantamount to instructing the jury that if defendants frequently visited the still it was a circumstance which the jury might take into consideration in determining the issue as to whether or not defendants were guilty of the crime charged, and was not erroneous as instructing the jury to find the defendants guilty.

3. Criminal law  $\S$  844(1)—Accused must specifically point out susceptibility of instruction to improper construction.

If accused believed that an instruction was susceptible of a construction which would make it erroneous, it was their duty to call the attention of the court to such particular construction by specific objection, and this they did not do by prayers for instructions on the subject.



4. Criminal law  $\Rightarrow$  721 (4)—Remarks not comments upon failure of defendants to testify.

Remarks of prosecuting attorney, "We find the five leaving the mill and going in the direction of the still. None of them denied that they went to the still but P."—could not be construed as a comment upon the failure of the defendants to testify, and did not contravene the provisions of Crawford & Moses' Dig. § 3123; witnesses for defendants, who were supposed to have been present with defendants at the still, testifying that they were not there, and that defendants were not there, so far as they knew.

Appeal from Circuit Court, Pike County; Jas. S. Steel, Judge.

Elh Markham and others were convicted of unlawfully manufacturing intoxicating liquors, and they appeal. Affirmed.

W. S. Coblenz, of Mufreesboro, for appellants.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

WOOD, J. The appellants were separately indicted at the March term of the Pike county circuit court for the crime of manufacturing and being interested in the manufacture of intoxicating liquors. The cases were consolidated for trial.

J. E. Chaney testified that he was the sheriff of Pike county and was acquainted with the appellants. Some time in February, 1921, he discovered a still near Franklin's sawmill, about 350 yards from Perry Franklin's house. He saw five persons coming away from the still on Thursday, and on Friday he again saw five persons at the still, among whom were the appellants. "They were working around there—brought up a little turn of pine and were working around the furnace; filled up the boiler, put the cap on, wrapped a rag around it, and walked away." When the parties who were at the still on Thursday went away, witness went down there and found a hog in the pen which seemed to be pretty helpless, intoxicated. Witness also found a lot of barrels, boxes, and about 200 or 300 gallons of beer. Later, on Friday night, witness saw some parties go past the still and saw them go back carrying some glass jugs. One of the persons was the size of Jewell Sparks and the other was the size of Green.

Another witness testified that he saw Jewell Sparks at the still. He had a bucket. Witness heard him hit the bucket against the barrels there and thought he was getting a bucket of beer. When he got back up to Perry Franklin's house he heard one fellow say, "If that is not enough, I will go back and get some more." The parties he saw going to the still that night were carrying jugs. One of the parties corresponded in

size with Jewell Sparks and another with Green or Martin. It was shown that the appellants were arrested on Sunday, and that some bottles and glass jugs were found in a sack at Perry Franklin's house, and the beer when destroyed on Sunday was ready to run.

Perry Franklin testified for the appellants to the effect that he had been running the sawmill mentioned about two months. He discovered a still near his home on Monday before he was arrested on Sunday. He went to the still on Tuesday and looked around a little and drank a little beer; went back on Thursday and got a sow out of the pen where the still was; that on Friday appellants and others working at the mill left the mill and went to witness' house. Witness was not at the still on Friday. Jewell Sparks did not bring a bucket of beer to his house. Witness did not tell appellants about the still, and they were never at the still, so far as witness knew. Witness stated that on Friday evening he, Ben Davidson, and the appellants left the mill together. Some of them had been drinking at the mill that week. It was shown by other witnesses on behalf of the appellants that the mill closed down about 5 o'clock on Friday evening, and that in about 30 minutes after closing time the appellants came back to the mill. In rebuttal Matthew Cummins testified that he heard Jewell Sparks admit that he had frequented the still. Sparks said he went up there and carried a bucket of beer on Thursday evening to the mill; that when he got to court he was going to tell that he went up there twice after beer, and if they stuck him for it he would just have to go.

The appellants asked the court to grant the following prayers for instructions:

"The mere fact, if shown, that these boys went there and drank beer would not be sufficient to convict. You are instructed, if you find from the evidence in this case beyond a reasonable doubt that the defendants frequently visited the still, drank beer there at it, these are circumstances which the jury may consider with all the other facts and circumstances in determining whether or not they were interested in the manufacture of intoxicating liquors.

"You are further instructed, gentlemen of the jury, that even though you should believe that these parties visited the still and drank beer, or carried beer away from the still, from this fact alone you cannot convict the defendants; but it would be a mere circumstance which you may consider with all the other facts and circumstances in the case, and unless you are convinced beyond a reasonable doubt, notwithstanding although you should believe they visited the still and drank beer, that they manufactured or were interested in the manufacture of intoxicating liquors, you will acquit the defendants."

Mr. Rountree, one of the attorneys for the appellants, thereupon remarked:  $\wedge$

"The fact alone that they were there and drank beer is not of itself sufficient to warrant the jury in finding appellants guilty."

To which the court replied:

"That is for the jury to say—that is a circumstance they may consider."

The court refused to grant the above prayers, saying:

"I want to give one along that line."

The appellants duly excepted to the ruling of the court. The court, among others, gave the following instruction:

"The fact that the parties, if it is a fact, that they visited the still frequently, or any at all, are only circumstances that the jury may consider in arriving at their guilt."

"You must believe, beyond a reasonable doubt, from all the facts and circumstances in evidence, that the defendants did manufacture the whisky, or were interested, or aided or abetted, as defined by the instructions I have read to you. The law presumes the defendants innocent until their guilt is proven beyond a reasonable doubt."

In the course of his argument the prosecuting attorney used the following language:

"We find the five leaving the mill and going in the direction of the still. None of them denied that they went to the still but Perry Franklin."

The appellants objected to the argument of the prosecuting attorney, and asked that the jury be instructed not to consider it for the reason that "it was a direct reference to the failure of the defendants to testify." The court overruled the objection, and appellants duly excepted. The jury returned a verdict of guilty against the appellants and fixed their punishment at one year in the penitentiary. From the judgments of sentence based on these verdicts is this appeal.

[1] 1. The court did not err in refusing the appellants' prayer for instructions. These prayers were argumentative in form and calculated to mislead the jury. The phases of the case presented by the testimony which these prayers of the appellants were intended to submit were covered by the instructions which the court gave "along that line." The court told the jury that—

"The fact that the parties, if it is a fact, visited the still frequently, or any at all, are only circumstances that the jury may consider in arriving at their guilt."

When this paragraph is read in connection with the succeeding paragraph, it is clear that the court told the jury, in substance, that they should take into consideration the testimony tending to show that the appellants visited the still frequently, and all the facts and circumstances in evidence in determining whether or not the appellants were guilty of the crime charged.

[2, 3] Learned counsel for appellants contend that the court instructed the jury in the first paragraph of the instruction to find the defendants guilty. That paragraph might have been more happily phrased if the attention of the court had been drawn to the verbiage to which the appellants' counsel now for the first time urge a specific objection. The instruction was not inherently erroneous. It was correct to tell the jury that if the appellants frequently visited the still this was a circumstance which the jury might take into consideration in determining the issue as to whether or not the appellants were guilty of the crime charged. The language used by the court was tantamount to so instructing the jury, and when the instruction is considered as a whole, and in connection with the remarks of the court, it is evident that such was the court's purpose. If the appellants believed that the instruction was susceptible of the construction which they now give it, it was their duty to call the attention of the court to such particular construction by specific objection. This they did not do, and the prayers they presented do not have that effect. *St. L., I. M. & S. Ry. Co. v. Holmes*, 88 Ark. 181, 114 S. W. 221; *St. L., I. M. & S. Ry. Co. v. Dallas*, 93 Ark. 209, 124 S. W. 247; *St. L., I. M. & S. Ry. Co. v. Stacks*, 97 Ark. 405, 134 S. W. 315; *Thompson v. Southern Lumber Co.*, 104 Ark. 196, 148 S. W. 537, and other cases cited in 4 Crawford's Digest, § 110, p. 5027.

[4] 2. The remarks of the prosecuting attorney should not be construed as a comment upon the failure of the appellants to testify, and hence these remarks do not contravene the provisions of our statute to the effect that the failure of an accused to testify shall not create any presumption against him. Section 3123, Crawford & Moses' Digest.

In *Culbreath v. State*, 96 Ark. 180, 131 S. W. 677, the attorney representing the state in his closing remarks said:

"Where was the defendant that day? He has never seen fit to say. He has not shown by any one where he was between the hours of 10 o'clock in the morning and 1:30 in the afternoon."

Concerning these remarks we said:

"Taking the whole statement together, we do not think it can fairly be construed as a comment or criticism on defendant's failure to testify in his own behalf or as calling attention to that fact. It was merely an expression of the opinion of counsel that the defendant had not adduced evidence accounting for his whereabouts during the hours named."

In *Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436, the appellant, Davidson, did not testify in his own behalf. The sister of the deceased testified to a certain conversation the appellant had with the deceased. The prosecuting attorney referred to this testimony in the following language:

"You have a right to consider this conversation with Miss Barham in presence of her sister, gentlemen of the jury, so unexplained by any one and unexplained and undenied by any one, and I call on them now to explain this conversation, if untrue."

Concerning these remarks, we said:

"It is not a comment or criticism on the defendant's failure to testify in his own behalf, but was the expression of the opinion of counsel that the testimony had not been rebutted and it should be accepted as true."

Now, in the case at bar it was shown that there were two others besides the appellants that were seen leaving the mill and going in the direction of the still. Ben Davidson was one of the five. He was not on trial with the appellants, and was a competent witness in their behalf to prove that neither he nor the appellants were at the still on the occasion mentioned, if such were the facts. The appellants did call Perry Franklin, who was also designated as one of the five who were seen leaving the mill and going in the direction of the still, and he testified that he was not at the still on Friday. He was asked whether the appellants were at the still and answered, "Not that I know of."

In *Davis v. State*, 96 Ark. 7, 130 S. W. 547, the appellant was charged with the crime of abortion. Two witnesses had testified about the conversation appellant had with them concerning the alleged crime. The prosecuting attorney referred to this testimony in the following language:

"He [the defendant] told Bently and Dr. Cunningham how he had administered the medicine to her to produce an abortion and it is undisputed and undenied in this case, and he cannot deny it."

In that case the defendant did not testify. Concerning the above remarks we said:

"These remarks, we think, were but the expression of the opinion of the state's attorney as to the weight of the testimony of these two witnesses, and could not fairly be construed to refer to the fact that the defendant had not testified in the case and did not tend to create any presumption against him by reason of his failure to testify."

In the light of the above cases we are convinced that the remarks of the prosecuting attorney under review here should not be construed as a comment upon the failure of the appellants to testify, but rather as an expression of his opinion as to the weight of the evidence adduced on the part of the state to the effect that the appellants and two others left the mill and were seen at the still on a certain day mentioned by the witnesses. The purport of the argument couched in the remarks of the prosecuting attorney was that the testimony tending to show that these parties left the mill and were at the still on that day was undenied and un-

controverted. There were other parties besides the appellants said to be at the still on that day. One of these parties was called on by the appellants to testify, and he denied that he was there, but did not categorically deny that appellants were there. His testimony was to the effect that if the appellants were there he had no knowledge of the fact, and the other party said to be in the company of appellants on that occasion was not called on to testify. Hence the prosecuting attorney argued that the presence of the appellants at the still on that day, as proved by the state, neither the appellants nor any one else denied. If the appellants were not at the still as proved by the state, it was a fact which, as the circumstances disclosed, they might have adduced testimony tending to prove by other witnesses than themselves. In this respect the case differs from the cases of *Curtis v. State*, 89 Ark. 394, 117 S. W. 521; and *Hoff v. State*, 83 Miss. 488, 35 South. 950, upon which counsel for appellant relies.

In the first of those cases the appellant was charged with the crime of rape and in the second case with the crime of seduction. The remarks of the prosecuting officer in those cases to the effect that the crimes charged were not denied, were correctly held as referring to the failure of the defendants to testify because in cases of that character, aside from the general denial involved in a plea of not guilty, the only way that such offenses could be denied would be by the defendants themselves denying the charges on the witness stand.

In the case of *Starnes v. State*, 128 Ark. 302, 194 S. W. 506, the appellant was charged with grand larceny. He did not testify at the trial, and in his concluding remarks the prosecuting officer said: "The defendant has not denied a single allegation of the indictment." In that case we held that any prejudice resulting from the remarks of the prosecuting attorney was removed by instructions to the jury, and we announced the general doctrine that it was improper and presumptively prejudicial for the prosecuting attorney to call the attention of the jury to the failure of the accused to testify. But because of the instructions of the trial judge removing any possible prejudice that might have resulted from these remarks, we were not called upon to decide, and did not decide, in that case, whether the remarks of the prosecuting attorney were in fact a comment upon the failure of the defendant to testify. The effect of the holding in that case is that if the remarks there objected to could be considered as obnoxious to the statute there was no prejudicial error in the ruling of the court in refusing to rebuke the prosecuting officer for having made them, because the court eliminated all possible prejudice by explicit instructions in telling the

jury that they could not infer guilt because of the defendant's failure to testify.

The case for decision on the record now before us is ruled by the cases of *Culbreath v. State*, supra, *Davis v. State*, supra, and *Davidson v. State*, supra. See, also, *Blackshare v. State*, 94 Ark. 548, 558, 128 S. W. 549, 140 Am. St. Rep. 144.

We find no error. The judgments are therefore affirmed.

### MAGNOLIA PETROLEUM CO. v. JOHNSON. (No. 102.)

(Supreme Court of Arkansas. July 11, 1921.  
Rehearing Denied Sept. 26, 1921.)

1. Master and servant  $\S$ 318(1)—Contractor for delivery of oil held agent for whose negligence oil company was responsible.

An agreement between an oil company and another, by which he undertook to handle delivery of oil and to make sales on a commission basis, using his own teams and vehicles and employing and discharging his own servants, subject to directions of the company's representatives, construed, and held to create the relation of principal and agent so as to render the company liable to a customer for damages by a fire set by an explosion from negligent delivery by the servants employed.

2. Principal and agent  $\S$ 23(1)—Use of term "agent" is not conclusive of the relation created by contract.

The designation of one as an agent in a contract is not conclusive as to the relation.

3. Master and servant  $\S$ 318(1) — Right of control test of existence of relation.

The test as to the existence of relation of principal and agent between an oil company and one under contract to sell and make deliveries on a commission basis is not whether the company actually directed the manner of the delivery of the oil, but whether it had the right to control the delivery.

4. Explosives  $\S$ 10—Contributory negligence of person injured held for the jury.

In an action for injuries from an explosion of gasoline from alleged negligent method of delivery by plaintiff's servants, the contributory negligence of the plaintiff in holding a lantern near by for the benefit of the servants delivering the oil held, under the evidence, a question for the jury.

5. Explosives  $\S$ 10—Negligence of servants delivering gasoline held a jury question.

Negligence in the method of servants delivering gasoline to a tank in a barn after night held a question for the jury.

Appeal from Circuit Court, White County;  
J. M. Jackson, Judge.

Action by G. A. Johnson against the Magnolia Petroleum Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Cockrill & Armistead and Jno. W. Newman, all of Little Rock, for appellant.

Jno. E. Miller and C. E. Yingling, both of Searcy, for appellee.

SMITH, J. Appellee recovered judgment against appellant company for the value of a barn and its contents, alleged to have been negligently set on fire by the agents, servants, and employees of appellant. Liability on the part of appellant is denied upon two grounds: First, that it was not responsible for the acts of the persons whose negligence caused the fire; and, second, that appellee was guilty of contributory negligence which defeats his right of recovery.

Appellant is engaged in producing and selling oils and gasolines, with its principal Arkansas office in the city of Little Rock. In order to supply the territory in and about Searcy, appellant entered into a contract with one J. N. Smith, who was in the transfer business at Searcy. Under this contract the company shipped oil and gasoline to Searcy, and stored it in their tanks there for sale, with Smith in charge. Smith undertook to handle the property with proper care, and to make sales and deliveries of gasoline on a commission basis, graduated according to the expense of delivery. The commission on deliveries in the city was two cents per gallon and to country points was three cents. The company supplied the containers for the oil and gasoline, while Smith, in consideration of the commissions paid, used the teams, wagons, and drivers employed by him in his transfer business. The company was not consulted in the employment or discharge of these men, whose wages were fixed and paid by Smith. The contract is a very elaborate one, and designates Smith throughout as the company's agent, and he signed it in that capacity.

The company furnished the gasoline and oil and specified the prices at which it should be sold. The company required the drivers of the wagons making deliveries in the country to use sales slips furnished by it. These slips were signed by the driver, and were so prepared that a carbon copy might be delivered to the purchaser. The originals were turned in to the company, and in cases where accounts were run bills were sent out from the company's office in Little Rock. Any money collected by the drivers was turned in by them to Smith, and all checks given in payment for oil or gasoline were made payable to the order of the company. The company caused to be painted on the wagons and tanks used in making deliveries the words, "Magnolia Petroleum Company," this being the name of appellant company.

Section 21 of the contract between Smith and the company contains the following recitals:

"It is expressly understood and agreed that the above rates of commission apply on sales made by agents, and the commissions to apply on sales made by salesmen, managers and others, and the commissions to apply on transfers between agencies, on home office contracts and on railroad contracts, are allowed as full compensation to agent for service to be rendered in connection with the proper handling of the company's business in the territory assigned to the agency. The duties of the agent in return for said compensation includes the proper care of stock placed in his charge, storage tanks, warehouse and other equipment, soliciting and carrying on business under the direction of the division manager, and other authorized representatives, and the making of deliveries, the collecting of accounts, the making of reports required, unloading cars, and such other services as may be required for the proper conduct of the business."

Section 22 of that contract provides that the company shall furnish, free of charge, all forms, stationery and postage for the proper conduct of the business, and that all other items of expense shall be assumed by the agent, Smith.

No complaint is made of the instructions given on this subject. The insistence is that the undisputed evidence shows that Smith was an independent contractor, and that the drivers of the wagon were the servants of Smith.

[1] The majority of the court are of the opinion that the facts stated made a case for the jury, and that the contract between the company and Smith created the relation of principal and agent, and that the company had reserved the right to control and direct the manner of making deliveries of oil, and that, while no directions were given in the particular instance as to the manner of delivering the oil to appellee, which caused the fire that destroyed the barn, the company had reserved the right of direction; and, in the discharge of all duties, whether performed by Smith himself or by men employed by him, in selling and delivering the oil, the work done was that of the company.

[2, 3] We recognize, of course, that the designation of Smith as "agent" in the contract is not conclusive of the relation. *J. R. Watkins Medical Co. v. Williams*, 124 Ark. 545, 187 S. W. 653. The test is, not whether the company actually directed the manner of the delivery of the oil, but is whether the company had the right to control the delivery. 14 R. C. L. § 3, p. 67, of the article on Independent Contractors. And the majority, are of the opinion that the contract between the company and Smith, as interpreted by the conduct of the parties under it, shows that it was the purpose of the company to retain complete control of everything done in connection with the sale and delivery of the oil, and that the testimony, in its entirety, warranted the finding that

the drivers of the wagon were themselves the servants of the company.

[4] The majority are also of the opinion that the question of appellee's contributory negligence was properly a question for the jury. Instructions on the question of negligence of the drivers and the contributory negligence of appellee correctly declared the law. The insistence on this branch of the case is that under the undisputed evidence appellee was negligent as were the drivers of the wagon, and that, if it be said that the testimony supports the finding that the drivers were negligent, it must also be said that appellee was guilty of contributory negligence.

The testimony on this branch of the case is as follows:

The wagon used in delivering oil to country customers was driven by Ernest Neal and Jim Mann. They drove the wagon to the home of appellee, and arrived there about dark on March 5, 1920. When they arrived they called and asked appellee if he had a gasoline tank, and, if so, where it was. Appellee answered that he had a tank, and that the tank was in his barn. Johnson was told to light his lantern and bring it to the barn. This appellee did, and he relates what happened as follows:

"They drove the wagon up in front of the door, and backed right in front of the car shed door. Jim Mann started to draw the gasoline. He started to unscrew these taps, I call them, in the end of the steel barrel; I had seen it drawn that way before; I had seen them fake the small tap out, and it seemed like it did better, and I mentioned it to him, and he said, no, he thought he could manage it all right that way, and he just took it out, the gasoline was flowing in the barrel back and forth. When he took the tap out, he said 'Hold your light up where I can see.' I was standing something like six or eight feet from him, with the lantern down by my side, and when he told me to hold the light up I held it up waist high, and just about that time he took the tap out and the gasoline flew all over him, all over his hands and in front of his clothes and it caught him afire. I saw the blaze leave the lantern and go to him. The blaze went right up into the barn and ignited it. Before he threw the barrel down and took the big bung out I suggested that he first take the small tap out. They usually pour the gasoline out of the barrel into a 10-gallon can, and then pour it into the gasoline tank. All the time before that they poured the gasoline through a rubber hose."

We think this testimony legally sufficient to support the finding that Neal and Mann were guilty of negligence in the manner employed of transporting the gasoline from the barrel to the tank, in that they did not use the rubber hose; nor did they remove the tap before tilting the barrel; nor did they first pour the gasoline into the 10 gallon can. The jury might have found that if any one of

these things had been done the gasoline would not have splashed out over Mann.

[5] The majority are also of the opinion that the question of appellee's contributory negligence was properly a question for the jury. It is true he held the lantern which caused the explosion, but Mann and Neal were in charge of the barrel, and they ignored appellee's suggestion, which, if it had been accepted, might have prevented the explosion. Moreover, the jury might have found that Mann and Neal were more experienced in handling gasoline than appellee was, and that appellee had, to that extent, the right to rely upon this superior knowledge and experience, inasmuch as the act being done was not so obviously dangerous that it must be said as a matter of law that an ordinarily prudent man would not have participated in it to the extent that appellee did.

No error appearing, the judgment is affirmed.

**TAYLOR, County Treasurer, v. SPIVEY et al.**  
(No. 107.)

(Supreme Court of Arkansas. July 11, 1921.  
Rehearing Denied Sept. 26, 1921.)

**Public lands** — 143—County treasurer, receiving money deposited for school district by purchasers of school lands in the district pursuant to an unlawful agreement between them, required to account to the district therefor.

Where an unlawful agreement was entered into by the purchaser of school lands lying within a school district and a subsequent purchaser to give the district the difference between the sale price and a higher amount for less than that which the land should be sold, the remedy to the state is either to sue the purchasers for the fair price of the property or to rescind the sale and recover the land; but, notwithstanding such unlawful agreement, the county treasurer may be required to account for the money paid to him for the district pursuant thereto, the money being received by him in his official capacity as a gift from the purchasers, and not as a part of the state school fund.

Appeal from Circuit Court, St. Francis County; J. M. Jackson, Judge.

Objections by W. A. Spivey and others, as School Directors of Common School District No. 27, St. Francis County, to the report of George P. Taylor, as County Treasurer. Objections to report sustained in the circuit court, and judgment rendered against the defendant and his bondsmen, and he appeals. Affirmed.

See, also, 222 S. W. 57.

Mann & Mann, of Forrest City, for appellant.

J. W. Morrow, of Forrest City, for appellees.

**HUMPHREYS, J.** This is the second appeal in this case. On the first appeal (222 S. W. 57) the judgment of the circuit court was reversed, dismissing appellant's appeal from the county court to the circuit court, with directions to the circuit court to hear the objections which appellants had filed to the report of the appellee, the county treasurer, on the ground that he had failed to account in his report to the county court for certain money which, it was alleged, belonged to common school district No. 27, in St. Francis county. Upon remand, the circuit court heard and sustained the objections to the report and rendered judgment against said county treasurer, George P. Taylor, and his bondsmen, for the sum of \$3,000 and interest, alleged to have been received by said county treasurer for said school district, for which amount he failed to account in his report. From that judgment, an appeal has been duly prosecuted to this court.

The facts developed upon the hearing are, in substance, as follows: State school lands lying within said district were advertised according to law, and sold by the sheriff of the county at public sale to the highest bidder. J. S. R. Cowan and B. C. Friar, being interested in the land and school district, agreed between themselves that, if the land sold for less than \$6,400 at the sale, the difference between the sale price and that amount should be presented to said district, to be used as a building fund. Pursuant to this agreement, J. S. R. Cowan purchased the land at the sale for \$3,400, and that amount was paid in cash to the sheriff, who, in turn, paid it to the treasurer of the state for the benefit of the public school fund. Shortly thereafter, Cowan sold the land to B. C. Friar, and, in addition to the purchase price of \$3,400, received an additional check for \$3,000 as a donation or gift to said school district No. 27. Either the check or the money derived therefrom was deposited by Cowan in the Planters' Bank & Trust Company, at Forrest City, to the credit of George P. Taylor, as county treasurer. Thereupon the treasurer issued the following receipt to Cowan:

"\$3,000.00.

Oct. 2, 1917.

"Received of J. S. R. Cowan, three thousand dollars. Deposited by J. S. R. Cowan, to be placed to the credit of the building fund for school district No. 27, St. Francis county, Ark. Ok. of B. C. Friar.

"George P. Taylor, County Treasurer."

The fund was checked out of the bank on checks signed by the county treasurer, but was used by the said George P. Taylor personally.

[1] Appellant contends that the court erred in requiring him to account to said school district No. 27 for the sum of \$3,000 deposited by J. S. R. Cowan at the Planters'

Bank & Trust Company in Forrest City for him, and for which he receipted as county treasurer, because the fund was in fact a part of the general school fund of the state, and properly payable to the State Treasurer. The record of the sale of said school land does not so show. On the contrary, it shows that the land sold for \$3,400, and that the amount of the bid was paid to the collector for the benefit of the general school fund of the state. It is true that an unlawful agreement was entered into by the purchasers to give \$3,000 to the school district No. 27 in lieu of bidding the additional \$3,000 at the sale. If the state was defeated by reason of the illegal combination from obtaining this additional sum for the general school fund, the remedy to the state is twofold: Either to sue the purchasers for the fair price of the property, or to rescind the sale and recover the land.

The record reflects that the said sum of 3,000 was in the nature of a gift to said school district No. 27 by the purchasers at the sale, and was so received by the county treasurer, and that it was not received by him as a part of the state school fund. By the receipt of same, as county treasurer, for the use and benefit of school district No. 27, the county treasurer became a public bailee of said fund for said district. Appellant, by virtue of his office, was the official custodian of the funds of said school district No. 27, and, having received the funds in his official capacity, is accountable for them in his official settlement to said district, regardless of the means through which the funds were acquired. *Skagit County v. American Bonding Co. of Baltimore*, 59 Wash. 8, 109 Pac. 199.

No error appearing, the judgment is affirmed.

# CENTRAL COAL & COKE CO. v. BARNES. (No. 99.)

(Supreme Court of Arkansas. July 11, 1921.)  
Rehearing Denied Sept. 26, 1921.)

## 1. Master and servant §118(4)—Impracticability of complying with statute as to ventilating mine no defense.

Under *Crawford & Moses' Dig. § 7284*, requiring not less than 200 cubic feet of air per minute to pass each working place in mines, it is no defense to an action for negligence based on noncompliance with the statute that it is not practical to comply therewith; this being a question for the Legislature.

## 2. Master and servant §118(4)—Compliance with statute as to ventilating mine necessary.

Where a miner and a shot firer in the discharge of their duties worked in a crosscut, it was necessary to comply with *Crawford & Moses' Dig. § 7284*, relative to air currents in such crosscut.

## 3. Master and servant §286(19)—Compliance with mining statute held question for jury.

Where the testimony of a mine fire boss that he placed a warning of danger of gas in a crosscut on a blackboard, as required by *Crawford & Moses' Dig. § 7279*, was contradicted by the testimony of an injured employee that he examined the blackboard and found nothing thereon indicating danger in the crosscut, the question of negligence was one of fact for the jury.

## 4. Master and servant §236(10)—Shot firer required to test for gas, not insurer of own safety.

Though it was the duty of a shot firer in a mine to test for gas before firing a shot, he was not thereby made an insurer of his own safety.

## 5. Master and servant §288(12)—Shot firer's assumption of risk of gas explosion held question for jury.

In an action for injuries to a shot firer in a mine caused by an explosion of gas, evidence held to make a question for the jury as to whether the danger of firing a shot was so patent and obvious that he assumed the risk.

## 6. Master and servant §293(14)—Instructions on mine operator's duties not too general or misleading.

An instruction that it was the duty of one operating a mine to exercise ordinary care to furnish an employee with a reasonably safe place to work and not expose him to any unusual danger, and in the exercise of ordinary care to make such reasonable inspections and examination as would enable it in the exercise of ordinary care to know of any dangers or dangerous places that might imperil the safety of a shot firer in the discharge of his duty, and to notify him by a notice on a blackboard of any dangers or dangerous places where he was required to work, if there were any and it knew of them, or in the exercise of ordinary care might have known thereof, held not too general and misleading as not specifically defining the issues.

## 7. Master and servant §235(6)—Shot firer in mine entitled to rely on employer's compliance with statute.

Though the fact that a mine fire boss had made an inspection for gas did not justify an employee in firing a shot where he knew that there was gas, in determining whether it was safe to fire the shot he had a right to rely on the fact that the fire boss had not marked any danger as required by statute, and that the statute prescribed the amount of air to be circulated at the place the shot was fired.

## 8. Master and servant §291(4)—Instruction on mine ventilation warranted by evidence as to size of mine.

Though *Crawford & Moses' Dig. § 7284*, prescribing the amount of air required to pass each working place in mines does not apply to coal mines where less than 10 men are employed underground in 24 hours, and though there was no specific evidence that a mine came within the statute, an instruction thereon was proper, where the whole tenor of the evidence showed that it was a large mine, and the

State Mine Inspector testified that he inspected the mine as required by law, though, under section 7259, such inspection was not required unless more than 10 men were employed.

**9. Master and servant** ⇨276(3)—Jury held warranted in finding compliance with statute as to mine ventilation would have prevented explosion.

In an action by a shot firer for injuries due to an explosion of gas in a mine, the jury held warranted in finding that if the current of air required by Crawford & Moses' Dig. § 7284, had been in operation, it would have driven the gas out of a crosscut and not allowed it to accumulate in sufficient quantities to ignite.

**10. Master and servant** ⇨226(2)—Instruction on assumption of risks by miner held correct.

An instruction that, while plaintiff by entering defendant's service as a shot firer in its mines assumed all the risks ordinarily incident to that employment, he did not assume any risks arising from the negligence of defendant, or any one to whom it intrusted its superintending authority, unless plaintiff was aware of such dangers and appreciated them, was correct.

**11. Negligence** ⇨141(12)—Instruction on damages in case of contributory negligence held not erroneous.

An instruction that if plaintiff was guilty of contributory negligence such contributory negligence would not bar a recovery if plaintiff was otherwise entitled to recover, but that the damages, if any, should be diminished by the jury in proportion to the amount of negligence attributable to plaintiff, was in accord with Crawford & Moses' Dig. § 7145, and was not erroneous.

**12. Trial** ⇨296(11)—Instruction as to damages not prejudicially erroneous because of reference to amount sued for, in view of another instruction.

In an action for personal injuries, an instruction that if the jury found for plaintiff they should assess his recovery at such sum as from the evidence in their judgment would fairly compensate him for the injuries which he had sustained, if any, "not to exceed the sum of \$3,000," and that in arriving at the amount of recovery the jury might consider his pain and suffering, loss of time, etc., held not prejudicially erroneous because of the reference to the amount sued for, in view of the direction to find only such amount as the evidence warranted.

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

Action by Tom Barnes against the Central Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Affirmed.

James B. McDonough, of Ft. Smith, for appellant.

A. M. Dobbs, of Hartford, Norwood & Alley, of Mena, and G. L. Grant, of Ft. Smith, for appellee.

**HART, J.** The Central Coal & Coke Company prosecutes this appeal to reverse a judgment for damages for personal injuries in favor of Tom Barnes, who was injured by the explosion of gas while he was acting in the capacity of shot firer in one of the company's coal mines.

Tom Barnes was a witness for himself. According to his testimony he was 37 years of age, and had worked 17 years at mining in the neighborhood of the mine where he was injured. He had had 11 years' experience as a shot firer, and had been working in the mine where he was injured 17 months as shot firer. He knew that gas feeders were in the mine. Gas feeders are crevices in the coal where the gas escapes. The gas also sometimes comes out of the roof, or the bottom of the mine. You can only tell by testing it out with a safety lamp. An open lamp will explode the gas. The shot firer goes into the mine after the miners have left it, and fires the shots which the miners have fixed during the day. A shot firer usually goes to work about 4:30 o'clock in the afternoon. On the day in question Barnes went to the blackboard on the surface and looked to see what warnings of danger had been placed there. It was his duty, as well as the duty of those who mine coal, to look at the blackboard to find out what dangerous places in the mine had been marked on it by the fire boss. Barnes found no warnings on the blackboard for the place where he was injured. When he entered the mine he went to the fourth south entry, and found three shots prepared for firing. He tamped the shots, and then went back to the air course. He opened the crosscut, and found gas in it. He brushed the gas out of the crosscut, and then tamped a shot in it. By brushing the gas out is meant that he took a rag curtain, left there for the purpose, and fanned the gas out of the crosscut. He then went back to the other side and fired a shot. Then he came back to the crosscut and fired the shot in it with his open lamp. The use of the open lamp caused the gas to explode, and severely injure him. He knew that gas was feeding in there, but he did not know that it was coming in so rapidly. Barnes made the first test for gas in the crosscut, and also made a test for gas in the entry. There were shots to be fired on the air course side of the crosscut and also on the entry side of the crosscut. Barnes fired the shots on the entry side before the explosion. The safety lamp will indicate whether there was a great or small quantity of gas. When Barnes first went in there he heard the gas bubbling in the water, and made a test for it with his safety lamp. He knew that a good deal of gas had accumulated there, but he readily brushed it out, and did not know that it was coming in so rapidly as to explode if he



should return in so short a time and fire the shot with his lighted lamp. It was necessary to fire the shot with his lighted lamp, and Barnes was doing his work as shot firer in the usual and customary manner. It was his duty to make a test for gas before he fired the shot. The miner who prepared the shot in the crosscut where Barnes was burned worked in the crosscut all day, but used a safety lamp. The fire boss had told him that gas was there, and to use a safety lamp. In the morning a dead line had been located between the first and second crosscuts, but it was moved later in the day.

Tom Shaw, State Mining Inspector was a witness for the plaintiff. According to his testimony he was familiar with the mine in question, for the reason that he had inspected it. He explained how the air was made to circulate in the mine, and said that while gas cannot be prevented from coming out of the feeders, the circulation of the air will carry the gas away. He explained how the air circulated through the fourth south entry, and stated that under the law 200 cubic feet of air per minute is required to be circulated in all working places in the mine. He stated further that, if that much air had been kept circulating in the second crosscut per minute, it would have kept the crosscut free from gas. The reason is that the gas is so much lighter than air that the current of air sweeps it out of the mine.

R. E. Hinson, the gas man and fire boss, was a witness for the defendant. He went into the mine on the morning in question, and examined the fourth south air course. The face of it was practically clear, but the crosscut had a feeder in it that morning, which was making quite a lot of gas. Witness marked it out and put a dead line there. He then went to the top of the mine and put a notice on the blackboard. The marking on the board showed that the fourth south air course was cut off. The notice was put there for everybody to see. There was no duty on his part to notify Barnes personally. It was Barnes' duty to examine all places for gas where he was required to go before doing anything in those places. According to the testimony of the mine foreman, it was Barnes' duty, even after he had swept the gas out, to examine it again with a safety lamp. According to the evidence adduced for the defendant, it was, also, shown that it was not practical to provide 200 cubic feet of air each minute in the crosscuts.

It is earnestly insisted that under this evidence the court should have directed a verdict for the defendant. We are of the opinion that the court properly submitted the issue of negligence, on the part of the defendant, and assumption of risk, on the part of the plaintiff, to the jury.

Section 7279 of Crawford & Moses' Digest provides that in all mines where a fire boss is employed all working places shall be ex-

amined at least once a day by the fire boss, and that all dangerous places shall be marked on the blackboard before any other employees enter the mine.

Section 7284, provides that there shall not be less than 200 cubic feet of air pass each working place per minute, and that it shall be the duty of the State Mine Inspector to measure the air at all working places in making his inspection.

[1, 2] The testimony on the part of the defendant itself tended to show that the latter section of the statute had not been complied with. Counsel seek to justify the neglect on the ground that it was not practical to comply with the statute. This is a matter that addresses itself to the Legislature, and does not furnish a defense to an action for negligence based on a noncompliance with the statute. Then, too, it is insisted by counsel for the defendant that it was not necessary to comply with the statute in the crosscut where the plaintiff was injured. This question has been decided adversely to his contention in *Western Coal & Mining Co. v. Jones*, 75 Ark. 76, 87 S. W. 440.

[3] It was there contended by the plaintiff that the company owed no duty to its servants to keep the room adjoining his working room free of gas. The court said that the statute meant that the air shall be carried to the extremest point where the pick falls, and that the entire mine shall be free of gas. In the discharge of their duties the employee who mined the coal and the shot firer both worked in the crosscut where the injury occurred. Therefore it was necessary for the company to keep the current of air in circulation in the crosscut, as required by the statute. It was also the duty of the fire boss to have placed a warning of danger of gas in the crosscut on the blackboard. This he claimed he did. His testimony, however, is contradicted in this respect by that of the plaintiff, who testified that he examined the blackboard, and found no marking there indicating danger in the crosscut. This made a question of fact for the jury, and the court properly held that the question of negligence was one of fact for the jury, and not of law for the court.

Again it is insisted by counsel for the defendant that the court should have declared as a matter of law that the plaintiff assumed the risk, and therefore should have instructed the jury to find for the defendant. Counsel points out the fact that it was the duty of the plaintiff to make a test for gas, that plaintiff discovered that gas was coming into the crosscut, and that he assumed the risk of firing the shot when he knew that the gas was escaping in such large quantities.

[4, 5] While it was the duty of the plaintiff to inspect for gas, he was not made the insurer of his own safety. Of course if the gas was coming into the crosscut in such

large quantities and so rapidly as to have been obvious to the plaintiff that it was dangerous to fire the shot, he would have assumed the risk of doing so. But we do not think that the undisputed evidence made the danger of firing the shot a patent and obvious one. The warnings, required by the statute, of dangerous places in the mine were placed there for the benefit of the plaintiff, as well as the miners who worked the mine. The plaintiff says that no marking with regard to the crosscut was placed on the blackboard.

The jury might have found that he relied on this fact in estimating the amount of gas that would come in the crosscut in a given time. Then, too, he readily brushed the gas out of the crosscut with the cloth left there for that purpose. The jury had a right, also, to assume that he might rely to some extent on the company complying with the statute in regard to the circulation of the air. The plaintiff was only gone a short time, and, when all these matters are considered, we are of the opinion that the court was right in submitting to the jury the question of assumption of risk.

Section 7145 of Crawford & Moses' Digest provides that contributory negligence shall not bar a recovery, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The court gave an instruction to the jury in compliance with this section of the statute. Therefore there was no error in refusing to direct a verdict for the defendant.

[6, 7] It is next insisted that the court erred in giving instruction No. 1 for the plaintiff. The instruction is as follows:

"You are instructed that it was the duty of the defendant to exercise ordinary care to furnish the plaintiff with a reasonably safe place in which to work, and not expose him to any unusual danger while in the discharge of his duty as an employee in the defendant's mine; and it was also the duty of the defendant in the exercise of ordinary care to make such reasonable inspections and examination in its said mine as would enable it in the exercise of ordinary care to know of any dangers or dangerous places in its mine that might imperil the safety of the plaintiff while in the discharge of his duty as a shot firer, and to notify the plaintiff by marking on the blackboard of any danger or dangerous places existing in said mine where the plaintiff was required to work, if there were any such dangers or dangerous places and the defendant knew of them or in the exercise of ordinary care might have known thereof.

"If you find by a preponderance of the evidence that the defendant negligently failed to perform all or either of said duties and that the plaintiff was injured by reason of such failure and negligence, that the plaintiff is entitled to recover, unless he is precluded from recovering under the other instructions given you in this case."

Counsel for the defendant claims that the instruction is too general and misleading, because it does not specifically define the issues in the case. He also contends that the instruction is erroneous, in that it points out to the jury the duty of the defendant to make an inspection, whereas the duty rested upon the plaintiff alone to make the inspection for gas at the place where he was injured. Counsel contend that the fact that the fire boss had made an inspection did not justify the plaintiff in firing the shot where he knew that there was gas. That is true, but the quantity of gas and the rapidity with which it was feeding the crosscut were questions to be decided by the plaintiff in determining whether it was safe to fire the shot. As above stated, in arriving at the conclusion, he had a right to rely in part upon the fact that the fire boss had not marked any danger there, and also upon the fact that the statute prescribed the amount of air to be circulated there. These were statutory requirements enacted for the purpose of providing him with a safe place in which to work, and the court did not err in defining the duty of the fire boss to make the examination and inspection required by the statute, and of notifying the plaintiff by marking on the blackboard any danger in the mine where he was required to work. We are of the opinion that the court did not err in giving the instruction.

[8] It is next insisted that the court erred in giving an instruction on air currents in compliance with the provisions of section 7284 of Crawford & Moses' Digest. It is contended by counsel for the defendant that this section does not apply to coal mines where less than 10 men are employed underground in 24 hours, and that there is no proof in the present case that the mine in question came within the provisions of the act. It is true that there is no specific evidence to this effect. But the evidence shows that there were at least four south air courses; that the mine employed a general foreman, a fire boss, and a shot firer. The whole tenor of the evidence shows that it was a large mine. The State Mine Inspector, without objection, testified that he had inspected the mine, as by law he was required to do. The statute only requires him to inspect mines where more than 10 men are employed. Crawford & Moses' Digest, § 7230.

[9] It is claimed that the court erred in giving an instruction based upon the section of the statute above referred to, because the plaintiff knew that gas was in the crosscut, and because the failure to cause 200 cubic feet of air per minute to pass the crosscut where the plaintiff was at work had nothing to do with his injury. The jury might have found that had the current of air been in operation there, as required by the statute, it

would have driven the gas out of the cross-cut, and not allowed it to accumulate there in sufficient quantities to ignite, and thereby injure the plaintiff. It will be remembered that the evidence shows that he had returned in a very short time after brushing the gas out when he first found it there.

[10] It is next insisted that the court erred in giving instruction No. 4, which reads as follows:

"You are instructed that while the plaintiff, by entering the services of the defendant as a shot firer in its mine, assumed all the risks ordinarily incident to that employment, he did not assume any risks arising from the negligence of the defendant, or any one to whom it intrusted its superintending authority, unless it be further shown that the plaintiff was aware of such dangers and appreciated the same."

It is contended that the instruction is erroneous upon the authority of the *Athletic Mining & Smelting Co. v. Sharp*, 135 Ark. 330, 205 S. W. 695. In that case an instruction on assumed risk was held to be wrong because the court neglected to tell the jury that an assumption of risk includes the negligence of the defendant if the plaintiff knew of the negligence and appreciated the danger incident to the service. That defect is not in the instruction in question. The instruction in plain terms tells the jury that the plaintiff did not assume any risk arising from the negligence of the defendant unless it was shown that he was aware of the danger and appreciated the same. The instruction as given was correct. *Ark. Land & Lbr. Co. v. Fitzhugh*, 143 Ark. 122, 219 S. W. 1022.

[11] It is next insisted that the court erred in giving instruction No. 5. It is as follows:

"Upon the question of contributory negligence, you are instructed that the burden is on the defendant to establish that the plaintiff was guilty of contributory negligence, and that the defendant must make proof thereof by a preponderance of the evidence, unless such proof appears from the evidence on the part of the plaintiff, but if you find that the plaintiff was guilty of contributory negligence, such contributory negligence will not bar a recovery, or preclude the plaintiff from recovering in this action, if he is otherwise entitled to recover, but the damages, if any, shall be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff."

The instruction tells the jury to take into account the negligence of the plaintiff and re-

duce his recovery in the proportion in which his negligence contributed to his injury. The instruction is in accord with the provisions of section 7145 of *Crawford & Moses' Digest*, and is not erroneous. The section, in substance, provides that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. See, also, *Kansas City So Ry. Co. v. Sparks*, 144 Ark. 227, 222 S. W. 724.

[12] Finally, it is insisted that the court erred in giving instruction No. 6, which is as follows:

"If you find for the plaintiff, you will assess his recovery at such a sum as from the evidence, in your judgment, will fairly compensate him for the injuries which he has sustained, if any, not to exceed the sum of \$3,000. In arriving at the amount of plaintiff's recovery, if you find for him; you may take into consideration the plaintiff's pain and suffering, mental and physical, if any; his loss of time, if any; his diminished capacity to earn a livelihood, if any; the temporary or permanent character of his injury; the necessary expense incurred by him for medical and surgical attendance, if any; and upon consideration of all these elements of recovery, if proven, you will assess the damages in favor of the plaintiff. If you find for the defendant, you will simply so state in your verdict."

Counsel relies upon the case of *St. L. S. W. Ry. Co. v. Aydelott*, 128 Ark. 479, 194 S. W. 873. In that case the instruction did not restrict the jury to a consideration of the amount of damages as shown by the evidence, and for that reason the instruction was held to be erroneous.

In the case at bar the rule announced in *St. L., I. M. & S. R. Co. v. Snell*, 82 Ark. 61, 100 S. W. 67, governs. There we held that it was improper for the trial court to make reference in an instruction to the amount sued for. The reason given was that the jury is presumed to know from having heard the complaint read that its verdict should not exceed the amount asked for. The court said, however, that where an instruction containing such reference is properly limited by a direction to find only such amount as the evidence warrants, the court will not hold it to be prejudicial error. The rule there announced governs the present case.

We find no reversible error in the record, and the judgment will be affirmed.

**FRANKLIN et al. v. STATE. (No. 101.)**

(Supreme Court of Arkansas. July 11, 1921.  
Rehearing Denied Sept. 26, 1921.)

**1. Criminal law §598(7)—Diligence in procuring witness necessary for continuance.**

There was no error in refusing a continuance on account of the absence of a witness not subpoenaed, where accused did not show due diligence in endeavoring to procure his attendance; the absent witness being a person who was indicted and had been permitted to go home to visit a sick wife at the time the case was tried, and defendant having no right to rely upon his being present when defendant's case was called.

**2. Criminal law §183—Accused held to have impliedly consented to discharge of juror.**

It must be held that accused impliedly consented to discharge of a juror from the panel, where such juror had previously been on a panel which convicted three other defendants charged with being engaged in making intoxicating liquors at the time and place that defendant was charged with making liquor, such juror going to the court and telling him that he had formed and expressed an opinion by his verdict, and accused remained silent during the colloquy between the court and the juror, and did not interpose a plea of former jeopardy until after the juror's discharge.

**3. Criminal law §184—Proper discharge of juror not available on plea of former jeopardy.**

Discharge by the court of a juror who had tried and convicted three defendants charged with making whisky at the same time and place that defendant was charged with making it did not operate to discharge defendant under a plea of former jeopardy; the action of the court being a manifest necessity and in the interest of the accused for the purpose of enabling him to obtain a fair and impartial trial.

**4. Criminal law §137(5) — No claim that confession was obtained by threats after denial.**

Accused, having denied that he made an admission at all, is on appeal in no attitude to claim that a confession was obtained from him by threats.

**5. Criminal law §406(5)—Testimony as to defendant's telling witness how to make whisky held admissible.**

In a prosecution for manufacturing intoxicating liquors, court did not err in permitting a witness to testify that accused had told him how to make intoxicating liquors, the witness having already testified without objection that he had bought a still and three barrels of beer from accused and that at the time he said that he had put  $1\frac{1}{2}$  bushels of meal and 60 pounds of sugar in the three barrels of beer, being competent to connect defendant with the making or being interested in the manufacture of intoxicating liquors on the occasion in question.

Appeal from Circuit Court, Pike County; Jas. S. Steel, Judge.

Perry Franklin and four others were separately indicted and convicted of manufacturing intoxicating liquors, and appeal separately. Cases tried together. Affirmed.

W. S. Coblenz, of Murfreesboro, for appellants.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

HART, J. Perry Franklin, Ben Davidson, Eli Markham, Jewell Sparks, and Ira Green were separately indicted for the crime of manufacturing and being interested in the manufacture of intoxicating liquors. The defendants were charged with manufacturing and being interested in the manufacture of intoxicating liquors at the same place and at the same time. They were tried separately and there is a separate transcript in each case, but the testimony in each is practically the same. There was a verdict of guilty in each case, and from the judgment of conviction each defendant has separately prosecuted an appeal to this court.

For the sake of convenience the cases have been briefed and heard together here. The evidence for the state is sufficient to warrant a conviction, and no assignment of error is urged here on that account.

[1] The defendant in each case assigns as error the refusal of the court to grant him a continuance on account of the absence of Buck Nicholson. There was no error in the action of the court in refusing the continuance because the defendants did not show due diligence in endeavoring to procure the attendance of the absent witness. *Osborne v. State*, 121 Ark. 160, 180 S. W. 497. The record shows that Buck Nicholson had, also, been indicted for the crime of making intoxicating liquors and had been permitted to go home to visit a sick wife at the time these cases were tried. Nicholson had not been subpoenaed as a witness in either of the cases. He was not required to attend court except in his own case. The defendants had no right to rely upon his being present when their cases were called for trial. Having failed to have the witness subpoenaed in their cases, they are in no attitude to complain that he was not present in court when they wished to call him as a witness, and the court did not abuse its discretion in refusing to grant them a continuance.

In No. 2526 the defendant, Franklin, assigns as error the action of the court in refusing to sustain his plea of former jeopardy. Counsel rely upon the holding of the court in *State v. Brown*, 135 Ark. 166, 204 S. W. 209, and *Whitmore v. State*, 43 Ark. 271, to the effect that when a jury in a criminal case is impaneled and sworn in a court

of competent jurisdiction under a valid indictment, the accused is in jeopardy and the discharge of the panel or any part thereof without his consent will bar a further prosecution for the same offense.

We think the record in the present case shows an implied consent on the part of the defendant to discharge one of the jurors. The record is as follows:

"Court: After the jury was sworn, and before anything else was done in the case, it was discovered that Theodore Mansfield, one of the jurors selected in the case, was disqualified for the reason he had sat upon the case of Ira Green, Eli Markham, and Jewell Sparks, three defendants who were jointly charged with the defendant in the manufacture of liquor; that he claims he didn't think about it at the time he was impaneled, but after being impaneled he comes to the court and tells him he was on that case, and was disqualified in the case because he had formed and expressed an opinion by his verdict, and he asked the court to excuse him because of his disqualifications as a juror, and for this cause, upon challenge of the state, the court discharged said juror, Theodore Mansfield, and ordered the clerk to call another name.

"Mr. Coblentz: The defendant now interposes a plea of former jeopardy, from the fact the jury had already been sworn. The defendant also excepts to the ruling of the court in discharging Mansfield on motion of the state. The court overrules the plea of former jeopardy, and the defendant now excepts."

In *Whitmore v. State*, *supra*, the court said that the general rule is that the discharge of a jury, after the machinery of the court is fully organized for trial and judgment, without the consent of the defendant, express or implied, operates as an acquittal. In *Atkins v. State*, 16 Ark. 568, the court said:

"Lord Coke seems to have been of the opinion that a jury charged in a capital case could not be discharged without giving a verdict, even with the consent of the prisoner and the attorney general. 1 Inst. 227b; 3 Inst. 110. But the doctrine was fully discussed in the case of the *Kinlocks*, Foster 22, and the law settled to be that where the jury is discharged by the consent, and for the benefit of the prisoner, he cannot avail himself of such discharge as ground to be released from further prosecution."

[2] The record shows that the discharged juror had been on the panel which had convicted three other defendants charged with making intoxicating liquors at the precise time and place that the defendants were charged with making such liquors. In other words, five persons, including the defendants, were engaged in making intoxicating liquors at a certain time and place, as one transaction. Three of them were tried together and convicted before the defendants were put on trial. The juror in question was on the panel which had convicted these other three

defendants. When the juror saw that the defendants were being tried for the same transaction, he informed the court that he had an opinion of their guilt, and it is obvious that the court discharged the juror in the interest of the defendants. The defendants and their attorney must have known that this was the case, and yet they sat by until after the court had discharged the juror before they made any objection or entered their plea of former jeopardy. This is shown by the language of the attorney. After the court had discharged the juror and ordered the clerk to call another man, the attorney for the defendants said that "the defendant now interposes a plea of former jeopardy," and that the defendant, also, excepts to the ruling of the court in discharging the juror. His action in remaining silent during the colloquy between the court and the juror and in permitting the court to discharge the juror and summon another one, under circumstances so manifestly for the benefit of the defendant, constituted an implied consent on his part to the action of the court. He must have known as a man of reasonable intelligence that the court was acting for his best interest, and, not having raised any objection, he will be deemed to have impliedly assented to the action of the court, and not merely to have acquiesced in the action of the court.

Moreover, there was a manifest necessity which warranted the court in discharging the juror, and no jeopardy attached to the accused. The question was fully discussed in *Thompson v. United States*, 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146. In that case, after the jury had been sworn and a witness examined, the fact that one of the jury was disqualified by having been a member of the grand jury that found the indictment became known to the court. Thereupon the court, without the consent of the defendant and under exception, discharged the jury and directed that another jury should be called. The defendant pleaded former jeopardy, but the court denied his plea. In discussing the question the court said:

"As to the question raised by the plea of former jeopardy, it is sufficiently answered by citing *United States v. Perez*, 9 Wheat. 579. *Simmons v. United States*, 142 U. S. 148, and *Logan v. United States*, 144 U. S. 263. Those cases clearly establish the law of this court, that courts of justice are invested with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States."

The question was also thoroughly discussed by the Supreme Court of Maine in

State v. Slorah, 118 Me. 203, 106 Atl. 763, 4 A. L. R. 1256, and the authorities bearing on the question reviewed. The court said:

"The administration of justice requires that verdicts, criminal as well as civil, shall be found by impartial juries, and shall be the result of honest deliberations absolutely free from prejudice or bias. The public as well as the accused have rights which must be safeguarded. If during the progress of a trial it shall become known to the court that some of the jury do not stand indifferent, whether toward the state or the accused, it would be a travesty on the administration of justice if the trial must proceed, and, if acquitted by such a tribunal, the constitutional safeguard may be invoked against again placing him in jeopardy before an impartial jury. Such a trial obviously should not constitute jeopardy, whether the jury be prejudiced or influenced in behalf of the accused or the state. To prevent such a perversion of justice, it is now well recognized that, if it comes to the knowledge of the presiding justice that such conditions exist, it creates that imperious, manifest necessity that will warrant a discharge of the jury, and such discharge will constitute no bar to another trial on the same indictment."

In the case of State v. Duvall, 135 La. 710, 65 South. 904, L. R. A. 1916E, 1264, the Supreme Court of Louisiana held that the trial court may discharge a juror in a capital case without the consent of the prisoner, whenever in its opinion there is a manifest necessity for such discharge. In that case, after the jury had been sworn and the indictment read, the court found one of the jurors to be legally incapable to sit on the jury because he had formed an expressed determination not to find the defendants guilty.

[3] In the present case the juror had been on the jury which had tried and convicted three defendants who had been charged with making whisky at the same time and place that the defendants were charged with making it. In other words, the five men were

engaged in the same transaction, and as soon as the juror discovered this to be the fact, he announced to the court that he had formed an opinion. Manifestly the action of the court in discharging the juror was in the interest of the accused and for the purpose of enabling him to obtain a fair and impartial trial.

Again it is insisted by counsel for Franklin that the court erred in permitting the sheriff to testify to an admission made by the defendant which was in the nature of a confession and which is claimed to have been obtained by threats.

[4] In answer to a question propounded to the defendant as to what had been said to him by the sheriff about it being to his best interest to tell about his connection with making the liquor, the defendant answered that the sheriff had said there was a worm in the defendant's loft; that if the defendant did not tell about it, the other boys were going to bring it up against him. The defendant then denied having made an admission to the sheriff at all. Having made this denial, he is in no attitude to claim that a confession was obtained from him by threats.

[5] In No. 2527 counsel for Ben Davidson assigns as error the action of the court in permitting Jim Higgins to testify that Ben Davidson had told him how to make intoxicating liquors. Higgins had already testified, without objection, that he had bought a still and 3 barrels of beer from Ben Davidson. The witness was then permitted to testify that the defendant at the time said that he had put 1½ bushels of meal and 60 pounds of sugar in the 3 barrels of beer. There was other evidence tending to show that these ingredients were used in making whisky. Therefore the testimony was competent as tending to connect the defendant with the making, or being interested in the manufacture of, intoxicating liquors on the occasion in question.

We find no prejudicial error in the record, and the judgment will be affirmed.

**STERNBERG v. CITY NAT. BANK OF FT. SMITH. (No. 81.)**(Supreme Court of Arkansas. July 4, 1921.  
Rehearing Denied Sept. 28, 1921.)**1. Bankruptcy §172—Trustee has the rights of judgment creditor.**

Since the amendment to Bankruptcy Act, § 47a2, in 1910 (U. S. Comp. St. § 9631), a trustee in bankruptcy has the rights of a lien creditor or a judgment creditor against an unrecorded transfer, although prior to that time he was vested with no better right or title than the bankrupt had.

**2. Chattel mortgages §6—Though note was given for price of automobiles, transaction held a conditional sale and not absolute sale with mortgage back.**

Where manufacturer of automobiles drew drafts on a sales agent with bill of lading attached and the bank paid such drafts, transmitting the funds directly to the manufacturer and allowing the agent to take possession and resell the automobiles, *held*, that the transaction was one of conditional sale and not a contract for an equitable mortgage, notwithstanding the sales agent executed note for the advances; the bank reserving title.

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

The Adams-Cooper Sales Company having been adjudged bankrupt, M. Sternberg, trustee in bankruptcy, filed an intervention in receivership proceedings in the state court, in which the City National Bank of Ft. Smith also intervened. From a decree for the Bank, the trustee appeals. **Affirmed.**

On application of a creditor the chancery court at Ft. Smith, Ark., appointed a receiver to take charge of the property of the Adams-Cooper Sales Company as an insolvent corporation. The company was engaged in selling automobiles at retail in the city of Ft. Smith at the time the receiver was appointed. The receiver took charge of certain automobiles owned by the company and sold them under direction of the court and held the money subject to the further orders of the court.

Subsequently the Adams-Cooper Sales Company was adjudged a bankrupt in the federal court, and M. Sternberg, trustee in bankruptcy, filed an intervention in the chancery court, claiming the money derived from the sale of the automobiles by the receiver. The City National Bank of Ft. Smith, Ark., also filed an intervention, claiming said money. The issue raised by this appeal is as to which of said parties is entitled to the proceeds of the sale of the automobiles by the receiver.

I. H. Nakdimen, president of the City Na-

tional Bank of Ft. Smith, was a witness for the bank. According to his testimony the Adams-Cooper Sales Company was engaged in selling automobiles by retail in the city of Ft. Smith. The company bought its cars from the manufacturers. According to an agreement with the manufacturers, the sales company, and the bank, whenever a car of automobiles was ordered the bill of lading with the draft for the purchase money attached was sent to the bank. The sales company was notified when the car arrived. Before delivering the bill of lading to the sales company, the bank required the company to make a note for each car, giving the description of the car and everything. The bank did not let the sales company pay for the bill of lading, but the bank itself paid the cost of the automobiles to the manufacturer. The note given to the bank by the sales company specified the number of the car, the engine, and so on, and when the car is sold the company brings the money to the bank and pays the note off.

One of the notes in question is as follows:

"No. 18941. Ft. Smith, Ark., Oct. 2, 1918.  
"30 days after date, without grace, we, or either of us, promise to pay to the order of 'the City National Bank of Ft. Smith, Ft. Smith, Arkansas,' five hundred dollars, at the City National Bank of Ft. Smith, with interest at ten per cent. per annum, payable annually, from maturity, until paid. Value received. Having deposited herewith, as collateral security for payment of this or any other liabilities of — to said bank due, or to become due, or which may be hereafter contracted, the following property, viz., 'one Chevrolet touring car No. 43641,' which I hereby authorize the holder of this note to sell at public or private sale, without demanding payment of this note or debt due thereon and without further notice by advertising or otherwise, and apply proceeds, or as much thereof as may be necessary, to the payment of this note, and all expenses and charges, together with ten per cent. commission on all sales, holding myself responsible for any deficiency. Should there be any depreciation in value of said security prior to the maturity of this note, such an amount of additional security shall be furnished as will be satisfactory to said the City National Bank, and if the additional security is not furnished within two days after demand is made, either in person or by written notice put in post office, said bank may proceed at once to sell security as above specified.

"Demand, notice and protest waived.

"Adams-Cooper Sales Co., Inc.  
"Troy Adams."

Every other note was like this except as to date, amount, and description of the car. In other words, they were all written on the same form. The company had an agreement with the bank that when it ordered a car of automobiles the automobiles should be shipped with a draft and bill of lading attached for the purchase money to the bank.

The draft was drawn by the factory against the sales company and sent to the bank. The bank had an understanding that the title of the cars should be in it. Nakdimen said:

"I want to explain the entire circumstance. Adams & Cooper has borrowed money from us. He had an understanding with us whenever he orders a carload of cars that we should loan him money when the carload of cars comes in. They generally come all alike; no exceptions; they come with a bill of lading attached to a draft for the amount of the cars.

"Q. Who was the draft on? A. The draft is drawn by the factory against the seller.

"Q. In this case? A. In this case Adams & Cooper. When the draft comes in, it is sent to us; before we paid for it, we have an understanding that the title of these cars goes to us.

"Mr. Daily: I object to him saying before he pays for it.

"Mr. McDonough: That is a matter of cross-examination.

"The Court: Be a little more specific in your statements.

"A. Well, when the bill of lading and draft comes, and when the car arrives, the understanding is that we loan him money to take that up, advance him money on it, and we take a lien on the cars until they are sold. We pay the draft to the company and we take notes for those cars, and when he sells the cars the understanding is, when he sells the cars, he takes up one of the notes.

"Q. How did you do that?

"Mr. McDonough: I object to the cross-examination pending the statement. I think it is proper to let him get through.

"Q. Did you do that in each instance, Mr. Nakdimen? A. Yes, sir."

Again we quote from the testimony of Nakdimen the following:

"Q. What did you do with the bill of lading when you marked the draft paid? A. Gave it to them.

"Q. To whom? A. Adams-Cooper Sales Company.

"Q. Then after you gave them the bill of lading they went down to the railroad company and took the cars out? A. Yes, sir.

"Q. They unloaded them and took them to their place of business? A. Yes, sir.

"Q. And sold them there in the ordinary course of trade? A. I suppose so; I couldn't keep them in the vault in the bank.

"Q. But they took them out and sold them in the ordinary course of trade? A. Yes, sir.

"Q. They were in the automobile business? A. Yes, sir.

"Q. They were selling Chevrolet and Chalmers cars? A. Yes, sir.

"Redirect Examination by Mr. McDonough.

"Q. In your testimony you referred to the title to the property being in the bank and about a lien. I wish you would explain exactly the agreement between you and the Adams-Cooper Sales Company in that matter?

"Mr. Daily: I don't think he can explain an agreement.

"The Court: He can testify what he said and

what they said and what was done. If you can't remember the exact language, give it as near as you can.

"Q. Just state what the facts are with reference to that agreement—the agreement relating to the method of handling these cars. A. The agreement was just like the note says, and the only reason why the collateral in this case is not attached is because it is too bulky and we have no room for it, and we give him the power to take it to his house and sell it; otherwise we would have had it attached to the note as collateral, because every car or cars we loaned money with the understanding we have got a lien on it until it is sold. The note shows for itself, and the only distinction is we can't take a car and keep it in the vault and put it in the note case."

Again we copy from the testimony of the witness the following:

"Q. Now did they make any contract with you with regard to helping them handle their business? If so, what was that contract? A. Well, they made a contract with us, whenever they buy a carload of cars, they are willing to give us a lien on it provided we pay for it, and when the car comes the contract was to make a note for each car. There was generally three or four cars in a car, and they make a note for it; and when they sell a car they come and pay the money, and in the meantime, when the carload arrives, they will come in the bank and make the notes and take credit for it, and then make a check for the draft, in order to have a record for all the transactions for their benefit, and as well for the bank. That was a standing contract.

"Q. Were they buying from manufacturer of the cars? A. Yes, sir.

"Q. Who did the ordering, you or them? A. They ordered from them to be sent through us.

"Q. Was there anything in your contract, and, if so, state what it was, which induced the manufacturer to send the bill of lading and draft to your bank? Was there anything in the contract about that, that you know of? If so, state what it was. If there was anything in the contract, what was it? A. That we have a lien upon the cars.

"Q. If there was anything in your contract to induce the bill of lading to be sent to your bank rather than somebody else's bank? A. The inducement is the factory knows that we take care of it.

"Q. How do they know it? A. Every time that an automobile agent, every time they order the car the agent used to come down, the agent of the factory comes down frequently and visits them and visits the bank they do business with, so the factory is aware of the bank.

"Q. Did you have arrangements with this company whereby you or they one would notify the factory to send the bill of lading to your bank? A. Yes, sir.

"Q. Now, when it came to your bank, what was the contract with reference to how you discharged the thing, how would you pay it? A. By making notes for the car and we pay the factory.

"Q. Who would do that? A. Take the note and specifying the car off the bill of lading and off the invoice. Every time, Judge, the factory



sent a bill of lading there was an invoice and there was a draft. The bill of lading has to be delivered to the railroad company in order for them to deliver the car of automobiles to Adams-Cooper. The invoice was to them, so we copy it from the invoice the number of the car and the cost of it. That is the only way we could ascertain the number of the car and what it cost."

The chancellor found the issues in favor of the bank, and a decree was entered accordingly. To reverse that decree the trustee in bankruptcy has duly prosecuted an appeal to this court.

Daily & Woods, of Ft. Smith, for appellant.

Fadjo Cravens, Ira D. Oglesby, and James B. McDonough, all of Ft. Smith, for appellee.

HART, J. (after stating the facts as above). [1] It may be stated at the outset that prior to the amendment of the Bankruptcy Act in 1910 (36 Stat. 838) the trustee in bankruptcy was vested with no better right or title to the property of the bankrupt than the latter had when the trustee's title accrued. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

Section 47a2 of the Bankruptcy Act, as amended in 1910 (U. S. Comp. St. § 9631), gives to a trustee in bankruptcy "the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." See, also, *Fairbanks Shovel Co. v. Wills, Trustee*, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841. In that case the court said:

"Since the amendment of section 47a2 of the Bankruptcy Act by the act of June 25, 1910 (chapter 412, § 8, 36 Stat. 838, 840), trustees have the rights and remedies of a lien creditor or a judgment creditor as against an unrecorded transfer."

[2] If the transaction between the bank and the sales company constituted a conditional sale, it is manifest that under our decisions the bank is entitled to the proceeds arising from the sale of the automobiles by the receiver.

In *Starnes v. Boyd*, 101 Ark. 469, 142 S. W. 1143, it was said that this court has uniformly adhered to the rule that the vendor of a chattel may deliver possession on condition that the title shall not pass to the vendee until the purchase price shall be paid in full, and that a subsequent purchaser without notice acquires no title as against the original vender. In that case, under a contract for the sale of timber, whereby it was agreed that the seller's brother "is to receive all the lumber and funds for the same," until the seller is paid in full for all his logs delivered at the price stipulated, it was

held that the contract constituted a conditional sale with the reservation of title, and not an absolute sale with the reservation of a lien.

In *Bryant v. Swofford Bros.*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997, it was held that the validity of conditional sales depends upon the law of the state where made, and in bankruptcy proceedings the construction and validity of such a contract must be determined by the local law of the state. Following the decisions of the state of Arkansas, the court held that the sale of a stock of dry goods under a contract by which the articles sold were to remain the property of the seller until paid for, with provision for substitution of other goods and that the proceeds of the goods sold should also belong to the seller, constituted a conditional sale.

It is true that the contracts of sale in those cases were written ones, but this court has held that contracts for the conditional sale of personal property with the reservation of title in the seller are not required to be in writing. *Jones v. Bank of Commerce*, 131 Ark. 362, 199 S. W. 103, and *Estes v. Lamb & Co.*, 233 S. W. 99.

This brings us to a consideration of the question of whether, under the facts as disclosed by the record, the transaction under investigation was a conditional sale or a contract for an equitable mortgage. It is often difficult to decide whether in a given case the contracting parties intended to make an absolute sale and to give the seller a lien on the property for the purchase money, or whether the transaction was intended as a conditional sale.

It is certain that when the property arrived at Ft. Smith the title and possession were in the bank. A draft for the purchase money with a bill of lading attached was sent by the manufacturer and seller of the automobiles to the bank. In each instance the bank took the note of the sales company for the price of the automobile before it was turned over to the sales company. The bank itself transmitted the purchase money directly to the manufacturer of the automobiles. It is true that the note given by the sales company to the bank recites that the automobile is deposited as collateral security, and that Nakdimen in his testimony speaks of having a lien on the automobiles for the purchase money, yet, when the whole substance of the transaction is considered, we think it was a conditional sale. We attach no importance to the recitation in the note of the automobile being deposited as collateral security.

The record shows that the note was written on the printed form of the bank, and the form was the one generally used when notes were deposited, with the note filled out as collateral security. It is plain that the automobile could not be deposited with

the note as collateral security. There is much circumlocution in the testimony of Nakdimen, due in part to the way he was examined and cross-examined. While he speaks in one place of having taken a lien on the automobiles for the purchase price thereof, in another portion of his testimony he speaks of retaining title in them until the purchase price was paid. This view of the transaction is borne out when we consider that a separate note was given for each automobile and that it was considered a separate transaction. The bank became responsible to the manufacturer and seller of the automobiles at the time it permitted the sales company to take them from the possession of the railroad company. Acts and conduct of the parties indicate that it was the intention of the bank to retain the control of each automobile until it was sold and the proceeds applied to the payment of the purchase price. The fact that the sales company was allowed to have the possession of the automobiles and dispose of them does not, under the authorities cited above, prevent the transaction from being a conditional sale.

We think that when the testimony of Nakdimen, which is all the testimony there is on the question, is read and considered in connection with the note given by the sales company to the bank for the purchase money, the substance of the transaction is a conditional sale.

It follows that the decree of the chancellor was correct, and must be affirmed.

#### NAKDIMEN et al. v. ATKINSON IMPROVEMENT CO. (No. 83.)

(Supreme Court of Arkansas. July 4, 1921.  
Rehearing Denied Sept. 26, 1921.)

##### 1. Landlord and tenant §83(1), 87—Rule as to renewals stated.

Generally, where the lease provision is in general terms for a renewal, the lessee is entitled to only a single renewal, and a single covenant to renew implies a renewal for the same term and at the same rent.

##### 2. Landlord and tenant §87—Lease held to contemplate one renewal only.

A lease by the owner of building to the owners of a building to be erected adjacent to it, for the use of elevator, stairway, and lobby, running at a fixed rental for a 10-year period, with a provision for arbitration to fix the rental at the expiration of the 10-year period, held not a continuous contract to remain in force during the life of the buildings specified in it, but to provide for a renewal for a second 10-year period only, at rent to be determined by arbitration.

##### 3. Specific performance §75—Of lease provision for elevator service will not be decreed.

Under a lease by the owner of building to the owners of a building to be erected adjacent to it, for the use of elevator, stairway, and lobby, the court would not decree specific performance of the provision as to elevator service, as chancery courts will not decree the specific performance of contracts requiring continuous acts involving mechanical skill, or judgment and discretion.

##### 4. Specific performance §4—Arbitration clause does not render contract unenforceable.

The presence of an arbitration clause in a contract does not necessarily prevent the court from granting specific performance, and it is only where the act to be performed by the board of arbitrators is of the essence of the contract that the court will refuse to act.

##### 5. Landlord and tenant §86(4)—Provision for appraisal on renewal did not invalidate lease.

In a lease, where the essence of the contract was the renewal thereof for a further term, and the fixing of the rental for that term was merely ancillary to the main contract, the provision for fixing such rent by appraisal did not render the lease unenforceable, as the court could fix the reasonable rental value, and treat the method as a matter of form rather than substance; nor would the arbitration clause render the contract void, as being too indefinite to be enforceable.

##### 6. Reformation of Instruments §45(1)—Evidence must be clear.

While parol evidence is admissible in an action to reform an instrument on the ground of fraud and mistake, the evidence must be clear and convincing to warrant a reformation of the instrument.

##### 7. Specific performance §128(2)—Damages may be awarded in lieu of performance.

Under the rule that, where chancery has properly assumed jurisdiction, it will determine all issues, in a case where specific performance of a lease provision for renewal was not practicable, plaintiff was entitled to recover in the same suit damages for defendants' breach of the contract.

##### 8. Landlord and tenant §180(4)—Proximate damages recoverable for eviction.

Where a tenant is unlawfully evicted from the premises by the landlord, he may recover as damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord.

##### 9. Appeal and error §1178(6)—On remand of chancery case, it may be reopened for further testimony.

While chancery cases are tried de novo in the Supreme Court, they are tried on the record made in the court below; and where a decree is reversed and a cause is remanded for further proceedings, and it appears to the Supreme Court that the testimony on any branch of the case has not been fully developed, or that the court, in making a finding on a particular branch of the case, has proceeded on an erroneous theory, it is within the province of the

Supreme Court to allow the case to be reopened, and further testimony to be taken on that point.

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Suit by the Atkinson Improvement Company against I. H. Nakdimen and others. From the decree, defendants appeal, and plaintiff cross-appeals. Reversed and remanded.

This is a suit in equity by appellee against appellants, to enforce the specific performance of a renewal covenant in a lease, and also to compel the defendants to submit to an arbitration to fix the rent as provided in the covenant of renewal. The lease is in writing, and is as follows:

"State of Arkansas, County of Sebastian.—ss.:

"This instrument witnesseth a contract this day entered into by and between I. H. Nakdimen, hereinafter called the party of the first part, and Atkinson Improvement Company, hereinafter called the party of the second part, which is in the words and figures following, to wit:

"The party of the first part contemplates the erection of a six-story building upon his lot lying immediately west of and adjacent to the Merchants' National Bank Building, owned by the party of the second part, on Garrison avenue, Fort Smith, Arkansas; and for the mutual benefit of said parties of the first and second parts, they have entered into the following agreement and contract:

"For and in consideration of the sum of one dollar each to the other in hand paid, receipt of which is hereby acknowledged, and the mutual concessions, covenants and agreements hereinafter set out; the party of the first part is hereby granted the privilege and permission to use, for the period of ten years from the completion of his said building, the lobby and stairway of the Merchants' National Bank building, paying as rent and compensation for said privilege and use, to the party of the second part, the sum of twenty-five dollars per month, the said sum to be paid in advance, on the first day of each month during the said ten years; and in order to have such use and privilege said party of the first part is hereby authorized and permitted to cut through the wall of said Merchants' National Bank Building; on the first floor, for the purpose of access to his elevator, which is to be so located in his own building as to be accessible from the lobby of the Merchants' National Bank Building, and on the second, third, fourth, fifth and sixth floors, he is to cut archways, so as to give direct communication from his building to the said Merchants' National Bank Building at the elevators in each, so that the said elevators shall be common to both buildings.

"This work of cutting through said wall shall be done in a skillful and workmanlike manner, so as not to injure or impair said wall or said building, and said openings shall be finished in the same style and material as that used in said Merchants' National Bank Building; and all this work shall be done at the expense of the party of the first part.

"It is mutually agreed that at the expiration of said period of ten years, the rental to be paid by the party of the first part to the party of the second part for the concession and privilege herein granted, as herein set out, shall be fixed by a board of arbitrators, three in number, one to be named by each of the parties hereto, and the third to be selected by the two so named by the parties hereto, and that the award of any two of said arbitrators shall be final and conclusive upon the parties hereto.

"And it is further mutually agreed that in cutting through the said wall and making said openings and using the same, party of the first part must do the work and use said opening so as not to increase the rate of fire insurance upon said Merchants' National Bank Building, and that if such work and use cannot be accomplished without increasing the present rate of fire insurance upon said building then the party of the first part is to pay to the party of the second part said increased rate of insurance; and he hereby obligates himself to pay the same.

"And said party of the first part hereby obligates and binds himself to do, keep and perform all the acts and things herein undertaken by him, and especially to pay the rent herein reserved at the time herein indicated, and the rents named by said board of arbitrators; and to keep said openings so made in the wall of the Merchants' National Bank Building in repair during the life of this agreement; and the party of the second part binds and obligates itself to put no hindrance in the way of the exercise of the use of the privilege herein granted to the party of the first part, so long as he, and his heirs and assigns, keep and perform the obligations and agreements herein assumed by him.

"It is further agreed that the party of the first part is permitted to remove that part of the east party wall, now used exclusively for his present building, without recompense to the party of the second part, and by setting his new wall back two feet on his own property from the line between his lot and the lot of the party of the second part, he is by this concession, to enjoy the use of the areaway (for light and ventilation), now in use, and the additional two feet of areaway produced by setting his new wall back two feet, and the party of the second part is to also enjoy the privilege of the additional areaway so created.

"It is further agreed that the area walls of both parties to this agreement are to be painted white and enameled.

"In testimony whereof, the parties hereto have set their hands in duplicate; and party of the second part being thereunto authorized by resolution of its board of directors, empowering the president to execute this contract in its name, upon this 10th day of July, 1909.

"I. H. Nakdimen.

"Atkinson Improvement Company,  
"By W. J. Echols, President."

The lease was duly acknowledged and recorded. Subsequent to the execution of the contract, Nakdimen conveyed a part of his property to the other appellants, and for this reason they were also made defendants in the chancery court.

Under the terms of the lease, it extended

over a period of 10 years from the completion of the building by Nakdimen. Appellee claims that the lease contained a covenant for its perpetual renewal on a rental to be fixed by a board of arbitrators, as provided in the lease.

A short time prior to the expiration of the first term for 10 years, appellee made demand upon appellants to fix the rental for the next term by a board of arbitrators, as provided in the lease contract. Appellants refused to comply with this clause of the contract, and claimed that the lease expired by its own terms at the end of the 10 years, which was on the 10th of September, 1920.

Other facts will be stated under appropriate headings in the opinion.

The chancellor found that the lease copied above was a continuous contract, and remained in force during the life of the buildings specified in it; that appellee was entitled to compensation from appellants in the nature of an annuity; that the lease calls for the rental value for the use of the elevator, stairway, and lobby to be fixed by a board of arbitrators; that appellants, upon being notified of appellee's desire to arbitrate under the contract, refused to appoint an appraiser or arbitrator; that the reasonable rental value for a period of 5 years is \$300 per year, payable in monthly installments of \$25; that the rental value at \$25 may be increased on application of appellee for any month during said 5-year period by showing more than a designated number of persons occupying the Nakdimen building going in and out of the building; that, owing to the fact that the Nakdimen building had become vacant for a period of 3 months next ensuing, appellants may abate the monthly payment of \$25 as rent, by showing the actual number of persons going in or out of the building are less than a designated number; that the court retained jurisdiction of the cause in regard to the rent in order to carry out its decree by appropriate supplemental orders; that the rent fixed by the court for the use of the stairway and lobby expired 5 years from September 10, 1920; that at the expiration of that period the arbitration clause of the contract will again be in force, and then, on the failure of either party to select an arbitrator, the other may apply to the court to fix the rental.

A decree was entered of record in accordance with the finding of the chancellor. Appellants, who were defendants in the chancery court, have duly prosecuted an appeal from that part of the decree holding that the lease did not expire at the end of 10 years. Appellee has been granted a cross-appeal from that part of the decree fixing the rental value of the premises.

Warner, Hardin & Warner, and James B. McDonough, all of Ft. Smith, for appellants.

Hill & Fitzhugh, of Ft. Smith, for appellee.

HART, J. (after stating the facts as above). It is the contention of counsel for appellants that, under the terms of the lease contract which is copied in our statement of facts, the lease expired 10 years after the completion of the Nakdimen building, which was on the 10th day of September, 1920, and that the lease contained no covenant for renewal. On the other hand, it is the contention of counsel for appellee that the lease contained a covenant for renewal which might be exercised at the end of each succeeding 10-year period.

[1] Covenants for renewal are frequently inserted in leases for terms of years, and they add much to the stability of the lessee's interest, and afford inducement to make permanent improvements. The landlord is not bound to renew without a covenant for the purpose. Covenants for continued renewals are not favored, because they tend to create a perpetuity. They are valid, however, when there is an express covenant to that effect. The general rule is that, where the provision is in general terms for a renewal, the lessee is only entitled to a single renewal. A single covenant to renew a lease implies a renewal for the same term and at the same rent. 4 Kent's Commentaries; Winslow v. Baltimore & Ohio R. R., 188 U. S. 646, 23 Sup. Ct. 443, 47 L. Ed. 635; Taylor's Landlord and Tenant (9th Ed.) vol. 1, § 334; Thaw v. Gaffney, 75 W. Va. 229, 83 S. E. 983, 3 A. L. R. 495; Hoff v. Royal Metal Furniture Co., 117 App. Div. 884, 103 N. Y. Supp. 371; Tracy v. Albany Exchange Co., 7 N. Y. 472, 57 Am. Dec. 538; W. Trans. Co. of Buffalo v. Lansing, 49 N. Y. 499; and Cunningham v. Pattee et al., 99 Mass. 252.

[2] The lease contract under consideration does not contain any express covenant for continued renewals, and the chancellor erred in holding that the lease continued during the life of the buildings specified in the contract. On the other hand, when the lease is read from its four corners, in the light of the situation and condition existing at the time of its execution, it is fairly inferable that the parties contemplated a renewal of the lease at the expiration of the period of 10 years from the completion of the Nakdimen building. This is shown by the fact that the parties provided for a board of arbitrators to fix the rental value after that period of time expired. This indicates that they intended for the lease to be extended for another term. If they had intended that the lease should expire after the 10-year period, it would have been a vain and idle thing to have provided a board of arbitrators to fix the rent thereafter. This view is strengthened when we consider that the lease provides for the erection and operation of an elevator for the common use of both buildings. Therefore, we hold that, when the language of the lease is considered in its en-

tirety, it was intended by the parties that there should be a renewal of the lease for the period of 10 years upon a rental to be fixed by a board of arbitrators as provided in the lease.

Appellants declared that the lease was terminated by its own terms at the expiration of 10 years, and refused to comply with its provisions any longer. The court rendered a supplemental decree, in which it ordered appellants to restore the operation of the elevator service in the Nakdimen building. The appeal also challenges the correctness of this holding.

[3] We think the court erred in directing appellants to continue the elevator service. Chancery courts will not decree the specific performance of contracts requiring continuous acts involving mechanical skill and judgment, or technical knowledge, or acts requiring special skill, judgment, and discretion. 25 R. O. L. § 117, p. 303; case note to 140 Am. St. Rep. 62; case note to 68 Am. St. Rep. 760, 761.

The courts generally recognize that to enforce the specific performance of such contracts would unreasonably tax the superintendence of the court. In recognition of the principle, this court has held that equity will not decree the specific performance of a contract to build a levee, for the reason that there is no reasonable method by which such a decree can be enforced. *Leonard v. Bd. of Directors of Plum Bayou Levee Dist.*, 79 Ark. 42, 94 S. W. 922, 9 Ann. Cas. 159.

Again, in the case of *Warmack v. Major, Stave Co.*, 132 Ark. 173, 200 S. W. 799, the court refused to direct the specific performance of a contract with an electric light company to supply current for light between itself and a manufacturing company.

The running of an elevator requires both mechanical skill and judgment, and we are of the opinion that the contract in question comes within that class of cases which courts of equity will not specifically enforce. If the court should undertake to enforce the contract in the present case, it might involve the frequent necessity of hearing complaints from the appellee, charging the appellants with a breach of duty, or similar complaints from the appellants for a breach of duty on the part of appellee. There would be no limit to the number of times the court might be called on during the life of the lease to say whether the appellants have performed their duties faithfully or efficiently. For the same reason a court of equity in the present case would not seek to enforce the contract by a mandatory injunction. The performance of the contract would require continuous duties on the part of the appellants involving mechanical skill and care of such a character that the court could not superintend it.

[4] Again it is contended by counsel for appellants that the contract is void because

it provides for the rent to be fixed by a board of arbitrators, and they invoke the general rule that an agreement to enforce a contract by arbitration will not be carried out by a court of equity. The presence of an arbitration clause in a contract does not necessarily prevent the court from acting. It is only where the act to be performed by the board of arbitrators is of the essence of the contract that the court will refuse to act.

[5] In the present case, the essence of the contract was the renewal of the lease for another term of 10 years, and the fixing of the rental for that period was merely ancillary to the main contract. Where the provision for an appraisal is incidental and subsidiary to the substantive part of the agreement, the party refusing to name an appraiser or arbitrator cannot be heard to complain where the court performs or provides for the performance of such service. The court, in fixing the reasonable rental value, treats the method as a matter of form, rather than substance. So it may be said in the present case that the clause of the contract providing for a board of arbitrators to fix the rental value of the premises does not render the contract void as being too indefinite to be enforceable. *Mutual Life Ins. Co. of New York v. Stephens*, 214 N. Y. 488, 108 N. E. 856, L. R. A. 1917C, 809; *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304; *Kaufmann v. Liggett*, 209 Pa. 87, 58 Atl. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988. In each of the two cases last cited the court held that the fixing of the rental is not of the essence of a contract to renew a lease upon receipt of notice of that effect upon a rental to be fixed by arbitrators to be appointed by the parties. See, also, *Castle Creek Water Co. v. Aspen*, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660.

[6] On the question of the reformation of the lease contract, but little need be said. In *Welch v. Welch*, 132 Ark. 227, 200 S. W. 139, we reviewed the authorities on this question, and held that, while parol evidence is admissible in an action to reform an instrument on the ground of fraud and mistake, the evidence must be clear and convincing to warrant a reformation of the instrument. No useful purpose can be served by stating or discussing the evidence on this branch of the case. We need only say that it clearly falls short of the requirement of our decisions on the subject, and appellants are not entitled to reformation.

The court fixed the rental value of the premises for a period of 5 years, and then provided that the matter might again be taken up by it if the parties refused to arbitrate. There is some confusion in the testimony as to what the rental value of the elevator service should be; and for this reason, and the further reason that the decree must be reversed and the cause remanded, the

court will be directed to make a further finding on this branch of the case, and each party will be allowed to take additional proof therefor.

[7] The result of our views is that there could have been only one renewal of the contract for the period of 10 years from the 10th of September, 1920, and no specific performance of that contract could be enforced. The record shows that appellee applied to appellants for a renewal of the lease and for the appointment of a board of arbitrators under the contract to fix the rent. Appellants declined to appoint an arbitrator and to further perform the contract. This constituted a breach of the contract on the part of appellants. Having denied appellee the specific performance of the contract, it was entitled to recover from appellants for the damages suffered on account of the breach of the contract by appellants. The rule is that, chancery having properly assumed jurisdiction of an action, it will determine all issues presented by the pleading and evidence. In other words, when equity takes jurisdiction for one purpose, it takes it for all purposes, and will grant complete relief.

[8] Upon the remand of the case for the error in granting specific performance of the contract, it will be the duty of the court to settle the damages which resulted to appellee from a breach of the contract by appellants. Where a tenant is unlawfully evicted from the premises by the landlord, he may recover as damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord. *Byers v. Moore*, 110 Ark. 540, 163 S. W. 147.

In fixing the damages to be allowed to the appellee for the breach of the contract by appellants, it will be necessary for the court to consider and fix the rental value of the

premises. Therefore, for the reasons above stated, the rental value of the premises, fixed by the court, will not be considered as the correct rental value of the premises under the contract, and the court will be directed to make a new finding on that issue, and each party will be allowed to take additional proof thereon, and as well on the question of the amount of damages suffered by the breach of the contract.

[9] While chancery cases are tried de novo in this court, they are tried on the record made in the court below. Where a decree is reversed and a cause is remanded for further proceedings, and it appears to this court that the testimony upon any branch of the case has not been fully developed, or that the court, in making a finding on a particular branch of the case, has proceeded upon an erroneous theory, it is within the province of this court to allow the case to be reopened, and further testimony to be taken on that point. It will be the duty of the court upon the remand of the present case to fix the amount of damages suffered by appellee by the breach of the contract upon the part of appellants, and, inasmuch as it will be necessary for the court to know the rental value of the premises for the renewal period of 10 years in fixing the damages, it will be necessary for the court to fix the rental value for the elevator service for the reason that appellants refused to proceed under the arbitration clause looking to that end, as above stated. The court will allow both sides to take additional testimony on these points if they are so advised.

For the errors pointed out in the opinion, the decree will be reversed, and the cause remanded for further proceedings as indicated in the opinion, and not inconsistent therewith.

**JOHNSON v. MISSOURI PAC. R. CO.**  
(No. 76.)

(Supreme Court of Arkansas. July 4, 1921.  
Rehearing Denied Sept. 28, 1921.)

**1. Attorney and client ⇨190(4)—Ratification of institution of action and justification for discharge held for jury.**

In proceeding in intervention by attorney under Crawford & Moses' Dig. § 628, to enforce attorney's lien, *held* that whether the client, plaintiff in the action, approved or ratified its institution, and whether the attorney was negligent in failing to prosecute the client's claim with proper diligence so as to justify his discharge, were questions for the jury.

**2. Attorney and client ⇨76(1)—Attorney may be discharged.**

Although, under Crawford & Moses' Dig. §§ 628, 629, after an action is instituted the attorney's lien cannot be displaced by his wrongful discharge, the client has the unqualified right to control the litigation and to discharge the attorney.

**3. Appeal and error ⇨699(4)—Refusal to give instruction held not reviewable, in absence of matter from record.**

Where an additional instruction was requested by appellant during the argument of the case, on the ground of the character of the argument of appellee's counsel, its refusal was not shown to be an abuse of discretion, where the court did not certify in the bill of exceptions what the argument of appellee's counsel was.

**4. Trial ⇨237(2)—Striking out word "fair" before "preponderance of evidence" in instruction held not error.**

In proceeding in intervention by attorney under Crawford & Moses' Dig. § 628, to enforce attorney's lien, striking out the word "fair" before the words "preponderance of the evidence," in the attorney's requested instructions, requiring the client to show by a "fair preponderance of the evidence" that the attorney's discharge was justified, *held* not error.

**5. Attorney and client ⇨76(1)—Attorney may be discharged for failure to use reasonable diligence.**

A client's right to discharge his attorney is not restricted to cases of gross negligence of the attorney, but the client has a right to discharge his attorney for failing to prosecute the client's claim with reasonable diligence.

**6. Appeal and error ⇨974(1)—Trial ⇨349(2)—Requiring special verdict is discretionary.**

Under Crawford & Moses' Dig. § 1803, as to requiring special verdict, requiring such a verdict is discretionary, and the exercise of such discretion will not be disturbed on appeal, unless for clear abuse thereof.

Wood and Humphreys, JJ., dissenting.

Appeal from Circuit Court, Baxter County;  
J. V. Walker, Special Judge.

Action by Kathern King, administratrix, against the Missouri Pacific Railroad Company, in which Jo Johnson intervened. Judgment for the defendant, and the intervener appeals. Affirmed.

See, also, 144 Ark. 469, 222 S. W. 734; 224 S. W. 427.

Allyn Smith, of Otter, for appellant.

Thos. B. Pryor, of Ft. Smith, and Samp Jennings, of Little Rock, for appellee.

McCULLOCH, C. J. James E. King, a locomotive engineer employed by appellee, was killed while serving in the line of his duty as such engineer for appellee, and his widow was appointed administratrix of the estate, and instituted suit to recover damages for the benefit of herself, as widow, on account of the alleged negligence which caused the death of said decedent; and she entered into a written contract with appellant as her attorney to prosecute the litigation, and agreed in the contract to pay him as compensation for his services one-half of the amount recovered, after deducting expenses incident to the prosecution of the litigation.

Appellant instituted an action for his client Mrs. King, as administratrix, first in Lawrence county, on October 31, 1917, and dismissed it on March 13, 1918, and brought a second action in the circuit court of Independence county on the same day or the day thereafter. This action was dismissed by the Independence circuit court for want of prosecution, and appellant on April 23, 1918, brought a new action for Mrs. King in the circuit court of Marion county. This action was also dismissed, and appellant on June 3, 1918, instituted a new action for Mrs. King in the circuit court of Baxter county. Mrs. King subsequently dismissed this action, claiming that she had previously discharged appellant from her employment and employed other attorneys, through whom a settlement was negotiated and consummated whereby appellee paid to Mrs. King as such administratrix, the sum of \$8,500 as a compromise of her claim. Appellant filed his intervention at the next term of the Baxter circuit court, in which he set forth his claim for one-half of the amount of the compromised settlement between appellee and his quondam client, and prayed that the dismissed action be reinstated, and that he have judgment against appellee under the statute which gives a lien to attorneys. Crawford & Moses' Digest, § 628. Appellee filed a demurrer to the intervention, which was sustained by the trial court, but on appeal to this court it was held that the demurrer was improperly sustained and the cause was remanded for further proceedings. 144 Ark. 469, 222 S. W. 734. On the remand of the cause appellee answered, setting forth, in substance, that appellant had been discharged

ed by Mrs. King on account of negligence in failing to prosecute her claim with diligence, and that the action instituted by appellant for Mrs. King in the Baxter circuit court was without authority from her, and that therefore the court had no jurisdiction to entertain appellant's claim. Appellant filed a demurrer to the answer, and also a motion to make more definite and certain, and to strike out certain portions of the answer, all of which were overruled by the court, and the cause proceeded to a trial before a jury, which resulted in a verdict in favor of appellee.

The case was tried below on the theory that appellant was entitled to recover one-half of the amount of the compromise settlement between appellee and Mrs. King according to the terms of his contract, unless he was rightfully discharged by Mrs. King on account of negligence in failing to prosecute her claim with diligence, or unless the action in the Baxter circuit court was unauthorized.

Appellant requested certain peremptory instructions on the ground that the evidence was insufficient to justify a submission of the issues to the jury, and after those instructions were refused he requested the following instructions, which the court gave:

"(1) Gentlemen of the jury, this is an action by the plaintiff Kathern King, as administratrix of the estate of James E. King, deceased, against the defendant, Missouri Pacific Railroad Company and Jo Johnson as intervener, in which the intervener, Jo Johnson, alleges that the plaintiff, Kathern King, employed him to represent her as her attorney in the collection of her claim for damages against the defendant railroad company for the death of her husband, James E. King, agreeing to pay him for his services as such attorney one-half of the amount recovered after deducting the expenses incurred in the collection of said damages. To these allegations the defendant's answer and its response admits that the plaintiff employed the intervener as alleged and as set forth in the contract attached to his petition as Exhibit A, but deny that intervener performed his duty as such attorney in the settlement of such claim, as a diligent, prudent, and careful attorney should; and that by reason of his carelessness and neglect in the diligent prosecution of said claim to final settlement, plaintiff discharged said intervener as her said attorney, and employed other attorneys. These allegations and denials raise the issues to be determined by you.

"(2) You are instructed that it is admitted that the intervener was employed as such attorney by the plaintiff Mrs. Kathern King, that he was later discharged by such plaintiff, and that thereafter the cause of action was settled through other attorneys, and upon these admissions your verdict should be for the intervener, unless you further find that the discharge of the intervener was justified as hereinafter set out."

"(4) You are further instructed that unless you believe from a fair preponderance of the evidence that the intervener was negligent and

careless in the prosecution of the claim in controversy to settlement as alleged in defendant's response, and that he failed to prosecute the same as a prudent, careful attorney should, then your verdict should be for the intervener. However, the burden in the whole case is upon the intervener.

"(5) You are further instructed that under the law, when an attorney accepts a contract of employment from a client, he impliedly agrees to prosecute the cause with due and reasonable diligence; and, if you believe from a fair preponderance of the evidence in this case that the intervener, Jo Johnson, failed and neglected to diligently prosecute the claim in controversy to settlement, and that by reason of such neglect and failure the plaintiff discharged him as her attorney, or that at the time of the filing of the suit against the defendant railroad company in the Baxter circuit court by said intervener that he was acting without authority of employment from plaintiff, then your verdict should be for the defendant."

The court modified instructions Nos. 4 and 5 by striking out the word "fair" as it appears in each instruction preceding the words "preponderance of the evidence." Other instructions were given by the court of its own motion in harmony with those copied above.

[1, 2] The first contention is that the evidence was insufficient to sustain the verdict. Appellant and Mrs. King were each introduced as witnesses, and testified concerning the transactions and correspondence between them. There was a conflict in their respective statements. Mrs. King testified that when she met appellant at Yellville while the cause was pending in the circuit court of Marion county and the court was then in session, she discharged appellant from her service, and also testified that the action in the Baxter circuit court was instituted by appellant without her knowledge or consent. Appellant testified that he had a conversation with Mrs. King at the railroad station at Yellville upon his arrival there to attend court, but he denied that she discharged him from her service. He testified that the action then pending in that court was dismissed by the court on motion of counsel for appellee on account of its being in violation of an order issued by the Director General of Railroads, and that pursuant to agreement with Mrs. King, and with her knowledge, he brought the action in the circuit court of Baxter county. He also testified to the receipt thereafter of letters from Mrs. King, which established the fact that she approved and ratified the institution of that action, even though she had no knowledge at the time of the institution of the action that it was to be begun. It is argued that these letters, which were introduced in evidence, show conclusively that Mrs. King ratified the institution of the action in the Baxter circuit court. Mrs. King at first denied that she wrote the letters, but later, when they were



presented to her on cross-examination, she qualified this statement by saying that she did not remember whether she had written them or not. These letters tend to show that Mrs. King still regarded appellant as having authority to proceed with the collection of her claim against appellee, but nowhere in either of the letters is there any reference to the pendency of the suit in the Baxter circuit court or elsewhere, and Mrs. King testified positively that she had no knowledge of the institution of that action. Those letters were dated, respectively, June 18, 1918, and June 25, 1918. On July 15, 1918, and on a still later date, Mrs. King wrote to appellant, notifying him that he was not authorized to represent her in any litigation for the collection of the claim. We are of the opinion that it was a question for the jury to decide whether or not Mrs. King knew of the institution of the action in the Baxter circuit court, or whether she subsequently ratified the institution of the action. The testimony was sufficient to warrant a submission of the issue whether or not appellant's discharge by his client was rightful, and whether or not he was guilty of negligence in failing to prosecute her claim with proper diligence. Mrs. King had an unqualified right to control her own litigation and to discharge her attorney (St. L. I. M. & S. Ry. Co. v. Blaylock, 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563; St. L. I. M. & S. Ry. Co. v. Hays & Ward, 128 Ark. 471, 195 S. W. 28), but she could not displace the attorney's lien by his wrongful discharge after the action was instituted to recover on the claim. The statute provides that the compensation of an attorney shall be governed by agreement, and that the attorney who appears for a party has a lien on the cause of action from the commencement of the action "which attaches to a verdict, report, decision, judgment or final order in his client's favor and the proceeds thereof in whosever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order." Crawford & Moses' Digest, § 628. The statute also provides that the lien created by the act shall be determined and enforced by the court "before which said action was instituted, or in which said action may be pending at the time of settlement, compromise, or verdict." Crawford & Moses' Digest, § 629.

[3] It will be observed that the lien begins only from the institution of the action, and unless there is an action instituted by authority of the client or upon ratification by the client there is no lien. Thus the two issues were submitted to the jury in this case, whether appellant's discharge was rightful or wrongful, and whether or not he was authorized to institute the action in the Baxter circuit court. Appellant complains now that the court failed to submit to the jury the issue of ratification by his client of

the institution of the action in the Baxter circuit court. He did not ask the court at the proper time to give such an instruction. Instruction No. 5, quoted above, was given at the instance of appellant after the word "fair" was stricken out, and appellant has no right to complain of the failure of the court to incorporate in that instruction the issue of alleged ratification. It is true that the record shows that appellant during the argument of the case before the jury asked the court to give an instruction on that subject. The record recites that during the argument of the case appellant's attorney made the following request:

"In view of the argument of counsel for defendant that Jo Johnson, intervener herein, was discharged at Yellville, and that the court was without jurisdiction, we ask this court to instruct the jury that a client may approve and ratify the action of her attorney, even though such act is without the knowledge of the client; and such act of the attorney, when approved and ratified, has all the validity of an act which, when performed, has the approval and direction of the client."

There is nothing in the record to show what use was being made by counsel for appellee of the instructions of the court. According to the words of appellant's counsel, they were merely arguing that the court was without jurisdiction, which they clearly had a right to do under the issues presented to the jury, and this does not show abuse of discretion by the court in refusing to give new instructions at that stage of the trial. Statement of counsel, however, does not make a record of what actually was said by the opposing counsel. The court does not certify in the bill of exceptions what the argument of counsel was. That which is quoted above is merely the statement of attorneys for appellant, and if the opposing counsel were in fact making an illegitimate argument upon the instructions given by the court, or were making an argument which was calculated to mislead the jury and cause it to ignore the question of ratification, they ought to have shown this by a proper recital in the bill of exceptions. We have nothing before us except the statement of counsel themselves. The court may have refused the instruction on the ground that no such argument had been made by counsel. At any rate it was a question of discretion with the court as to whether or not the additional instruction should be given in the midst of the argument, and we cannot say there was any abuse of that discretion in this respect.

[4] It is insisted that the court erred in striking out the word "fair" from the instructions requested by appellant in regard to the preponderance of the evidence, but we are of the opinion that there was no error in that regard.

[5] It is also contended that the court erred in refusing to give an instruction

which would have told the jury, in substance, that the neglect of duty or want of diligence which would justify an attorney's discharge was "that degree which the law designates as gross negligence; that is, such management on his part must show a reckless disregard of his duties as an attorney or a dense ignorance of the law governing the conduct of such litigation." Counsel for appellant claim that this requested instruction was given under the rule announced by this court in *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262. That was an action instituted against an attorney by his client to recover damages on account of alleged negligence in prosecuting the client's cause, and the court laid down the following rule:

"Reasonable diligence and skill constitute the measure of an attorney's engagement with his client. He is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury. \* \* \*

In the present case the trial court followed this rule substantially in the statement to the jury that the client's right to discharge appellant as her attorney was dependent upon the question whether or not he was prosecuting her cause with diligence, or was guilty of negligence in failing to do so. In the fifth instruction, which the court gave at appellant's request, the law was stated to be that—

An attorney, when he accepts employment from his client, "impliedly agrees to prosecute the cause with due and reasonable diligence; and if you believe from fair preponderance of the evidence in this case that the intervener, Jo Johnson, failed and neglected to diligently prosecute the claim in controversy to settlement, and that by reason of such neglect and failure the plaintiff discharged him as her attorney, or that at the time of the filing of the suit against the defendant railroad company in the Baxter circuit court \* \* \* he was acting without authority of employment from

plaintiff, then your verdict should be for defendant."

Whatever the degree of diligence may be found necessary to establish the liability of an attorney to his client for damages, there can be no doubt of the right of a client to discharge an attorney who fails to prosecute the cause with reasonable diligence, for that is clearly the measure of an attorney's duty to his client. Any other rule would require a client to retain an attorney who was neglecting the cause and failing to proceed with proper diligence. We think that there was no error of the court in refusing to apply the rule of gross negligence as a condition upon the right of Mrs. King to discharge her attorney.

[6] Appellant requested the court to direct the jury to return a special verdict upon six separate interrogatories, some of which related to questions of law and the others related to matters of fact. The statute (*Crawford & Moses' Digest*, § 1303) provides that the court may require a jury to return a special verdict and to find specially upon particular questions of fact to be stated in writing. It is discretionary with the court whether or not such special verdict shall be required, and this court will not disturb the exercise of that discretion by the trial court unless there has been a clear abuse of it. *Little Rock & Ft. Smith Ry. Co. v. Pankhurst*, 36 Ark. 371. Certainly it cannot be said in this instance that there was an abuse of discretion, where the request contained interrogatories which related to matters which were not in any event proper to be submitted to the jury.

There are other assignments of error which we do not deem of sufficient importance to discuss. After careful consideration, we are of the opinion that there was no error committed in the course of the proceedings below, and that there was evidence legally sufficient to sustain the findings in the verdict. The judgment is therefore affirmed.

WOOD and HUMPHREYS, JJ., dissent.

STATE ex inf. CHINN, Pros. Atty., ex rel.  
BOTTS, v. HOLLOWELL. (No. 21989.)

(Supreme Court of Missouri, in Banc. Sept. 21,  
1921.)

Dissenting opinion.

For majority opinion, see 233 S. W. 405.

WALKER, J. (dissenting). I do not concur in either the reasoning or the conclusion of the majority opinion. It confuses the qualifications required to authorize one to teach the studies prescribed in the certificate granted to appellant with those necessary to render one eligible to the office of county superintendent of public schools. A normal diploma, or one from the State University Teachers' College, or a state or a first grade county certificate, is the requisite to eligibility to that office. Section 11843, R. S. 1919. To entitle one to teach in the manner in which the appellant was authorized, a certificate as to proficiency in certain designated studies is all that is necessary. Section 11502, R. S. 1919. That this certificate does not possess the comprehensiveness and thus indicate the proficiency of one who has a diploma or a first grade county certificate is beyond the purview of reasonable controversy. As is expressly stated in section 11507, R. S. 1919, these certificates simply authorize those to whom they are granted to teach under the provisions of section 11502, *supra*.

But it is contended that the authorization thus given the appellant is the equivalent of a state certificate. Without manifesting that impatience which might not improperly characterize the manner of one called upon to refute this conclusion, in the face of the statute, let the test of analysis determine whether there is merit in the contention. A state certificate can only be issued by the State Superintendent of Public Schools. A prerequisite to its being granted is that the applicant therefor shall pass a satisfactory examination before the State Superintendent. Section 11334, R. S. 1919. While this official has divided the certificates to be issued by him into classes (Public School Report of Missouri of 1920, p. 114) a course not expressly authorized by the statute, but probably permissible in the practical application and furtherance of the purpose of the law—the issuance of none is authorized in which the requirements are not of a higher grade and more comprehensive in their scope than that upon which the appellant relies for her eligibility. To illustrate: Before one can apply for an examination for what is termed a "rural state certificate," which we take to be of the lowest grade under the superintendent's classification, the latter must be satisfied that the applicant has completed 16 units of work in a state teachers'

college, more familiar to us as a normal school.

Thus panoplied, and the Superintendent satisfied of same, the examination is authorized. While the requisites of this class of state certificate are not defined by the school law, no violence is done to comparison in concluding that its scope must, at least, be equal to that of a first grade county certificate. A reference to the statute and to the appellant's certificate in the record will disclose that the former is higher in grade and more comprehensive in character than the latter. This, then, is the test, and not the disconnected phrase employed in the majority opinion to sustain a contrary conclusion, viz. that the appellant's certificate authorized her "to teach in the public schools of the state" and was consequently a "state certificate." Many ludicrous illustrations might be made, after the manner of the old logicians, to demonstrate, not only the fallacy, but the absurdity, of this conclusion. However, they are not appropriate here. The language of the statute (section 11502, R. S. 1919) is that those to whom certificates are granted by the Board of Regents of a normal school—now affectively called "Teachers' Colleges" (section 11490, R. S. 1919)—shall be entitled "to teach in this state for a period of two years from date." As to where they may teach, it is not difficult to determine, as the state has only supervision over the public schools; as to what they may teach, when the purpose for which the authority was granted, is given reasonable consideration, should be encompassed with as little difficulty in its determination.

The creation of our Normal Schools and the reason for their continued existence is the education of teachers. While being educated, or before they have completed the regular course, it was deemed wise by the Legislature that pupils, whether impelled by necessity or choice, should be given an opportunity to teach such branches in which they were known by the Board of Regents to have become proficient. Certainly it cannot be contended that they were to be authorized to teach other branches upon which they had not been examined and concerning their knowledge of which the Board of Regents could know nothing. If such was the purpose of this grant of power, then the issuance of these normal certificates as a test of proficiency becomes a travesty and a fraud upon the public. The statute, however, is too plain in its terms and unmistakable in its purpose to warrant such an interpretation. These certificates, granted in the interim to normal students, after the completion of certain studies and before the pursuit of others necessary to graduation, were never intended to confer authority to teach other than those branches in which the applicant had become proficient. Their scope, as we will presently demonstrate from the record,

is not only below the grade of the lowest classification of a state certificate, but of a first grade county certificate as well. Let its words bear witness as to the extent of a certificate of this character. Omitting formal matters it is as follows:

"Be it known that Lillian Leedom Hallowell has completed the elementary certificate course, the same being a one year course covering thirty semester hours in academic and pedagogic studies of college grade preceded by four years of high school courses. By statutory enactment this certificate is authority to teach in the public schools of Missouri for a period of two years from date, if not revoked."

Dated at Kirksville, Mo., May 23, 1917.

To this is appended a transcript of the record of the holder showing that her admission to the elementary certificate course, after college entrance requirements, was 15 units in two high schools, a named university, and the Kirksville Normal school. To this is added a list of 13 studies pursued by the appellant prior to her application for the certificate, to each of which except the Practice of Teaching and the History of Education she had devoted two and one-half semester hours; "the same being," asserts her counsel, "the only certificate or diploma warrant or authority held by the defendant on April 1, 1919, authorizing her to teach in any school." We take no account of certificates granted, if any, subsequent to appellant's election as county superintendent, as the statute is mandatory and requires the qualification to exist at the time of her election. Section 11343, R. S. 1919; State ex rel. Weed v. Meek, 129 Mo. loc. cit. 438, 31 S. W. 913.

It will be seen that there is nothing in the foregoing exemplification upon which the Board of Regents bases its power to act to authorize the classification of appellant's authority as a state certificate. The claim that the name of the then State Superintendent of Public Schools, appended to this certificate, imports the same character to it as if issued by him in his official capacity under the statute (section 11334, R. S. 1919), is a mere quibble. He does not sign these certificates as State Superintendent of Public

Schools, but as a member of the Board of Regents. That it was appropriate by reason of his being the head of the educational system of the state, that he should be designated (section 11492, R. S. 1919) as an ex officio member of each of the Boards of Regents of the State Normal Schools, there is no ground for controversy. However, in the absence of any statute to the contrary, his name affixed as it should be to any instrument requiring the signatures of the members of the Board of Regents, is a token of no more authority than that of any other member of the board.

A matter of more serious import than the mere right of the appellant to hold this office has impelled this dissent. Otherwise, I would have contented myself, without more, in simply expressing, in a word, my disapproval of the conclusion of the majority. Efficiency in any system, governmental or otherwise, is an essential of success. Efficiency in this instance may be measured accurately by the requirements the law prescribes for those who would hold the office. The importance of this office cannot be minimized. Our system of public education, rightly conducted, constitutes the safest foundation upon which to build an intelligent, patriotic, law-abiding, and God-fearing citizenship, without which individual liberty will not long survive and free government will soon become a mere name. We have legislated liberally, and in the main well, upon the subject of education. What we need, perhaps, to remedy existing defects, is not a new code of laws on the subject, hurriedly compiled and imperfectly digested, but the observance and enforcement of the one we now have. If we are lax in this matter, and intrust the supervision of our schools to those who fail to meet the plain requirements of the law, we not only bring discredit upon the system, but do an injustice to those for whose benefit it was created and is sustained. Satisfied, from a very careful study of the statutes, that the appellant was not eligible to the office of county superintendent of public schools, I am of the opinion that the judgment of the trial court should be affirmed, and the writ of ouster issued by it, be made permanent.

**BARNETT v. STATE ex rel. SMITH, Pres.  
Atty. (No. 85.)**(Supreme Court of Arkansas. July 4, 1921.  
Rehearing Denied Oct. 3, 1921.)**1. Justices of the peace — No vacancy authorizing appointment because of direction on ballot to vote for too many.**

The fact that the electors of a township were directed by the ballot to vote for three justices of the peace, when under Crawford & Moses' Dig. §§ 6388, 6389, in view of the number of votes cast in the general election next preceding, there was authority to elect only two, and no elector had the right to vote for more, did not create a vacancy, authorizing an appointment; the justices previously in office, by provision of Const. art. 19, § 5, continuing in office till their successors are elected and qualified.

**2. Justices of the peace — Number to be elected determined by number of votes at prior election.**

Under Crawford & Moses' Dig. §§ 6388, 6389, the number of justices of the peace to be elected in a township is determined by the number of votes cast in the general election next preceding; and in no respect by the number of electors in the township at the time of election of justices or by the number of votes cast at such election.

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Quo warranto by the State, on the relation of Jabez M. Smith, Prosecuting Attorney, against Horatio Barnett. From an adverse judgment, defendant appeals. Affirmed.

Oscar Barnett, of Malvern, for appellant.  
J. S. Utley, Atty. Gen., Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., and Jabez M. Smith, of Malvern, for appellee.

**SMITH, J.** This is a proceeding in the nature of a quo warranto proceeding to try the title of the appellant, Horatio Barnett, to the office of justice of the peace of Fenter township, in Hot Spring county, this state.

The facts are undisputed, and are as follows: At the general election in 1918, 245 votes were cast in Fenter township. At the 1920 election the ballot contained the direction to the electors to "Vote for three" justices of the peace, instead of the proper direction to "Vote for two" justices of the peace. At the time of the 1920 election four persons held commissions and were acting as justices of the peace for Fenter township.

Appellant Barnett testified that he and other electors supposed four justices of the peace were to be elected, but that after the election had been held he discovered the fact to be that authority existed for the election of only two justices of the peace. He thereupon applied to and received from the Governor of the state a commission to fill a

vacancy existing in the office of justice of the peace for Fenter township. He testified that the showing was made to the Governor—and such is the undisputed fact—that 1,180 electors had voted at the 1920 election, and that there were 1,326 qualified electors in that township. The commission of the Governor recites that "it appears that a vacancy exists in the office of justice of the peace in Fenter township, in the county of Hot Spring, state of Arkansas, caused by —," and bears date November 13, 1920.

After receiving the commission respondent took the oath of office November 15, 1920. The insistence of respondent is that, inasmuch as the electors undertook to elect three justices of the peace, when authority for the election of only two existed, no one was elected, and that there was therefore a vacancy for the Governor to fill, and the vacancy was filled by the appointment of respondent.

[1] It is also insisted that, inasmuch as the record of poll taxes paid shows that there were 1,326 qualified electors in Fenter township, the electors of that township were entitled to the services of six justices of the peace, and as that number was not elected there was a vacancy in office, which was properly filled by the appointment of respondent.

Respondent's authority to serve as a justice of the peace cannot be sustained upon either theory. It is provided that the electors of every township shall elect one justice of the peace for every 200 electors, provided each township, however small, shall have two justices of the peace. Section 6388, O. & M. Digest.

It is provided in section 6389, O. & M. Digest, that—

"In ascertaining the number of justices [of the peace] to be voted for and commissioned, the number of votes cast in the general election next preceding shall be taken as conclusive of the number of electors in such township."

This act was held constitutional in the case of Alford v. State, 69 Ark. 437, 64 S. W. 217.

There was authority to elect two justices of the peace, and only two. Each elector had the right to vote for that number, and for no more. This election appears not to have been contested, and we cannot here decide what its result was. Persons were in office when it was held, and under the Constitution these officers continued in office until their successors were elected and qualified. Section 5, art. 19, of the Constitution. So that, in no event was there a vacancy to be filled by the Governor's appointment.

[2] The showing that 1,180 electors voted at the 1920 election is unimportant, as is also the showing that there were 1,326 electors who were qualified to vote. Neither of

these facts can be considered in determining the number of justices of the peace to elect. The proper basis was the vote at the 1918 election. Section 6389, C. & M. Digest.

The court below found there was no vacancy in the office of justice of the peace, quashed respondent's commission, and enjoined him from exercising the functions of justice of the peace. This judgment was correct, and is affirmed.

### PARROTT TRACTOR CO. v. BROWN-FIEL et al. (No. 94.)

(Supreme Court of Arkansas. July 11, 1921.  
Rehearing Denied Oct. 3, 1921.)

1. Sales ⇨425—Purchaser who retains goods after breach of warranty liable for payment of price reduced by damages on account of breach.

The purchaser of goods, having the right to elect either to rescind on breach of warranty, or to sue for damages from the breach, is liable for payment of the price on his election to retain the article, but is entitled to reduce the amount by damages resulting from the breach.

2. Sales ⇨288(1)—Purchaser does not waive breach of warranty by promise to pay for goods.

The purchaser of goods, being liable for the price on his election to retain the property, does not waive a breach of warranty by promising unconditionally to pay for the goods subsequently to the breach, though his promise is a circumstance for the jury to consider on the question whether or not there has actually been a breach.

3. Trial ⇨194(13) — Requested instructions invading province of jury properly refused.

Where in action for price of a tractor it was for the jury to decide whether agent had authority to make warranty and whether there was a breach of warranty, requested instructions that agent had no authority to warrant and that promise to defer action on the note was a waiver of the breach were properly refused.

4. Sales ⇨442(6,7)—Measure of damages for breach of warranty expense of curing defects.

Where the defects in a machine sold could be corrected by reasonable expenditure, the correct measure of damages to the buyers from the breach of warranty was the expense of curing the defects.

5. Trial ⇨261—Plaintiff cannot complain of court's failure to define measure of damages where correct instruction not asked.

The trial court was not bound to give an instruction on a particular matter unless a correct one was asked, and plaintiff, who did not ask for a correct instruction on the measure of damages, cannot complain of the court's failure to define the measure.

6. Evidence ⇨400(4)—Note given for tractor containing reservation of title not a written contract excluding oral testimony of warranty.

A note executed by the buyer of a tractor containing a reservation of title as security for the price did not constitute a written contract evidencing the terms of sale, and therefore oral testimony as to an express warranty of the tractor by the seller was admissible.

Appeal from Circuit Court, Poinsett County; R. H. Dudley, Judge.

Action by the Parrott Tractor Company against J. W. Brownfiel and another. From judgment for defendants, plaintiff appeals. Affirmed.

Arthur L. Adams, of Jonesboro, for appellant.

McCULLOCH, C. J. Appellant sold and delivered to appellees a tractor for the sum and price of \$1,675, of which \$1,000 was paid in cash and a promissory note for \$675, dated April 18, 1918, due December 1, 1918, was duly executed by appellees to appellant. This is an action instituted by appellant against appellees to recover the amount of the note. There was an answer and counterclaim filed by appellees in which they alleged that there was an express warranty of the quality of the machine sold to them by appellant and a breach of the warranty whereby appellees suffered damages in the sum of \$1,675.

On a trial of the issues before a jury J. W. Brownfiel, one of the appellees, testified that he and his son purchased the tractor from appellant's agent, and the latter, in an oral contract, warranted said tractor to be of sufficient quality and capacity to do ordinary farm work, such as is commonly done in the use of that kind of a machine on a farm. The evidence of that witness and others tended to show that the tractor was not of that quality or capacity, and that appellees spent large sums of money in putting the tractor in condition to do the work which it was warranted to do. Appellee J. W. Brownfiel testified that he had spent \$600 on the tractor in order to make it do the work, and that that was not sufficient to put it in good order. There was other testimony as to the defects of the tractor and the amount of work necessary to put it in order. The testimony also tended to show that appellant was notified of the defects and sent an inspector to look at the machine. On the cross-examination of J. W. Brownfiel he stated that after his trouble in trying to make the machine work and after appellant's agent and inspector had failed to make it work properly, he had written to appellant a letter in May, 1919, in which he promised to pay the note given for the balance of the purchase price. The letter

was exhibited in evidence and contained the statement that the writer would pay the note or most of it in the month of July. Brownfield, in explanation of this letter, stated that he had intended to pay for the tractor if appellant would make it work properly. There was a verdict in favor of appellees for the recovery of damages in the precise amount of the note and interest, and the court rendered judgment offsetting the amount of damages found against the amount of the note sued on and adjudged that appellant recover nothing in the action.

[1-3] The principal assignments of error relate to the rulings of the court in the giving and refusing of instructions. The first contention is that the court erred in refusing to give an instruction which would have told the jury that it was "not a part of the implied authority of the agent to make any specific warranty." The court was correct in refusing to give this instruction, for it should not have been said as a matter of law that there was no implied authority on the part of the agent to warrant the goods sold. That depended upon the facts established by the evidence.

It is next insisted that the court erred in refusing to give the following instruction:

"Even though you may find that said tractor was unsatisfactory in that it would not do the work for which it was purchased, and though you further find that there was a specific warranty or guaranty that it would perform said work or that it would fulfill other conditions which said warranty or guarantee was not met, if you further find that the defendants, or either of them, made a new and definite promise to pay the amount originally agreed upon, they thereby waived any and all defenses accruing prior to such subsequent promise and are liable in the amount sued for, unless you further find that the plaintiff, after such subsequent promise of defendants, if any, renewed the original guarantee or made some further or other promise or agreement regarding said tractor with which they failed to comply."

The substance of the declaration contained in this instruction is that an unconditional promise to pay the balance of the purchase price with the knowledge of the breach of the warranty constitutes a waiver of the breach. This is but another way of saying that a reaffirmance of the sale after the breach of the warranty constitutes a waiver. Such is not the law. This court held in the case of *Plant v. Condit*, 22 Ark. 454, that, where there is a breach of an express warranty, the vendee may rescind the contract, or he may affirm the contract, keep the property, and, when sued for the price, set up the false warranty by way of recoupment. This doctrine was again reiterated in the case of *Weed v. Dyer*, 53 Ark. 155, 13 S. W. 592, where the court said:

"Acceptance of the goods, when the buyer knows that their quality is inferior to that war-

ranted, implies an agreement to take them notwithstanding the defect, and waives the right to reject them, but does not waive the right to a reduction when sued for the price."

Again the court said:

"In most cases the buyer, when he discovers that the quality of the goods is inferior to that warranted, would feel impelled by a sense of right and fair dealing to notify the seller of the fact: (1) That he might satisfy himself of its existence; (2) that he might cure it. But in many cases this course might be found impracticable or even impossible; and, while the failure might be a circumstance for the jury to consider in ascertaining if there was in fact a breach of warranty, it could not defeat the recoupment if the breach was proved. How far such failure would weigh with a jury would vary with the circumstances of each case, and in all cases be a matter for their determination."

In the very recent case of *Courtesy Flour Company v. Westbrook*, 225 S. W. 3, we said:

"The law on the subject is that, where chattels are purchased under express warranty as to quality, the purchaser may rescind on discovering the inferior quality of the article sold, but is not bound to do so, and, on the contrary, may retain the articles purchased and sue on the warranty or recoup the damages when sued for the price."

Now, if the retention of the article after discovery of the breach of the warranty does not operate as a waiver of the breach, it follows that the promise to pay the debt does not constitute a waiver. The purchaser having the right to elect either to rescind on account of the breach or to retain the articles and sue for damages resulting from the breach, he is liable for payment of the price upon his election to retain the articles, but is entitled to a reduction to the extent of the amount of damages resulting from the breach. So the purchaser, being liable for the price on his election to retain the property, does not waive the breach by promising unconditionally to pay it. It is, of course, as indicated by this court in *Weed v. Dyer*, supra, a circumstance for the jury to consider whether or not there has been a breach, but the promise does not, as a matter of law, operate as a waiver. The weight of this circumstance is, of course, affected by any explanation of the circumstance under which the promise is made, and it becomes a question of fact for the jury to determine whether there has been a breach of the warranty. We are of the opinion, therefore, that the court was correct in refusing to give this instruction.

Another refused instruction stated, in substance, that if appellant was induced to defer action on the note by a promise of appellee's to pay the debt at a future date, such promise constituted a waiver of the alleged breach of warranty. The instruction

is open to the same objection stated above in regard to the other instruction, and there was no error in refusing it.

The next two assignments relate to the rulings of the court in giving instruction No. 6 of its own motion and refusing to give instruction No. 5 requested by appellant, which would have told the jury that—

"The measure of damages for such breach is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty, with interest upon such sum."

Instruction No. 6 given by the court reads as follows:

"If you find there was a guarantee and a breach of it upon the part of the company and the defendants were damaged, then you will reduce your finding in the amount you find they have been damaged."

[4, 5] The court had previously told the jury in another instruction that the execution of the note was undisputed, and that the jury should find for the appellant for the amount of the note and interest. The contention is that the court, in giving instruction No. 6, failed to state the measure of damages, and that there was error in refusing to give instruction No. 5. It is true that instruction No. 6 given by the court did not undertake to declare the measure of damages. It merely told the jury that they should reduce the finding in favor of appellant to the extent of the damages suffered by appellees by reason of the breach of the contract of warranty. The court should, if asked, have given an instruction defining the measure of damages, but the instruction which appellant requested did not state the correct measure of damages, and therefore the court did not err in refusing to give it. The instruction stated the measure of damages to be the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty. The proof showed that the defects in the machine could be corrected by reasonable expenditure, and the correct measure of damages was the expense of curing the defects. *Western Cabinet & Fix. Mfg. Co. v. Davis*, 121 Ark. 370, 181 S. W. 273. The court was not bound to give an instruction unless a correct one was asked, and appellant is in no attitude to complain of the court's failure to define the measure of damages, inasmuch as it did not ask for a correct instruction on that subject.

[8] It is also contended that the testimony tended to establish an oral warranty and was inadmissible. There was no written contract of sale. The note executed by appellees containing a reservation of title as security for the price did not constitute a contract evidencing the terms of sale. Ap-

pellant relies on the recent case of *Federal Truck & Motor Co. v. Tompkins*, 231 S. W. 553, but in that case there was a written contract of sale which we held could not be waived by parol proof of a warranty. It was therefore not improper to admit oral testimony as to the express warranty.

It is also contended that the evidence was not sufficient to sustain the verdict, but our conclusion is that there was sufficient evidence.

The judgment is therefore affirmed.

#### NORSWORTHY v. STATE. (No. 103.)

(Supreme Court of Arkansas. July 11, 1921.  
Rehearing Denied Sept. 26, 1921.)

1. *Homicide*  $\S$  253(1)—Evidence sufficient to sustain conviction of first degree murder.

Evidence held sufficient to sustain conviction of first degree murder.

2. *Criminal law*  $\S$  444 — Testimony held to sufficiently identify defendant's letter.

Testimony of sheriff that when he arrested defendant, charged with first degree murder, he asked defendant about a letter to decedent's daughter, and defendant denied writing it, but admitted that a man on the gang with which he (defendant) worked wrote it at defendant's dictation, sufficiently identified the letter to make it admissible in evidence against defendant.

3. *Criminal law*  $\S$  854(2)—Separation of jury discretionary with court.

Under *Crawford & Moses' Dig. § 3187*, in a prosecution for first degree murder, it was in the discretion of the court to permit the jury to separate.

4. *Criminal law*  $\S$  1030(1), 1048—Objections, but not exceptions, necessary for review.

Under *Crawford & Moses' Dig. § 3414*, it is made the duty of the Supreme Court, on appeal or writ of error, to review a capital offense to consider all errors of the trial court prejudicial to the rights of defendant, whether exceptions were saved in the trial court or not, but there must have been objection in the trial court to the doing or omission of the thing assigned as error.

5. *Criminal law*  $\S$  1090(19)—Motion for new trial cannot be used to bring on record matter proper for bill of exceptions.

The motion for new trial cannot be used to bring upon the record matters which should appear in the bill of exceptions.

Appeal from Cross Chancery Court; A. L. Hutchins, Chancellor.

Suit by Ofie Norsworthy against the Prosecuting Attorney of the Second Judicial District and the Superintendent of the State Penitentiary to have the State of Arkansas submit to a new trial of plaintiff, convicted of murder (228 S. W. 384). From a decree dismissing the complaint, plaintiff appeals. Decree affirmed.



T. M. Mehaffy, of Little Rock, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

SMITH, J. This is an appeal from the decree of the Cross chancery court dismissing, for want of equity, the complaint of appellant filed in that court against the prosecuting attorney of the Second judicial circuit and the superintendent of the state penitentiary. By this suit the appellant sought to have the state, through its prosecuting attorney, submit to a new trial of appellant's case, and to restrain the execution of the judgment of the Cross circuit court pronouncing a sentence of death against appellant.

Among other things appellant alleges that he was not guilty of the crime of murder in the first degree of which he was convicted, and for which he was sentenced to be electrocuted. He alleges that he appealed from the judgment, and was allowed 55 days in which to file his bill of exceptions; that the bill of exceptions would have shown errors were committed at his trial which would have entitled him, on appeal to the Supreme Court, to a reversal of the judgment and a new trial of his case in the circuit court. He further alleged that the bill of exceptions was not filed within the time allowed by the trial court, and sets forth facts (which it is unnecessary to detail) showing that the failure to file the bill of exceptions within the time allowed was not on account of any negligence legally attributable to appellant, but that it was through the carelessness or negligence of those for whose conduct appellant was in no wise responsible, and that by reason of the fault and carelessness of others appellant was denied, on appeal to the Supreme Court, a hearing upon the exceptions which he had reserved at the trial, and which, if considered by the Supreme Court, he says would have resulted in the reversal of the judgment and sentence of death against him, and in the granting of a new trial.

There was a demurrer to the complaint, upon the grounds that the chancery court was without jurisdiction, and that facts were not stated sufficient to constitute a cause of action. The demurrer was sustained and the complaint dismissed; and this appeal is from that order and decree.

By stipulation the parties have tendered with the complaint, as an exhibit thereto, the bill of exceptions containing the evidence which was adduced on the trial of the original cause in the Cross circuit court.

This case is very similar to the case of *McLaughlin v. State*, 120 Ark. 151, 179 S. W. 326, and is controlled by that case. It was there contended on behalf of the state that the chancery court was without jurisdiction to grant the relief sought in the complaint.

We found it unnecessary there to decide that question; and we find it unnecessary to decide it here.

We have considered the bill of exceptions made an exhibit to appellant's complaint in connection with the allegations of the complaint, which we treat as true, inasmuch as the case was disposed of in the court below on demurrer, and have concluded that under the showing made the case would not have been reversed had the bill of exceptions been filed within the time limited. This court, on appeal in the case of *Norsworthy v. State*, 228 S. W. 384, did not discover any error on the face of the record. The only error there assigned was the failure to swear the jury; but that apparent defect was cured, before the final submission of the cause, by an amended transcript filed in this court, which disclosed that a nunc pro tunc order had been entered by the trial court showing that the jury had been duly sworn.

[1] The first error assigned for the reversal of the judgment is that the testimony does not support the verdict. On this proposition it suffices to say that an eyewitness to the killing testified that Sam Farmer, the deceased, was plowing in his cotton field, and that appellant walked to the end of the row deceased was plowing; that appellant commenced talking to deceased; that they were too far away for witness to hear what was said, but witness heard a pistol fire, and "at the time the pistol fired Mr. Farmer was running, trying to get away." The witness further testified that appellant pursued Farmer, firing as they ran, until five or six shots had been fired. The witness was asked to give an account of about how the shots were fired by snapping his fingers, and the answer was, "Something like this (indicating deliberate snapping)." The witness further testified that Farmer fell when the last shot was fired.

[2] Error was assigned in admitting a letter addressed to Mary Jane Farmer, who was the daughter-in-law of the deceased. This letter was unsigned, and the objection to it is that it was not shown to have been written by appellant. The letter was offered in evidence by the sheriff, who testified that when he arrested appellant in St. Louis he asked appellant about the letter, and appellant denied writing the letter, but admitted "that a man on the gang" with which appellant worked wrote it, and wrote what appellant asked him to write. This testimony sufficiently identified the letter to make it admissible in evidence.

[3] It is next insisted that the court erred in permitting the jury to separate, and that the court erred in a comment about keeping the jury together. It was within the discretion of the court to permit the jury to separate. Section 3187, C. & M. Digest. No attempt was made to show an abuse of this discretion except that the court made a remark in the hearing of the jury about the policy of keeping juries together.

[4] It is insisted that this remark, in itself, constituted reversible error. But no objection appears to have been made to it at the time. Under section 3414, C. & M. Digest, it is made the duty of the court, upon an appeal or writ of error from a conviction of a capital offense, to consider all errors of the lower court prejudicial to the rights of the appellant, whether exceptions were saved in the lower court or not. But there must be an objection in the court below to the doing or to the omission of the thing assigned as error. This statute was so construed in the case of *Harding v. State*, 94 Ark. 68, 126 S. W. 90, the reason assigned being that it would be an act of original jurisdiction for this court to pass upon a matter not passed upon by the court below.

[5] The final error relates to a statement of the prosecuting attorney in the closing argument. Nothing about this argument appears in the bill of exceptions. The only reference to this argument is found in the motion for a new trial. The motion for a new trial cannot be used to bring upon the record matters which should appear in the bill of exceptions. In the case of *Cravens v. State*, 95 Ark. 321, 128 S. W. 1037, this court said:

"It is the office of a bill of exceptions to bring upon the record matters which do not appear upon the judgment roll or record proper, and motions for new trials have never been used for that purpose. *Foohs v. Bilby*, ante, p. 302; *Cox v. Cooley*, 88 Ark. 350. In the latter case the court said: 'The motion for new trial cannot be used, and has never been used, to incorporate anything into the record or any exceptions to anything done by the court. Its sole use is to assign errors already committed by the court, except for newly discovered evidence as provided in the sixth paragraph of section 6215, Kirby's Digest.'"

In the case of *McLaughlin v. State*, supra, we said that the appellant did not disclose any error in the record then before the court that would have justified a court of chancery (conceding that it had jurisdiction) in restraining the judgment of the law court, and in compelling the state to submit to a new trial. Such appears to be the state of the record now before us, and the decree in this case, as in that, will therefore be affirmed, for the same reason.

#### CREAMERY PACKAGE MFG. CO. et al. v. WILHITE et al. (No. 104.)

(Supreme Court of Arkansas. July 11, 1921.)

I. Banks and banking §54(1)—Directors liable for negligent mismanagement, though facts not reported to them by State Bank Commissioner.

The requirement of Banking Act, § 19 (Crawford & Moses' Dig. § 683), that the State

Bank Commissioner report irregularities of any bank officer to the bank's directors does not limit the directors' liability for negligent mismanagement to cases where such report has been made to them; the purpose of the provision being rather to enlarge than to limit their liability.

2. Banks and banking §55(4)—Pleading §205(2)—Complaint of depositors of insolvent bank against directors for negligent mismanagement defective, where not alleging Bank Commissioner's failure to sue, and defect open to general demurrer.

In view of Banking Act, § 53 (Crawford & Moses' Dig. § 719), requiring the State Bank Commissioner to take possession of all the property of an insolvent bank and collect all debts due it, complaint in suit of certain depositors of an insolvent bank against its directors for negligent mismanagement was defective, where it failed to allege that the Commissioner had been requested to sue and had failed to do so; and such defect was vulnerable to general demurrer, notwithstanding *Crawford & Moses' Dig. § 1190*, not being a mere defect of parties.

Appeal from Mississippi Chancery Court; Archer Wheatley, Chancellor.

Suit by the Creamery Package Manufacturing Company and others against B. H. Wilhite and others. Decree for defendants and plaintiffs appeal. Affirmed.

J. T. Coston, of Osceola, for appellants.

Little, Buck & Lasley, of Blytheville, for appellees.

SMITH, J. The appellants, the Creamery Package Manufacturing Company, J. D. Johnson, and the Grassy Lake & Tyronza Drainage District No. 9, filed a complaint in the chancery court of the Chickasawba district of Mississippi county, which contained the following allegations:

"That the Bank of Blytheville, a banking corporation, was on the 10th day of March, 1920, indebted to appellants for money on deposit aggregating over \$23,000.

"II. That defendant J. C. Blaine was a director and defendant J. F. Wilhite, a director and president, and defendant B. H. Wilhite, cashier, and defendant W. O. Anthony, assistant cashier, of said bank.

"III. That the defendants, B. H. Wilhite and W. O. Anthony, systematically overdraw and stole from said bank for a period of many years prior to March 10, 1920, in various sums, aggregating about \$100,000, and they permitted J. H. Reese and others, known to be insolvent, to overdraw in sums aggregating half a million dollars.

"IV. That the defendants J. C. Blaine and J. F. Wilhite knew, or by the exercise of reasonable, ordinary care as officers in said bank could have known, of the reckless, careless, and criminal manner in which the affairs of said bank were being handled by defendants, B. H. Wilhite and W. O. Anthony, and plaintiffs believe and allege that defendant J. F. Wilhite did

know of the manner in which the affairs of said bank were managed, but defendant Blaine negligently and carelessly failed to give the affairs of said bank any attention whatever, as director.

"V. Plaintiffs charge said defendants with the following specific acts of negligence:

"(1) That said directors failed and refused and neglected to exercise reasonable care in the management, supervision, and control of the affairs of said bank.

"(2) In failing to remove the cashier and assistant cashier after they knew, or by the exercise of reasonable care could have known, that said cashier and assistant cashier were dishonest, reckless, and incompetent.

"(3) In failing to require sufficient bonds of said cashier and assistant cashier for the faithful performance of their duties.

"(4) Declaring and paying dividends out of the capital of said bank when they knew, or by the exercise of reasonable care could have known, that said bank was insolvent.

"(5) In declaring and paying dividends out of the capital stock of said bank at times when there were no profits out of which to pay such dividends.

"(6) In receiving dividends from said bank when they knew, or by the exercise of reasonable care could have known, that said bank was insolvent.

"(7) In receiving dividends when they knew, or by the exercise of reasonable care could have known, that there were no profits out of which to pay same.

"(8) In assenting to the reception of deposits and the creation of debts by said bank when they knew, or by the exercise of reasonable care could have known, that said bank was insolvent.

"(9) In lending the funds of said bank to individuals and corporations in sums greatly in excess of 30 per cent. of the capital stock of said bank.

"(10) In suffering and permitting the depositors of said bank to overdraw their accounts.

"(11) In failing to exercise reasonable care and diligence in the collection of overdrafts and other debts due said bank.

"(12) In permitting said cashier and assistant cashier to pay out the funds of said bank upon the checks and orders of individuals, firms, and corporations which had no deposits with the said bank.

"(13) In ratifying overdrafts.

"(14) In neglecting to inquire into and ascertain the condition of said bank by periodical audits of the books and accounts of said bank.

"That by reason of the reckless, careless, and unlawful manner in which the affairs of said bank were managed, it became insolvent, and was taken over by the State Banking Commissioner, March 10, 1920, and will pay only a small percentage of its indebtedness."

There were allegations that J. C. Blaine and J. F. Wilhite had fraudulently conveyed certain real estate owned by them, and there was a prayer for judgment for the amount of the deposits and for a decree uncovering the property which had been conveyed in fraud of these creditors. Blaine is a nonresident and was not served. Wilhite is a res-

ident, and was served, and there was a prayer against him for a personal judgment.

A general demurrer to this complaint was filed, which alleged a failure to state facts sufficient to constitute a cause of action. This demurrer was sustained, and the complaint dismissed, and this appeal is from that order.

The action of the court in sustaining the demurrer is defended upon two grounds: First, that under Act 113 of the Acts of 1913, p. 462, entitled, "An act for the organization and control of banks, trust companies and savings banks," commonly known as the Banking Act, directors and officers of banks have been absolved from the liability here sought to be enforced; second, that appellants have not alleged sufficient facts to entitle them to maintain this suit.

[1] Appellees concede that under the allegations of the complaint as to the mismanagement of the bank they would have been liable for the results thereof in a proper suit brought prior to the passage of the Banking Act of 1913. Of this there can be no question. This court, in the cases of *Bailey v. O'Neal*, 92 Ark. 327, 122 S. W. 503, 135 Am. St. Rep. 185, and *Bank of Des Arc v. Moody*, 110 Ark. 39, 161 S. W. 134, had occasion to consider the liability of directors and officers of banks for negligent waste and mismanagement; and in the later case of *Bank of Commerce v. Goolsby*, 129 Ark. 416, 196 S. W. 803, these and many other authorities on the subject were reviewed, and the law of the subject so fully stated that no useful purpose would now be served by restating it. The insistence is that the General Assembly, in the Banking Act of 1913, took up the general subject of banking, and there differentiated banks from other corporations, and prescribed the liability of the directors and officers of banks, thereby absolving them from any liability on account of the neglect of duty except such liability as the Banking Act itself imposed.

This court has, in a number of cases, applied the canon of construction that—

"Where the later of two statutes covers the whole subject-matter of the former, and it is evident that the Legislature intended it as a substitute, the prior act will be held to have been repealed thereby, although there may be no express words to that effect, and there be in the old act provisions not in the new." *Sanderson v. Williams*, 142 Ark. 95, 218 S. W. 179, and cases there cited.

We think, however, this canon of interpretation has no application to the facts of this case. The particular section of the Banking Act which appellees insist makes the canon of interpretation above stated applicable to the facts of this case is section 19, which is section 683 of *Crawford & Moses' Digest*. This section provides that the affairs of in-

corporated banks shall be controlled by a board of directors of not less than three, who shall be selected from the stockholders, and that the board shall select from their number a president and such number of vice presidents as shall be provided in the by-laws, and may elect a secretary and treasurer and a cashier, all of which may be one and the same person, and may elect assistant cashiers. It is further provided that these officers shall hold their offices for a term of one year, and until their successors are elected and qualified, unless sooner removed by the board, and that the board shall require of these officers such bonds as are deemed necessary to protect the funds of the bank. It is there further provided that:

"Any officer of a bank found by the Commissioner to be dishonest, reckless, or incompetent shall be reported in writing to the directors of the bank of which he is an officer, and if they neglect or refuse to remove such officer, they shall be liable for any loss that may accrue to the bank by reason of his dishonesty, recklessness, or incompetency."

We think the language quoted does not place a limitation upon the liability of directors and officers of banks for negligent mismanagement. If such was the case, these officers would be liable only when the commissioner had reported in writing to the directors that an officer of the bank had been found by the Commissioner to be dishonest, reckless, or incompetent. We think it was not the legislative purpose to absolve directors from liability except in the isolated case mentioned in section 683 of Crawford & Moses' Digest. We think counsel for appellants correctly interprets the act in stating that the legislative purpose was to enlarge the liability of these officers and to impose a liability which did not previously exist.

Prior to the enactment of this act directors were held only to the exercise of ordinary care and good faith in keeping themselves informed as to the management of the bank. The Legislature was evidently of the opinion that the practiced eye of the Bank Commissioner might be able to discover some significant irregularity which might escape the observation of the less highly trained director. In such case it is the duty of the Commissioner to advise the directors that the bank has in its employment a dishonest, a reckless, or an incompetent employee, and upon receipt of this official information it becomes the duty of the directors to remove such officer. Failing to do so, the directors are made liable for any loss that may accrue to the bank by reason of the dishonesty, recklessness, or incompetency of the person reported upon. In imposing this additional duty on directors we are unwilling to say that the Legislature has absolved them from all other duties for the negligent nonperformance

of which they were liable prior to the passage of the Banking Act.

If such was the purpose of the Legislature, then directors have, for all purposes except to remove an officer upon whom the Commissioner has adversely reported, become mere figureheads.

In the case of *Bank of Commerce v. Goolsby*, supra, upon a thorough consideration of the authorities, we accepted the dissenting views of Justice Harlan in the case of *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, as correctly defining the duties of bank directors, expressed in the following language:

"Again, he says: 'When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trust committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such degree of care and prudence.'"

We do not think a fair interpretation of the Banking Act supports the conclusion that directors have been relieved of their pre-existing responsibility and liability for negligent mismanagement, and left only with the responsibility and liability which follows from the failure to remove an officer adversely reported upon by the Bank Commissioner.

This question was not raised or decided in the case of *Bank of Commerce v. Goolsby*, supra, yet it was necessarily presented by the record in that case if the appellees are correct in their interpretation of the Banking Act. But the eminent counsel representing the directors in that case did not even raise the question. The Banking Act was approved March 3, 1913, and became effective January 1, 1914. *Davis, Com'r. v. Branch*, 133 Ark. 417, 202 S. W. 705. The opinion in the case of *Bank of Commerce v. Goolsby* was delivered May 23, 1917. The mismanagement in that case commenced in 1911, and extended throughout the year 1914. The directors were held liable, and no attempt was made to distinguish their liability subsequent to the act from their liability prior to the act.

[2] We think, however, that appellees are correct in their second contention that appellants do not state facts in their complaint entitling them to maintain this suit. The allegations of the complaint are that appellants have lost the aggregate sum of \$23,000. But they are not the only losers. The complaint

(233 S.W.)

further recites that insolvent persons were permitted to overdraw in sums aggregating \$500,000, and that the cashier and assistant cashier were permitted to misappropriate \$100,000, and that the bank has become insolvent, and was, on March 10, 1920, taken over by the State Bank Commissioner, and will pay only a small percentage of its indebtedness.

It thus appears from the allegations of the complaint that the losses sustained by these appellants constitute a comparatively small part of the losses for which the directors are said to be liable, yet it appears that the purpose of this suit by the three depositors who have brought it is to apply to the discharge and satisfaction of the bank's indebtedness to them the liability of the directors for the negligent mismanagement of the bank's affairs; and this without any allegation that the Commissioner had been requested to sue and had failed to do so. This they cannot do. 4 Fletcher's Cyclopaedia Corporations, § 2570, and authorities there cited.

The Banking Act requires the Bank Commissioner to take possession of all the property of an insolvent bank, and "to collect money due it, and do such other acts as are necessary to conserve its assets and business and shall proceed to liquidate the affairs thereof as hereinafter provided." The Commissioner is further given authority to "collect all debts due and claims belonging to it," his proceedings being under the direction of the chancery court. Section 719, C. & M. Digest; Aber v. Maxwell, 140 Ark. 203, 215 S. W. 389; Greer v. Merchants' & Mechanics' Bank, 114 Ark. 212, 169 S. W. 802.

Appellants say, however, that this rule does not apply here, for the reason that a general demurrer was filed, and he cites section 1190, C. & M. Digest, which provides that a demurrer shall distinctly specify the grounds of objection to the complaint, and that unless this is done the demurrer shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action, and the general demurrer does not therefore raise the question of defect of parties. But the trouble with that contention is that there is not a mere defect of parties within the meaning of the statute.

For the reasons stated appellants have failed to show any right on their part to maintain this suit, and for that reason the demurrer to the complaint was properly sustained.

Decree affirmed.

MCCULLOCH, C. J. (concurring). According to the great weight of authority the directors of a corporation are not, in the absence of a statute on the subject, individually liable to the creditors of the corporation for loss on account of mismanagement or

waste. This is so because the directors are the agents of the corporation, and not of its creditors, and there is no privity or relationship between the directors and the creditors of the corporation. 7 R. C. L. 482; U. S. F. & G. Co. v. Corning State Bank, 154 Iowa, 588, 134 N. W. 857, 45 L. R. A. (N. S.) 421; Frost Mfg. Co. v. Foster, 76 Iowa, 535, 41 N. W. 212; Hart v. Hanson, 14 N. D. 570, 105 N. W. 942, 3 L. R. A. (N. S.) 438; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536; Fusz v. Spaunhorst, 67 Mo. 256; Minton v. Stahlman, 96 Tenn. 98, 34 S. W. 222; Chester v. Halliard, 36 N. J. Eq. 813.

A statute (Crawford & Moses' Digest, § 1730) construed by this court to impose such liability reads as follows:

"If the president, directors or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them, respectively, such of them as so neglect or refuse shall be jointly and severally liable, in an action founded on this statute, for all the debts of such corporation contracted during the period of such neglect or refusal."

We decided in Bailey v. O'Neal, 92 Ark. 327, 122 S. W. 503, 135 Am. St. Rep. 185, that the statute just quoted conferred a right of action on the creditors of a corporation directly against the directors, "and that the fact that the affairs of the corporation had been placed in the hands of a receiver neither takes away or suspends this right of action." That case involved the question of liability of bank directors. The statute just quoted was a section of the act of April 12, 1869, enacted for the purpose of regulating the organization and control of corporations for manufacturing and other business purposes. The statute contained a complete plan for the organization, operation, and control of all business corporations, including banks, and contained the section quoted above, which imposes liability against the president, directors, and secretary of any such corporation for neglect of duty, and, as before stated, a right of action was conferred in favor of the creditors against the officers of the bank. The act of March 3, 1913 (Crawford & Moses' Digest, c. 15) is entitled "An act for the organization and control of banks, trust companies and savings banks," and provides a complete plan for the control of banking corporations, and imposes liability in certain instances against the officers of such corporations. It changes the then existing law with reference to the method of the organization of banks and in numerous other respects. The statute makes the stockholders of the bank liable to the extent of the par value of the stock in addition to the amount invested in the stock, and it provides, as set forth in the opinion of the majority, for liability on the part of the directors of the bank in the event of their fail-

ure to remove an officer found to be dishonest, reckless, and incompetent. There is every indication from the face of the statute itself that the lawmakers intended to make it complete in its regulations for the control and management of banks. It falls within the rule, I think, so often announced by this court that—

"Where the later of two statutes covers the whole subject-matter of the former and it is evident that the Legislature intended it as a substitute, the prior act will be held to have been repealed thereby, although there may be no express words to that effect, and there be in the old act provisions not in the new." *Sanderson v. Williams*, 142 Ark. 91, 218 S. W. 179.

I do not mean to say that it repeals the whole of the general statute on the subject of corporations, but it has the effect, under the rule stated above, of lifting banking corporations completely out of the operation of the general statute. In the new statute liability against the directors and stockholders is imposed only to the extent that the lawmakers saw fit to do so in that particu-

lar statute, which they manifestly intended to cover the law on the subject.

In the recent case of *Bank of Blytheville v. State for the use of Mississippi County*, 230 S. W. 550, we decided that the Banking Act of 1913, *supra*, did not repeal the general statute (*Crawford & Moses' Digest*, §§ 2832-2835), making the stockholders of banks liable for public funds, for the reason stated in the opinion that the two acts related to different subjects. That decision has no bearing on the present case, for the reason that the section of the general statute creating liability of directors of corporations has no reference to the same subject as that embraced in the new banking statute, in that it does not relate to the regulations and control of banks.

It seems to me that the majority have reached the correct result, but base the conclusion on erroneous grounds in holding that the old statute in regard to liability of directors of corporations is applicable to directors of banks. I concur, therefore, in the judgment, but not on the grounds upon which it is based.

**JOHNSON v. BROWN et al. (No. 20483.)**

(Supreme Court of Missouri, in Banc. July 8, 1921. Motion for Rehearing Denied July 22, 1921.)

**Appeal and error §1108**—Where judgments rendered were paid, appeal therefrom will be affirmed.

Where on appeal it appeared that all judgments sued on by bill in equity in the lower court had, together with the costs, been paid and discharged, judgment would be rendered for defendant appellants.

David E. Blair, Walker, and Higbee, JJ., dissenting.

Appeal from St. Louis Circuit Court; Thomas, L. Anderson, Judge.

Suit by James B. Johnson against James Brown and others. From judgment for plaintiff, defendants appeal. Reversed and rendered.

This case is a bill in equity, and is before this court on appeal from the circuit court, of the city of St. Louis. The record shows that all the judgments sued on in this case have, with the costs, been fully paid and discharged.

Boyle & Priest and G. T. Priest, all of St. Louis, for appellants Mercantile Trust Co. and others.

A. & J. F. Lee and James A. Waechter, all of St. Louis, for appellant David R. Francis.

John A. Gilliam, of St. Louis, for respondent.

WOODSON, J. Upon the above showing there remains nothing further for this court to do except to enter here a judgment for the appellants. Railroad v. Bridge Co., 215 Mo. 286, loc. cit. 296, 114 S. W. 1084; State ex inf. v. Standard Oil Co., 218 Mo. loc. cit. 388, 116 S. W. 902.

It is so ordered.

ELDER, J., concurs.

GRAVES, J., concurs in a separate opinion in which JAMES T. BLAIR, C. J., concurs.

DAVID E. BLAIR, J., dissents in separate opinion, in which WALKER and HIGBEE, JJ., concur.

GRAVES, J. I concur in this opinion for the same reason expressed in my separate concurring opinion in case No. 18176, 232 S. W. 680, between Johnson and other parties therein named.

JAMES T. BLAIR, C. J., concurs in these views.

DAVID E. BLAIR. I dissent in this case for the reasons stated in my dissenting opinion in Johnson v. Conrades, No. 18176, 232 S. W. 680.

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**HINES, Director General of Railroads, v. TAYLOR'S ADM'R.**

(Court of Appeals of Kentucky. June 10, 1921.)

**1. Railroads — 5½, New, vol. 6A Key-No. Series—Venue of action for death held proper.**

Under Civ. Code Prac. § 73, and General Order No. 18a of the Director General of Railroads, circuit court of Harlan county had jurisdiction of an action brought by administrator of resident of such county, killed in such county, against Director General to recover for intestate's death, although at time of accident such administrator was not a resident of county, but was such at the time of his appointment by county court.

**2. Railroads — 370(2) — Must not needlessly kill trespasser.**

When trainmen discover that trespasser on track is in danger, they must exercise ordinary care by means at their command to save such person from injury, as no person has right to wantonly and needlessly cripple a human being.

**3. Railroads — 377—Engineer need not stop train immediately on discovering person on track.**

An engineer who discovers a person on the track at some distance is not negligent as a matter of law in failing to attempt to stop his engine in time to prevent an accident, unless he knows the party on the track is unconscious of his danger, or is aware of the fact that the party is laboring under some disability that prevents him from knowing the danger he is in, or his condition is such as prevents him from going or keeping out of the way, or unless he sees evidence of such disability from the party's actions or appearance.

**4. Railroads — 379—Care required as to trespasser not possessed of ordinary faculties.**

Where conduct of trespasser on track at a distance is such as to excite doubt that he is possessed of the ordinary faculties, engineer of train is bound to use greater caution than otherwise, but presumption that trespasser will get off before train reaches him does not exist as an abstract proposition of law, depending upon all the circumstances surrounding the parties at the time.

**5. Railroads — 400(8)—Negligence as to trespasser held for jury.**

In an action for death of a trespasser, whether enginemen used ordinary care after discovery of the presence of the decedent on the track to avoid injuring him held for the jury.

Appeal from Circuit Court, Harlan County.

Action by Condry Taylor's administrator against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Low, of Pineville, and Benjamin D. Warfield, of Louisville, for appellant.

J. G. & J. S. Forester, of Harlan, for appellee.

QUIN, J. About 5:30 p. m. on October 24, 1918, plaintiff's intestate was struck and killed by a south-bound passenger train between Wallsend and Pineville. The train consisted of two baggage cars and four passenger coaches. For at least a quarter of a mile from the point of accident the track is straight and there was nothing to obstruct the view of the engineer.

In this action to recover damages for the death of his intestate, there was a verdict in plaintiff's favor for \$4,000, to reverse which the defendant has prosecuted this appeal.

The two main points urged for reversal are: (1) Whether the court had jurisdiction of the action; (2) whether defendant was entitled to a peremptory instruction on the merits.

It is defendant's contention that neither decedent nor his brother, the administrator, were residents of Harlan county. At the time of the accident the railroad was being operated by the Director General of Railroads under the Federal Control Act (41 Stat. 305). Prior to the enactment of this federal legislation, in construing section 73 of the Civil Code, it had been held that an administrator could bring an action against a carrier for negligence in the county of his residence if the carrier passed into that county, although his intestate was killed, or at the time of his death resided, in a different county. *I. C. R. Co. v. Stith's Adm'r*, 120 Ky. 237; 85 S. W. 1173, 27 Ky. Law Rep. 596. 1 L. R. A. (N. S.) 1014.

By General Order No. 18a, issued by the Director General on April 18, 1918, it is provided:

"It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

The only proof as to the residence of the administrator and his deceased brother is furnished by the former. He testifies that at the time of the accident he, the administrator, was living in Virginia, and shortly thereafter moved to Harlan county, but that decedent was residing in Harlan county with his wife and child at the time of his death; that about two weeks previous to October 24th decedent went to Virginia because of the serious illness of his mother, but had returned home the day he was killed.

The administrator was appointed on motion of decedent's widow. He appears to have been somewhat of a nomad. At the time of trial he was living in Virginia, but says he resided with his family in Harlan



county until about a month and a half before the trial.

[1] On this evidence we are urged to reverse the judgment because of the want of jurisdiction in the county court to appoint the administrator and of the circuit court to try the action. Unless it be so ordered, defendant says it was at least entitled to the instruction which it tendered submitting to the jury the question of whether at the time of his death decedent was a resident of Harlan county. We are of the opinion the court did not err in either instance. According to the uncontradicted facts decedent was a resident of Harlan county at the time of his death; the administrator resided in said county at the time of his appointment; therefore the circuit court of that county had jurisdiction of the action. *L. & N. R. R. Co. v. Mitchell*, 162 Ky. 253, 172 S. W. 527.

[2] We will pass to the second question, to wit, the refusal to give the peremptory instruction. Decedent was concededly a trespasser, but we have said in a number of cases that when trainmen discover that a person on the track is in a place of danger they must exercise ordinary care by the means at their command to save such person from injury, as no person has the right to wantonly and needlessly cripple a human being, although he be a trespasser. *Willis' Adm'r v. L. & N. R. Co.*, 164 Ky. 124, 175 S. W. 18.

Defendant's engineer testifies he saw decedent in the middle of the track going in the same direction as the train when the latter was distant about a quarter of a mile; that when at such distance from decedent he gave the crossing signal, and decedent turned about halfway around and waved his hand, as much as to intimate he knew the train was coming. When he, the engineer, saw he was gaining on decedent, who was still on the track, he grabbed the whistle with one hand and pulled it two or three times and put on the emergency brake with the other hand. By this time the man had left the middle of the track and walked to the right and to the outside of the rails, when he was struck by the pilot of the engine. The engineer says that after he gave the crossing signal, and decedent raised his hand, he took it for granted the man would get off the track, and as soon as he realized there was a question whether he would do so he applied the emergency. The train was then only 75 or 80 feet from decedent, its estimated speed was 35 miles an hour, and it is admitted it could not have been stopped, under the circumstances, in less than six car lengths, or in about 300 feet.

In *L. & N. R. R. Co. v. Welser's Adm'r*, 164 Ky. 23, 174 S. W. 734, it is said:

"It has often been held by this court and in other jurisdictions, and is a most reasonable rule, that persons in charge of and operating a railroad train, who see some distance ahead

persons upon the track, are not bound immediately to take steps to stop the train, but, on the contrary, have a right to assume that such persons, with due regard to their own safety, will leave the track before the train can reach them. The necessities of commerce and the convenience of the traveling public require that trains shall be run as near as may be on their schedule time, and it is apparent that, if every time an engineer discovers a person on the track ahead of him he is required to stop his train, or even to slacken its speed, efficiency of railroad operations would be greatly impaired."

See, also, *Reynolds' Adm'r v. C., N. O. & T. P. Ry. Co.*, 148 Ky. 252, 146 S. W. 416.

[3] This is a fair statement of the rule governing the rights of the parties to this appeal. In such cases it is not negligence, as a matter of law, on the part of the engineer if he fails to attempt to stop his engine in time to prevent an accident unless he knows the party on the track is unconscious of his danger, or is aware of the fact the party is laboring under some disability that prevents him from knowing the danger he is in, or his condition is such as prevents him from going or keeping out of the way, or unless the engineers see evidence of such a disability from the party's actions or appearance. 23 Cyc. 800; *Thompson on Negligence*, § 1736; *L. & N. R. R. Co. v. Hunt's Adm'r*, 142 Ky. 778, 135 S. W. 288.

[4] Where the conduct of the traveler is such as to excite doubt that he is not possessed of the ordinary faculties, the engineer is bound to use greater caution. *Shearman and Redfield on Negligence*, § 483.

But the presumption that a trespasser on a track will get off before the train reaches him does not exist as an abstract proposition of law; but whether or not it obtains in any particular case depends upon all the circumstances surrounding the parties at the time. 23 Cyc. 800.

As said in *Willis' Adm'r v. L. & N. R. Co.*, supra:

"If, however, the persons in charge of an engine were seen looking ahead at a time when the trespasser was in plain view, and in such close proximity to the train as that in the exercise of reasonable care they might anticipate that he was not aware of its approach or apprehensive of his danger, and they failed to give any warning of the approach of the train or take any steps to avoid injury, this evidence would be sufficient to take the case to the jury on the theory that, after discovering the peril of the trespasser, they failed to take the required care to avoid injury to him."

[5] Two witnesses testify that at 3 o'clock of the afternoon of the accident decedent was seen in an intoxicated condition at the Pineville passenger station; and Frances Farmer, who resided about 100 yards from the track and who saw decedent some time before the accident, testifies he was traveling very fast down the track, he was going from

one side of the track to the other, and seemingly paid no attention to the distress signals that were given about the time the emergency brakes were applied. This evidence necessitated a submission to the jury, as was done, as it raised the question of whether, after the discovery of the presence of the decedent on the track, ordinary care was used to avoid injuring him. For example, in *Williamson & Pond Creek R. Co. v. Charles' Adm'r*, 168 Ky. 41, 181 S. W. 614, we said:

"It is quite true that this court has held in a number of cases that where the presence of one is discovered on a track ahead of a train that it does not devolve upon those in charge of the train to immediately stop it or even slacken its speed, the trainmen having the right to assume, under ordinary conditions, that the person would leave the track before the train reached him; but it has also held that it is a question for the jury to determine whether the trainmen exercised ordinary care to avoid the injury after discovering his presence on the track."

This is the question in the instant case. It was for the jury, under the circumstances presented by the record, to say whether the engineer exercised ordinary care to avoid the injury after he was aware of decedent's presence and demeanor on the track.

Instruction No. 1, of which chief complaint is made, is a clear statement of the law governing this case. The first part of said instruction is as follows:

"No. 1. Gentlemen of the jury, the plaintiff's intestate, Condry Taylor, was at the time of his injury a trespasser, and those in charge of the train owed him no duty until his peril was actually discovered by them, and, although the engineer saw the decedent in front of the engine at a point so far distant that he was not in any immediate danger, the engineer was not required to take steps to stop the train or to slacken its speed, but had the right to assume that the decedent, with due regard for his own safety, would leave the track in time to avoid the injury. But it was the duty of the engineer in charge of the train to slacken the speed of the train and use all reasonable means at his command to avoid injuring the decedent when he became aware that the decedent did not intend to leave the track."

Defendant concedes the correctness of this part of the instruction, but insists the court erred in incorporating in said instruction the second literary paragraph thereof, which is as follows:

"Now, if you shall believe from the evidence that after the engineer in charge of the train became aware of the fact that the decedent did not intend to leave the track and his position was dangerous or perilous, and failed to use ordinary care to avoid striking the decedent, and as the result thereof he was struck and killed at a time when he was using ordinary care for his own safety, then you ought to find for the plaintiff. Unless you so believe from the evi-

dence, then you ought to find for the defendant."

The vice of this criticism lies in the fact that defendant ignores entirely the testimony of the witness Frances Farmer.

Finding nothing in the record authorizing a reversal of the judgment, same must be, and is accordingly, affirmed.

### STRINGER v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 14, 1921. Rehearing Denied Oct. 4, 1921.)

1. Indictment and Information  $\S$  125(47)—Indictment charging entering of railroad car with intent to steal held not duplicitous.

Indictment charging defendant with breaking and entering a railroad car with intent to steal, in violation of Ky. St.  $\S$  1163, and with "stealing" described property "of and in the possession of a common carrier for transportation," held not demurrable, as stating two public offenses, the averments as to the stealing of the described property being insufficient to charge the taking of property from a box, barrel, or other package in the possession of a common carrier, in violation of section 1201b, and being therefore mere surplusage.

2. Burglary  $\S$  18—Averments held not to charge taking of property from common carrier.

Averments charging defendant with breaking and entering a railroad car, and stealing therefrom described property "of and in the possession of a common carrier for transportation," held insufficient to charge the taking of property from a box, barrel, or other package in the possession of a common carrier with the intent and purpose of appropriating the same to the use and benefit of the taker, in violation of Ky. St.  $\S$  1201b.

3. Indictment and Information  $\S$  119—Surplusage stricken on timely motion.

In prosecution for breaking and entering a railroad car with intent to steal property therefrom, under Ky. St.  $\S$  1163, averments as to stealing the property, being surplusage, might by timely motion have been stricken from indictment.

4. Burglary  $\S$  45—Evidence held sufficient for jury in prosecution for entering railroad car with intent to steal.

In prosecution for breaking and entering a railroad car with intent to steal, in violation of Ky. St.  $\S$  1163, evidence corroborative of the testimony of an accomplice held sufficient, under Cr. Code Prac.  $\S$  241, to warrant submission of case to the jury.

5. Burglary  $\S$  41(4)—Entering of railroad car with intent to steal may be established by circumstantial evidence.

The breaking and entering of a railroad car with intent to steal property therefrom in violation of Ky. St.  $\S$  1163, may be established by circumstantial evidence.

6. Criminal law  $\S$  444—When one in charge of records may testify as to entry made by absent or deceased subsidiary employee.

One in charge of the records of an office, who can state that an entry was made in the regular course of business, by an employee whose handwriting he knows, can testify concerning such a record by showing that the person is dead, or is absent from the state, or that his whereabouts is unknown, without showing that such person clandestinely left the state, or is at the time concealing himself to avoid service of process.

#### Appeal from Circuit Court, Boyle County.

Nelson Stringer, Jr., was convicted of breaking and entering a railroad car with intent to steal property of value therefrom, and he appeals. Affirmed.

King Swope, of Lexington, O. C. Bagby, of Danville, and J. S. Owsley, of Stanford, for appellant.

Chas. I. Dawson, Atty. Gen., for the Commonwealth.

SAMPSON, J. Appellant Nelson Stringer, Jr., was in the employ of the Cincinnati, New Orleans & Texas Pacific Railroad Company, in February, 1920, as car inspector at Danville. While so engaged a quantity of cigarettes were taken from a Baltimore & Ohio car which had been broken open in the Danville yards in the early hours of the morning of February 23. He was indicted for the crime, and by a jury found guilty, and his punishment fixed at three years confinement in the state penitentiary. Judgment being entered on the verdict, Stringer prosecutes this appeal. The facts in this case are almost identical with those proven in the case of *Shuttles v. Commonwealth*, 190 Ky. 176, 227 S. W. 154. The grounds upon which he relies for a reversal of the judgment are: (1) The indictment states two public offenses; (2) the court erred in overruling appellant's motion for a peremptory instruction to find him not guilty; and (3) the trial court improperly admitted evidence to the prejudice of appellant's substantial rights.

[1-3] (1) The indictment does not state two public offenses, although it contains averments which serve no useful purpose in charging the crime for which Stringer was prosecuted. The indictment designates the crime committed by Stringer as "unlawfully and feloniously and forcibly breaking and entering a railroad car with intent to steal property of value therefrom." This crime is covered by section 1163, Kentucky Statutes. After stating the crime against which the statute is leveled, the indictment contains the following: "And stealing property therefrom, the said property so stolen being a lot of Camel cigarettes, of value and of greater

value than \$20, and said property and car being the property of and in the possession of the common carrier for transportation, and not the property of the defendant" which was wholly surplusage. The surplus averments are not sufficient to constitute a valid indictment under section 1201b for taking property from a box, barrel, or other package in the possession of a common carrier with the intent and purpose of appropriating the same to the use and benefit of the taker. The indictment, while prolix, is not duplicitous nor subject to demurrer, though appellant might by timely motion have caused the surplus words to have been stricken therefrom. *Commonwealth v. L. & N. R. Co.*, 191 Ky. 634, 231 S. W. 236.

[4, 5] It is earnestly insisted that the trial court should have sustained the appellant's motion to instruct the jury to find him not guilty. This insistence is based upon the assumed absence of evidence of a breaking and entering of the railroad car. No witness testifies that Stringer either broke or entered the car from which the cigarettes were taken, but the evidence abundantly proves that the car was closed and sealed when it arrived in the Danville yards; that a short time thereafter the seal was broken, and the car was open; that about daylight Stringer and another person drove an automobile loaded with Camel cigarettes, which were afterwards identified as coming from the car, to the house of Goode, and left them in his coalhouse. Without considering the evidence of McKenzie, the accomplice, the evidence is sufficient to support the inference, deduction, and belief in the minds of a jury that appellant Stringer, in whose possession the cigarettes were first found, was the one who broke and entered the railroad car, for such a crime is as susceptible of establishment by circumstantial evidence as is any other charge.

The accomplice, McKenzie, testified that he saw Stringer and a companion carrying the boxes of cigarettes from a car in the railroad yards to an automobile which was later driven away in the direction of the house of Goode. This evidence of the accomplice was sufficiently corroborated and supported by the evidence of Goode and wife to sustain a conviction under 241 Criminal Code. Especially is this true in this case where appellant Stringer does not undertake to account for the possession of the cigarettes, but contents himself with a denial that he had any connection with them. If appellant had acknowledged that he took the cigarettes to the Goode home, but testified that he had innocently purchased or otherwise obtained them from another, he would have been in better condition to claim there was no evidence of a breaking and entry by him; but, in the absence of such a showing, the

jury was forced to believe either the evidence of the witnesses for the commonwealth from which the breaking and entry of the railroad car is naturally deductible, or believe the appellant, who deposed that he did not break or enter the railroad car or carry away the cigarettes. The jury was the sole judge of the credibility of the witnesses, and the weight and sufficiency of the evidence under such circumstances.

The following circumstances: The B. & O. car of cigarettes arrived sealed in the Danville railroad yards where appellant worked and had access to the car; shortly after the arrival of the car, and while appellant was in the yards, the car was broken open and the cigarettes taken; immediately appellant appears at the home of Goode with an automobile load of cigarettes, which he left in a coalhouse, and departed; the following night, after urgent request by Goode to remove the cigarettes from his premises, Stringer agrees to take the cigarettes away, and they were taken away; no explanation by Stringer of where or how he became possessed of the cigarettes was given, but only a denial that he had any connection with them—fully warranted the jury in finding as a fact that Stringer broke and entered the B. & O. railroad car while in the possession of the common carrier with the intention of stealing property therefrom. There was no other fair or reasonable inference or deduction to be drawn from such evidence, if believed, as it was by the jury. Certainly such evidence was sufficient to carry the case to the jury.

[6] Complaint is made by appellant that the trial court allowed a witness for the commonwealth to testify concerning certain tallies and entries on books in the railroad offices of Kansas City, Mo., relating to the shipment of cigarettes involved, when it is admitted the witness did not himself make the entries or tallies, but the same were made by another under the direction and supervision of such witness, without sufficiently accounting for the absence of the person who actually made the entries. If the person who made the entries be dead or beyond the jurisdiction of the court, and this fact appears, the record may be proven by the one in charge of them by showing that the records were made in the ordinary course of business, contemporaneously with its transaction, by an authorized agent or servant of the person carrying on the business. It is sometimes said that such evidence is only receivable when the person who made the

record is either dead or has absconded. The evidence in this case does not indicate that the person who made the tally and entry is dead, nor that he has absconded in the ordinary meaning of that term, but only that said person had left the employment of the railroad company before the trial, and his whereabouts was unknown to the agent of the company who had the company's records in court. The word "abscond" is too harsh and narrow a term to correctly define the person included in the exception to the rule. Undoubtedly, the person in charge of the records of the office, who can state that the entry was made in the regular course of business at the time of its transaction by an employé whose handwriting he knows, can testify concerning such a record by showing either that the person is dead or is absent from the state where the trial is had or his whereabouts is unknown without showing that such person clandestinely left the state, or is at the time concealing himself so as not to be served with process. When the trial court is satisfied from the evidence that the person making the entry is absent from the state or his whereabouts unknown, it should allow the one having the records in charge to testify if he can otherwise qualify.

There was no apparent effort on the part of the commonwealth to evade the rule or to avoid the introduction of the witness Schultz, who had made the entry, and who had testified concerning the same records in another action commenced in the same court growing out of practically the same facts. The attorney for the commonwealth agreed; at the suggestion of counsel for appellant, that the testimony of Schultz might be read as evidence in this case instead of introducing Murray, who did not make the entry, but had charge of the office and records. Appellant did not take advantage of the agreement to read the evidence of Schultz given on a trial of a kindred case as evidence in this case. We think that, under the facts of this case, the trial court properly allowed Murray, who had charge of the records, and who testified that the same were made by Schultz, while in the employ of the railroad company, contemporaneously with the transaction and in the regular course of business, to introduce the records and testify concerning the same.

A careful examination of the entire record discloses no error prejudicial to the substantial rights of appellant, and the judgment is affirmed.

**BOARD OF PARENT MINISTRY et al. v.  
BOHON et al.**(Court of Appeals of Kentucky. May 13, 1921.  
Rehearing Denied Oct. 7, 1921.)**1. Religious societies ¶18—Parent church held to have no interest in property of local society.**

Where religious society recognized the authority of parent church in religious matters, only, and did not give to such parent church any interest in or voice in the management of its property, the parent church had no interest in the property of such religious society.

**2. Religious societies ¶20 — Parent church estopped from attacking validity of religious society's deed.**

Where minister of parent church, acting for the church, confirmed deed executed by trustees of a branch of such church by indorsement on the deed, approved by the head of the church, and where the ministry of parent church thereafter executed to grantee a quitclaim deed conveying the parent church's interest in the property, and by letters to grantee confirmed the transaction, the parent church could not attack validity of a deed of such branch.

**3. Religious societies ¶20—Society held entitled to convey its property in consideration of grantee's agreement to maintain members during their lifetime.**

Where covenant of religious society provided that the property brought into the society by its members should become the property of the whole society as such, with a several right of use conferred on each member, as a member, so long as he remained a member, the society having dwindled to 11 members, and having lost much of its property, and permitted remaining property to deteriorate, had the right to convey its property in consideration of grantee's agreement to support the remaining members during the rest of their lifetime.

**Appeal from Circuit Court, Mercer County.**

Action by the Board of Parent Ministry and others against Irene Bohon, executrix, and others. Judgment of dismissal, and plaintiffs appeal. Affirmed.

Charles Carroll, of Louisville, R. T. Crowe, of La Grange, and R. L. Black, Charles T. Corn and J. F. Vanarsdall, all of Harrodsburg, and John P. Parker, of Schenectady, N. Y., for appellants.

Helm Bruce and Bruce & Bullitt, all of Louisville, and C. E. Rankin and E. H. Gither, both of Harrodsburg, for appellees.

QUIN, J. The United Society of Believers, commonly known as Shakers, had its origin in France prior to 1706. Their fundamental doctrine was that the second coming of Christ was near. A small society was organized in England in 1747. Because of her persecution, Ann Lee (to whom, according to their belief, Christ had revealed himself)

came to this country in 1774. As the result of Ann Lee's work, a colony was organized at Mt. Lebanon, N. Y., in 1787. This became the parent church, and from it branches were established in many states. Headquarters for the western country were opened at Union Village, Ohio, in 1805. The society in Kentucky had its beginning in Mercer county in August, 1805, at a place appropriately named Pleasant Hill. Here the society greatly prospered, reaching the zenith of its glory, power, and affluence at a date prior to 1806. There were 450 members in the society at one time, and it had title to 6,000 or 7,000 acres of property, including some of the best land in the county.

The history of Pleasant Hill, the activities and achievements of its people, their profound faith in God, and their quaint customs make a most interesting story. Because of their emotional nature, and the fact that in their religious service they were often exercised with great agitations of body and limbs, shaking, running, and walking the floor, with a variety of signs and motions, they received the appellation of Shakers.

The members practiced communism, and in order to enter the sacred privileges of the church relation they were required to first settle all just claims of creditors and filial heirs, and then followed a dedication and consecration of their persons, services, and property to the pious and benevolent purpose of the gospel. Celibacy is a cardinal principle of their belief. Accessions, including children, were necessarily sought and obtained from the outside. Married persons could become members, but they ceased to live together upon joining the society.

The great prosperity of the colony was not destined for a long life; adversity came, new members ceased to be taken in, former members were growing older, and the infirmities of old age incapacitated many of them from rendering any effective service. An affirmation by the United States Circuit Court of Appeals of a judgment against the society on a note executed by one of the trustees necessitated the execution of a mortgage of their property to the Kentucky Title Company, of Louisville, for \$30,000. This was in January, 1896, at which time the society had disposed of nearly one-half of its property; the mortgage embraced 3,334 acres. To lift this mortgage considerable of the land had to be sold. Despite frequent sales of land to pay accruing debts, the property was allowed to deteriorate, the fences were practically gone, the houses and barns in a bad state of repair, and the land, to use the expression of one witness, "had been cultivated down to the clay." Truly pathetic was the situation that confronted those good people, and gloomy the outlook when, in September, 1910, the remaining covenant members of the society, 11

in number, held a meeting looking to their future welfare. Fully cognizant of their deplorable condition, and that it was imperative some action be taken to provide for their support, a committee of three was appointed, with authority to enter into such contracts as would guarantee to them proper support and comfort during the remainder of their lives. This authorization included the right to incumber or convey the property.

Carrying out the suggestion of this meeting, the committee, with the assistance of counsel, decided the best plan would be to convey the property to some one willing and able to provide for them. Mr. George Bohon, a nonmember of the society, and a leading citizen and banker of Harrodsburg, was prevailed upon to accept the trust. The property, consisting of 1,400 acres, was conveyed to Bohon. He took possession of it and undertook the care of the members of the society, who continued to live on the property. Between the date of the conveyance and October, 1912, Bohon expended a net sum of \$20,371.08 on the property. The transfer of the property resulted in protracted litigation, this being the third suit that has found its way to this court.

Under Ky. St. § 323, the county superintendent of schools of Mercer county filed a petition alleging the society had been dissolved, and therefore the Shaker property had escheated to the commonwealth. But a judgment dismissing the petition was affirmed on appeal. *Adams v. Bohon*, Ex'x, 178 Ky. 66, 195 S. W. 156, wherein it was held that the statute under which it was sought to escheat the property expressly exempted the society from its operations.

In *Easum v. Bohon*, Ex'x, 180 Ky. 451, 202 S. W. 901, L. R. A. 1918D, 1144, it was alleged the society was a purely charitable institution, whose purposes and objects had failed, and that the conveyance to Bohon had effected its dissolution; hence it was sought to have an accounting and distribution of the property to the members living at the time of the dissolution, and to the descendants of the deceased members. The petition in this suit was likewise dismissed.

The present suit was instituted by the Board of Parent Ministry of the United Society of Believers and others, to set aside the deed to Bohon on the ground that it was obtained by fraud, and without authority. A like order was asked in regard to a deed from Bohon to Pennebaker, executed in 1913, and of a quitclaim deed from appellants to Bohon in 1912. It was alleged the deed to Bohon effected a dissolution of the society, and therefore the Shaker property reverted to appellants for the benefit of the various Shaker societies in the United States. Upon final hearing this petition was dismissed, and this appeal followed.

It is urged that, under the covenants of the society, property is not held for any in-

dividual, nor owned by any branch of the society, but is a consecrated whole devoted to the society as a whole, and upon the dissolution of any branch or colony all property held by it reverts to the Parent Ministry.

Aside from a recognition of the Mt. Lebanon, N. Y., society as the Mother Church, an occasional reference to it in the records kept by the three colonies, to wit, Pleasant Hill, Mt. Lebanon, and Union Village, and the evidence of certain reports made to the parent society, we find nothing to indicate that appellant society has any right, title, interest, or claim in or to any of the property owned by the Mercer county Shakers. Beginning as far back as 1821, in the conveyances of all property purchased, the grantee is designated as the "Society at Pleasant Hill," in Mercer county, nor do the deeds contain any reference to or intimation of any interest on the part of any one else.

[1] Recognition of the parent church at Mt. Lebanon and of the Central Church at Union Village in no wise deprived the Pleasant Hill society of the right to acquire, own, or dispose of property in its own right. The authority and leadership of these two societies seems to have been recognized and acknowledged solely in spiritual matters. There is nothing to indicate any control or direction over the Pleasant Hill society in matters temporal. The Pleasant Hill colony bought and sold property without the consent or objection of the two senior societies.

In a circular epistle sent to all the societies from Mt. Lebanon in 1829, appears this significant statement:

" \* \* \* And our mutual faith and love are the only bonds of union that have been found necessary, so far as regards our relation to God and each other as a separate and peculiar people."

And in the same document we find:

" \* \* \* Hence it becomes indispensably necessary that our temporal interest be secured in the hands of trustees. \* \* \* "

A very solemn ceremony usually attended the elevation of a member to the important office of trustee. He was required to execute a declaration of trust in conformity to the provisions of "the covenant and constitution of the United Society of Believers, commonly called Shakers, at Pleasant Hill, in the county of Mercer, and state of Kentucky."

Of the three trustees at the time of the conveyance to Bohon, one (F. W. Pennebaker) was inducted into office in 1904. He became a trustee of the church and society at Pleasant Hill. As such he was to hold, manage and improve the temporal property of said church and society for its use and benefit and to buy, sell, and transact business in behalf of same. The investiture was of the legal title to all the property belonging to said church and society. And so throughout the

entire instrument the repeated use of the participial adjective "said" could refer to none other than the Pleasant Hill society. Of this branch alone were they trustees.

The Mercer county society entered into a church covenant or constitution in 1814, but, as their written agreements were not, like the laws of the Medes and Persians, unalterable, this covenant was changed from time to time. Others were executed in 1830 and 1844. It is upon these covenants that such stress is placed by counsel for appellants to substantiate their claims in the present suit; but, from a study of these documents, we are unable to agree with counsel as to their interpretation and construction thereof. This conclusion is exemplified in the preamble to the covenant or constitution of 1844, which reads:

"We the brethren and sisters of the United Society of Believers (called Shakers), residing in the county of Mercer and state of Kentucky, being connected together as a religious and social community, distinguished by the name and title of the Church of the United Society at Pleasant Hill, which, for many years, has been established and in successful operation under the charge and protection of the ministry and eldership thereof; feeling the importance not only of renewing and confirming our spiritual covenant with God and each other, but also of renewing and improving our social compact, and amending the written form thereof, do make, ordain and declare the following articles of agreement as a summary of the principles, rules and regulations established in the church of said United Society which are to be kept and maintained by us, both in our collective and individual capacities, as a covenant or constitution, which shall stand as a lawful testimony of our religious association before all men, and in all cases of question and law, relating to the possession and improvement of our united and consecrated interest, property and estate."

Acknowledgment of the ministry at Mt. Lebanon as the general center of union is found in article 1, § 2. But throughout the entire document this recognition of the ministry, as before suggested, seems to have reference only to the spiritual and primary authority of the society or community in all matters pertaining to the ministerial office. Visiting brethren from the Mother Church and from the society at Union Village would oftentimes be present and preside over the meetings at Pleasant Hill. But nowhere do we find in the well and neatly kept records of the societies anything indicating that either the parent society or the one at Union Village had aught whatever to do with the property belonging to the Mercer county colony. It is admitted in appellants' brief that no question was raised by the Parent Ministry in regard to the disposition of property by the Pleasant Hill society until the conveyance to Bohon. This is explained by the fact that when those sales were made the society was a going concern, and the sales and conveyances were within

the ordinary course of business, and did not affect the integrity of the society, as the proceeds of said sales were used for the benefit of the society as a whole. But, as we take it, the deed to Bohon was for no other purpose than for the protection and welfare of the society as a whole. The only instances giving any color to the recognition of appellants' claim of an interest of the parent church in the Pleasant Hill property is found in the mortgage to the Kentucky Title Company, and the later conveyance to Castle-mann, in which the title company joined. It is therein recited that the societies at Mt. Lebanon and Union Village gave their sanction and approval to these transactions; but this was manifestly for no other purpose than to satisfy the demands of the title company, which, as a matter of precaution and protection on its part, required this to be done. Other than the deed to Bohon the records of the Parent Ministry fail to show any other instance where notice was taken of any of the real estate transactions of the colony in Mercer county.

As we take it, the relation of the local branches of the Center of Union and the parent society is strikingly similar to that of the Methodist church, which has its general, annual, district, and church conferences, the first named being the final authority in matter pertaining to the church government and discipline. Methodism is divided into a number of annual conferences, each of which is presided over by a bishop, elected by the general conference. These annual conferences in turn assign to the several churches the pastors for the succeeding conference year. While the annual, as well as the district, conferences may own property such, for example, as an orphanage or a district parsonage, and while the authority of the bishop, presiding elders, and superior conferences in all matters disciplinary and governmental is fully recognized and respected by the local churches, no authority other than the local church has any voice in the management, control, or disposition of its church property, title to which, under the law of the church, is vested in trustee.

[2] But if there was any doubt (and we entertain none) about the conclusion we have reached to the effect that appellants have no claim or interest in the property at Pleasant Hill, this doubt would be dispelled by two events that took place subsequent to the execution of the conveyance to Bohon.

First. In October, 1912, pursuant to a telegram from Joseph Holden, then the first in the order of the ministry of the Mother Church, Bohon met Holden at Cincinnati for a conference, and as a result of that conference there was indorsed upon the original deed from the trustees of the Pleasant Hill society to George Bohon this statement, to wit:

"The foregoing contract and deed of sale between George Bohon and the society of Shakers at Pleasant Hill, Kentucky, is hereby ratified and confirmed this 18th of October, 1912. Joseph Holden, for Central Ministry of Mt. Lebanon, N. Y."

This visit was reported to the Parent Ministry. Apprised of the sale to Bohon, the head of the parent church assented to and approved of the conveyance. Certainly no one at the time entertained any idea of making claim to the property.

Second. Mindful of the fact that the Kentucky Title Company had required the Parent Ministry to give its consent to the execution of the mortgage to it, and with the evident purpose of trying to avoid any possible claim of title or interest in or to the property on the part of that society, such, for example, as is being made in the instant suit, Bohon, in September, 1910, mailed to the Parent Ministry a quitclaim deed to the property conveyed to him by the Pleasant Hill society. This quitclaim deed was executed November 16, 1912, by Joseph Holden, Harriet Bullard, and M. Catherine Allen for the ministry of the Home Society at Mt. Lebanon, and in it the first parties ratify and confirm said conveyance to Bohon and quitclaim any and all rights of the first parties to the property conveyed, and upon the terms, conditions, and stipulations contained in the said deed. Letters confirmatory of this transaction were later written by Holden to Bohon.

Thus it seems that, not only in the indorsement on the deed itself, and in the quitclaim deed, but in the letters last mentioned, the parent society fully recognized it had no claim or interest in or title to said property, or if it did they were willing to and did endeavor to waive and convey any such claim or title in the Mercer county land. Furthermore, it appears that when the Pleasant Hill colony was in financial straits they applied to the Parent Ministry for succor, but this was denied them, and they were told to manage their property to the best advantage under the circumstances. Before the conveyance to Bohon, they again applied to the Parent Ministry for help, and it was again refused, though at this time the Parent Ministry suggested they would remove all the remaining members of the Mercer county society to other colonies, sell the property, pay the debts, and give to the society any surplus that might remain, but this the local society was unwilling to do. Pleasant Hill was their home, and like the Moabites Ruth, the exemplary daughter-in-law, they wanted to die and be buried in the land of their adoption. The thought of a removal to other places was abhorrent to them. It is testified that when these terms were submitted they became hysterical; they could not bear the thought of leaving Pleasant Hill. As one of the two survivors expresses it, "all were too much

Kentuckians to do that—to want to go away anywhere."

It is rather significant, too, that when Elder Holden returned from his conference with Bohon at Cincinnati, and before the quitclaim deed was signed, he told his people that the place at Pleasant Hill was run down, and very much out of repair; that the people were absolutely helpless, and must be cared for. He also reported a statement of Bohon that, if he (Bohon) was reimbursed for what he had expended in repairs and in caring for the remaining Shakers, and was paid the sum of \$10,000 due him for money loaned the Pleasant Hill Shakers prior to the conveyance, he would be glad to convey the property to the Parent Ministry, if they would provide a caretaker for the remaining members, and see that they had a respectable burial. This offer was never accepted.

In March, 1913, Bohon and wife conveyed to W. F. Pennebaker, trustee for Sarah E. Pennebaker and three others, all of the grantees being members of the society, 576 acres of the land Bohon had received in 1910, upon the condition that Pennebaker would carry out the undertaking of Bohon's agreement as to the care and provisions of those named. Bohon retained the remaining portion of the property, and undertook the care of the remaining Shakers, of whom, at the time the proof was taken, there was but one, Sister Mary Settles; W. F. Pennebaker being the sole survivor of those he (Pennebaker) had agreed to care for. Sister Mary says the people have been very kind to her, that her board is furnished, likewise her clothing, and that she has a maid to take care of her. This indicates that the agreement to provide for the comfort and welfare of these unfortunate people has been fully and faithfully kept.

[3] Gass, etc., v. Wilhite, etc., 2 Dana, 170, 26 Am. Dec. 446, was a proceeding instituted by two seceding members of the Pleasant Hill society for the purpose of obtaining a division of the property and having their shares allotted to them, and it was held that the import of article 3 of the covenant was that property brought in by any members should become the property of the whole society as such, with a several right of use conferred on each member, as a member, and by consequence only whilst or so long as he remained a member. This statement is the basis of the argument in the present case that the trustees had no power to convey the property for the individual benefit of the members, and that this was the effect of the conveyance to Bohon. But the Bohon deed was not different from the many other deeds that had been executed by the trustees to others. Various tracts of land had been conveyed year after year for the sole purpose of paying the debts of the society, and to provide a suitable maintenance for the members. This



was the express purpose of the Bohon deed. It is so recited in the deed itself. At the time this deed was executed the society was indebted to Bohon in the sum of \$10,000. Not only did Bohon agree to provide for the members so long as they lived, and also covenanted to see that they were given a suitable burial, but, as a further consideration, he set aside the sum of \$5,000 to be used by them for such purposes as they might desire. The conveyance to Bohon was as much a conveyance by the society for the society as any other conveyance during the existence of the society at Pleasant Hill, and we can see no difference in effect between this deed and the others.

The proceeds of any conveyance by the society would necessarily inure to the benefit of the members of the society, and that is what happened when the property was conveyed to Bohon. It was for the protection, care, and welfare of the society or the individuals composing it—they were one and the same, and as such it was not contrary to the society's covenants or constitution. The conveyance to Bohon was but another way of providing for the maintenance of the aged and practically helpless members. Indeed, a conveyance by piecemeal would have given no assurance the property would hold out to the end for the sustenance of the last survivor. Under the deed to Bohon the grantors and members amply, wisely, and prudently provided against that proverbial rainy day that they felt was sure to come sooner or later. There is no semblance of fraud in the obtainment of the Bohon deed.

On the whole case, we are satisfied that appellants had no right, title, interest, or claim in or to any of the property of the Pleasant Hill society. Entertaining this view, it necessarily follows the lower court did not err in ordering a dismissal of the petition. The judgment is accordingly affirmed.

#### BROWNING et ux. v. MARSHALL et al.

(Court of Appeals of Kentucky. May 31, 1921.)

Adverse possession  $\Rightarrow$  85(4)—Strip held not adversely held.

In action wherein plaintiffs prayed to be adjudged owners of strip of land in controversy, evidence held to show that defendants did not hold the land adversely, but under an agreement to move the fence to the proper place.

Appeal from Circuit Court, Pendleton County.

Suit by Ira Marshall and others against N. O. Browning and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

John B. Colvin, of Falmouth, and Leslie T. Applegate, of Covington, for appellants.

A. H. Barker, of Falmouth, and M. C. Swinford, of Cynthiana, for appellees.

TURNER, O. Prior to November, 1913, W. R. Marshall was the owner of a tract of 119¼ acres of land on Licking river in Pendleton county. Adjoining his said farm on the northwest appellants, Browning and wife, owned a tract of land. In November, 1913, Marshall conveyed his tract of land to Dennie Washburn. For some years prior to that time the dividing fence between the Marshall and Browning farms had been very poor, and in fact at places there were gaps or openings in it, and it afforded no protection to either from the stock of the other. But it is claimed by appellees that, a year or two before the conveyance to Washburn, Marshall and Browning had entered into an agreement by which Browning might erect a temporary fence at a place known by them not to be on the true line, so that Browning might get the benefit of his pasturage and turn his stock out on his side; and this agreement as alleged, involved a temporary inclosure by Browning of a small strip of Marshall's farm, approximately an acre or an acre and a half, and it was agreed that later, when a permanent fence should be made, it was to be put upon the true line.

At the time of the conveyance by Marshall to Washburn it was pointed out to the latter that the temporary fence was not on the correct line, and Marshall informed Washburn of the agreement between him and Browning. Thereafter Washburn demanded of Marshall that he put him in possession of this strip of land, which he had conveyed him by warranty deed, whereupon Marshall demanded of Browning that he place the fence upon the true line, which Browning at the time, according to the plaintiff's contention, agreed to do. The matter thus ran on until 1918, when W. R. Marshall died, and thereafter his heirs or devisees, joint appellees herein with Washburn, made a similar demand upon Browning, and at that time it was agreed between them and Browning that a survey of the line between the two farms should be made, and that he would abide by the result of that survey, and move the fence if the survey showed that as then constructed it was not on the true line.

This is an equitable action by the children of W. R. Marshall and Washburn, praying that the latter be adjudged the owner of the strip of land in controversy, and that his title thereto be quieted, and that the defendants be required to put the fence on the true line. The answer was a traverse of the allegations of the plaintiffs' pleadings, and in a separate paragraph it was pleaded that at the time of the conveyance from W. R.

Marshall to Washburn the defendants were in the actual, open, adverse possession of the strip of land in controversy, and had the same inclosed, and that therefore the deed from Marshall to Washburn, in so far as it embraced this strip of land, was champertous and void. The plaintiffs by reply denied the adverse holding of the Brownings, and alleged, in substance, that their holding was under the agreement before mentioned, and was therefore not adverse to, but friendly to, the title of W. R. Marshall, and was in law and in fact the possession of W. R. Marshall. The circuit court adjudged Washburn to be the owner of the strip of land in controversy, and ordered the defendants to place the fence upon the true line, and from that judgment they have appealed.

Without going into detail, it may be safely said that the survey made by the surveyors in accordance with the agreement made after the death of W. R. Marshall convincingly shows that the true line is, that claimed by the plaintiffs. The beginning point of that line is fixed at a point on Licking river 12 links above a sycamore tree, and running thence N. 50° 30' E. 189 poles, to a walnut tree or stump in or near a turnpike. The sycamore tree is definitely located at 12 links down the river from the beginning point, and the walnut stump definitely located at the other end of that line; and not only so, but the plat of the survey shows that the line runs approximately through the center of a walnut line tree called for.

The remaining question is whether the holding of Browning of this narrow strip, inclosed by him prior to November, 1913, when Marshall conveyed to Washburn, was an adverse holding, or whether at that time he was holding under the agreement with W. R. Marshall, and therefore not adversely, but friendly, to Marshall's title. On this issue the appellee Ira Marshall, a son of W. R. Marshall, deceased, stated that Browning had said that he had moved the fence temporarily, so that he could pasture his stock, and that he would move it back, and that it was about 1911 when Browning put the temporary fence there.

The Brownings denied that they ever made this agreement with W. R. Marshall, but N. O. Browning admits, in substance, that after the death of W. R. Marshall he did enter into an agreement to be bound by the report of the surveyors; but he says that he had subsequently declined to be bound by that agreement, because Washburn had not carried out his agreement, made at the same time. The fact that Browning made the agreement with W. R. Marshall's heirs after his death to be bound by the line fixed by the surveyors is deemed strongly corroborative of the statement of Ira Marshall that there was such an agreement between Brown-

ing and his father during the latter's lifetime; for, if there had been none, it is not probable that Browning, holding the advantage he did after the death of W. R. Marshall, would have entered into the new agreement. At any rate, the finding of the chancellor below was necessarily that the holding of Browning was friendly to the title of W. R. Marshall, or the judgment could not have been entered, for, if Browning's holding was adverse to W. R. Marshall, it must be that the deed to Washburn would have been void to the extent of the strip in controversy.

That finding of fact by the chancellor is approved, and the judgment is affirmed.

### SHELBY v. SHELBY.

(Court of Appeals of Kentucky, June 10, 1921. Rehearing Denied Sept. 30, 1921.)

1. Partition  $\S$  13—Either of two sisters entitled to joint use of land could compel partition.

Where sisters were entitled under mother's will and under deed to them from other heirs to the joint use of certain land, either was entitled to partition of the property so that each might manage and control her separate portion independent of any interference by the other, under Ky. St.  $\S$  2348.

2. Partition  $\S$  13—Joint tenants entitled to partition.

Under Ky. St.  $\S$  2348, all kinds of jointly owned property may be partitioned in kind regardless of the nature of the joint title, provided it may be done without detriment to any of the joint owners or of their interests in the estate, and even then the property may be sold and the proceeds divided according to the interests of the respective owners unless the property is such that to divide it in kind or to sell it would violate some public policy or offend the public sense of decency or propriety.

3. Partition  $\S$  63(3)—Evidence insufficient to prove parties agreed that neither should have partition.

Evidence held insufficient to prove that parties to settlement deed giving grantees joint use of certain premises agreed that neither of such grantees should have the right to enforce a partition, and that such agreement was omitted from deed through oversight and mistake.

4. Reformation of instruments  $\S$  45(2)—Proof of mistake or fraud must be clear and convincing.

Written contracts will not be reformed because of fraud or mistake in the absence of clear and convincing proof of the existence of the alleged grounds therefor.

5. Contracts  $\S$  170(1) — Contemporaneous construction never relied on in absence of ambiguity.

Contemporaneous construction is never relied on in the absence of ambiguity in the language sought to be construed.

6. Partition  $\S$  22—Joint occupancy for long period insufficient to require deed to be construed to deprive joint tenant of right to partition.

Continued joint occupancy of premises by sisters entitled to jointly use premises under settlement deed for a period of 19 years held insufficient to require the deed to be construed so as to deprive either of sisters to the right of partition where during such period they lived in perfect peace and harmony, and there was no occasion to discuss or consider the right of separate occupancy.

7. Partition  $\S$  19—Right of one entitled to joint occupancy not lost by temporary absence.

Where two sisters were entitled to joint occupancy of certain premises under a settlement deed, one of the sisters by leaving the premises for a portion of a year without taking up a permanent residence elsewhere did not forfeit her right to partition.

Appeal from Circuit Court, Lincoln County.

Action by Mary P. Shelby against Florence M. Shelby. From judgment rendered, plaintiff appeals. Reversed, with directions.

Chas. H. Rodes, and Geo. E. Stone, both of Danville, J. B. Baxton, of Stanford, and Nelson D. Rodes, and W. S. Law Wil, both of Danville, for appellant.

Kendrick Alcorn and P. M. McRoberts, both of Stanford, for appellee.

THOMAS, J. This case is another of the long list of examples demonstrating the weakness, frailties, and shortcomings of human nature, and it reveals a story both sad and pathetic. Plaintiff and appellant, Mary P. Shelby, and defendant and appellee, Florence M. Shelby, are maiden sisters, the one being about 58 years of age and the other about 43 years of age. The property involved is about 600 acres of land in Lincoln county upon which is situated the historical old mansion of Kentucky's first Governor, and plaintiff and defendant are the lineal descendants of Isaac Shelby. No doubt if the premises involved could speak there would be many an unwritten story told concerning the life and conduct of that sturdy pioneer. The old fertile farm and the mansion upon it are and have long been known as "Arcadia," and were owned by Mary Steele Shelby, the mother of plaintiff and defendant, who died in the early part of 1895, having executed her will in 1892, which with some codicils was probated by the Lincoln county court on April 8, 1895. By the second clause of her will testatrix devised to her executor (Isaac Shelby, Jr.) all of the above land and the mansion house in trust with the imposed duty "to permit those of my children who are unmarried at the time of my death to occupy the residence and all the buildings used in connection therewith on the farm known as

'Arcadia' with so much of the adjoining land as he thinks necessary as a home and without rent or charge therefor until my youngest child shall arrive at the age of twenty-one years, or if it dies before, until the period of time at which it would have reached that age, if it had lived and the rest and residue of the lands to rent out in such way as he thinks best," etc. Out of the proceeds of the rental the trustee was directed to pay taxes, repairs, and other necessary expenses, including a reasonable compensation for his services, and with the balance he was directed to provide, maintain, and support the unmarried children of the testatrix, who were given the right to occupy Arcadia until such time as the youngest one would arrive at 21 years of age (changed to 25 years in a codicil), and the trustee was directed to permit such occupying children to have and to use the household and kitchen furniture of every sort, and all the carriages and buggies on hand, and to have set apart for their use such number of cows and horses as the trustee thought necessary, and he was directed to thereafter supply "such cows and horses as he thinks they (her children) need, as those set apart may die or become worthless and as the carriages and buggies wear out he will replace them with new." If such property was not on hand at the death of the testatrix, the trustee was directed to supply it, and he was further directed to supply an instructor or instructress to teach the younger children at the residence, and "he will provide said unmarried children as far as the means will allow with a comfortable and liberal support, providing not for actual necessities, but for such reasonable comforts and pleasures, including traveling expenses as they may desire and he approves." He was authorized to invest the surplus, if any, in income-producing properties, and, if necessary, to use the income from it in the maintenance and support of the occupants of Arcadia in the manner directed by the will. It was further provided in the same clause of the will that "upon the marriage of any of said children before the period above mentioned arrives such child is not thereafter to be supported by the executor," and upon the arrival of the period when the youngest child would become 21 years of age (25 by a codicil) he was directed to sell the property and divide the net proceeds of the estate of testatrix among her living children and the descendants, if any, of those who were dead.

At the time of the death of testatrix she had thirteen children, six of whom were unmarried daughters, and they jointly occupied the old Shelby home, Arcadia, under the provisions of the will of their mother until the 14th day of January, 1898, when the children, except Susan S. Mason, who were all adults, executed what is referred to in the record as

a "settlement deed," in which deed the married children of testatrix, who under the terms of her will were not given the right to occupy Arcadia, were designated as "grantors" and the six unmarried daughters, who were at that time jointly occupying the property, were styled "grantees," but the instrument was executed and acknowledged by all of the grantors and all the grantees. By its terms the grantees were extended the right to occupy the premises during their respective lives, or until they married, and when the last one married or died in spinsterhood the property should be sold and the proceeds divided among the heirs as therein specified. It was stipulated that when any of the grantees married the others should execute their joint note to her for the sum of \$2,000, which was to be a lien upon the land, but was not to be enforced until the last daughter died or married, and when any of the grantees married she should no longer have the right to occupy the premises, but that her right should thereby cease, and, in the language of the deed, "pass and belong to the other grantees then remaining alive and unmarried."

One of the considerations for that deed is stated therein to be a "desire to carry out the spirit and extend the gracious and benevolent provisions of the will of their said mother, who in order to secure a home for her unmarried children provided in her will that they should occupy the said land free of charge until the youngest should arrive at the age of twenty-five years, and whereas the grantors and grantees desire to preserve and keep in the family the said land, the old family homestead and above all desire to secure the grantees a comfortable home and support as long as they remain unmarried and alive. Mrs. Mason has died since the execution of the settlement deed, but if she left any children the record does not disclose the fact, and it appears that she executed a will in which she practically ratified the deed. At any rate, the fact of her not executing it is not involved in this controversy.

The unmarried daughters, after the execution of the settlement deed, jointly occupied the premises as therein provided for until some time in 1917, when there were only three of them unmarried, the plaintiff, the defendant, and Miss R. Tevis Shelby, at which time the latter died, leaving only plaintiff and defendant possessing the right of occupancy under the terms of the deed. It seems that for some time prior to the death of Miss Tevis Shelby there grew up an estrangement and some bitter feeling between plaintiff and defendant, who seem to possess dispositions more or less antagonistic. There is no doubt but that for some time prior to her death Miss Tevis Shelby was the tie that held together the other more

or less warring sisters. Her death removed the only soothing influence which made the joint occupancy of the premises by plaintiff and defendant even tolerable, and after that time the breach widened between them until it culminated in unfortunate personal encounters, and it is shown by the record that because of their different natures and temperaments, and because of their diverging views as to the superintendency and management of the jointly occupied property, it was impossible to continue such occupancy with any degree of peace or comfort to either of them, to say nothing of their personal safety. Under these circumstances plaintiff temporarily abandoned the premises from about the first of the year 1918 until the 1st of July following, when she returned, and on August 8, 1918, she filed this action in the Lincoln circuit court seeking a partition of the premises, including the mansion house, which it appears and seems to be conceded can be divided for the purpose of separate occupancy. The petition alleged the joint right of plaintiff and defendant to occupy the premises, and stated as a ground for the relief sought "that the relations between this plaintiff and the defendant have become so inharmonious that it is impossible for this plaintiff and the defendant to live together on said farm in peace or comfort, or to operate the said farm jointly." Defendant in her answer resisted the prayer of the petition, not because the premises could not be divided in kind, but upon the grounds: (a) That plaintiff had abandoned the premises and refused and declined to assist defendant in its management and had thereby forfeited her interest therein; and (b) that the terms of the settlement deed, read in connection with the provisions of the will as properly construed, provided for a joint occupancy and forbid an enforced partition of the premises against the consent or wishes of any of the beneficiaries; but, if not so, the answer then alleged that it was the intention of the parties, and was a part of the agreement at the time of the execution of the settlement deed, that no right of enforced partition should ever exist, and that such provision was left out of that deed by mistake and oversight, and it was sought to be reformed so as to include the provisions, and that it be enforced as thus reformed. A traverse and a plea of limitations against the right of reformation were contained in the reply. Considerable proof was taken by the parties, much of which is irrelevant, and after it was all read and the closing argument in the case had been made, the court suggested or inquired if it was possible for the parties to agree upon terms of settlement, and, to give them time in which to do so, the decision of the case was postponed to a future day. During that time plaintiff, through her attorneys, mailed to the

court an unsigned draft of an agreement, which she said she would accept in settlement of the suit upon condition, of course, that all of the submitted terms be carried out. The defendant, during the same time, submitted a form of an agreed judgment which she was willing to accept. The terms of the contract submitted by plaintiff and those of the agreed judgment submitted by defendant were radically different, although some few parts of each ran along parallel lines. For instance, plaintiff provided in her submitted compromise agreement that certain other suits which she had filed and which were then pending should be settled, and that she be paid the sum of \$5,000; that a named person be appointed as joint agent or receiver for plaintiff and defendant, and that he rent out all of the property involved, except about 100 acres, including the mansion house, which plaintiff agreed might be separately occupied by defendant at a named rental, and that such agent or receiver should never rent any part of the premises to any of the relatives of plaintiff or defendant. There were other very substantial stipulations which are not necessary to mention here, and all of which were entirely omitted from the agreed judgment submitted by defendant. Upon the reconvening of the court, after he had received the drafted papers, he on his own motion filed them as a part of the record of the cause, but which was objected to by the plaintiff, who afterwards moved that they be stricken from the record, especially the draft of her submitted agreement. Her motion was overruled, and the court entered a judgment allotting to defendant the sole use of the mansion house and of about 100 acres surrounding it at a rental to be fixed by an appointed agent for both parties (who was not the one named by plaintiff), and that the same agent rent out the remainder of the premises to whomsoever he pleased, and the judgment directed that he collect \$600 (proceeds of an insurance policy on a barn which had recently been destroyed by fire), and that he rebuild the barn with it, and that he pay off certain debts with the rentals which he was authorized to collect, and pay all taxes and repairs and other necessary expenses, and divide the net proceeds between plaintiff and defendant.

Manifestly the court was clearly in error in rendering that judgment. Its rendition is sought to be upheld by learned counsel for defendant upon the ground, as he claims, that it was an agreed judgment, but this is so far from being true that we do not deem it necessary to spend time and space in its discussion. It might be true that the physical separation of the properties made in the judgment followed the general lines indicated in plaintiff's submitted compromise agreement, but the terms and conditions upon which the defendant should occupy the

portion allotted to her, as well as the terms and conditions upon which their mutual agent should rent out the remainder of the property, were wholly unobserved in the judgment, and the provision for the settlement of the three other suits brought by plaintiff was entirely ignored. These statements alone, without reference to others which might be pointed out, are clearly sufficient to show the unauthorized entry of the judgment appealed from, and, as intimated, we would be compelled to reverse it for this reason alone.

[1] But there is another equally, if not more, fundamental error in the judgment, which is that, under the facts disclosed by the record, plaintiff was entitled to have commissioners appointed and to have the property divided so that each occupant might manage and control her separate portion independently of any interference by the other. In making this statement it necessarily determines the insufficiency of the defenses interposed.

[2] There was a time in the history of the law when the right to enforce a partition of jointly owned and possessed property was confined to "a division of lands by parceners or coheirs which had descended to them by common law or by custom." 38 Cyc. 152. But the law in respect to the right of partition has undergone a radical change, not only as to the character of title under which the property was held, but likewise as to the character of property which might be divided, and it is now the law in this jurisdiction that all kinds of jointly owned property may be partitioned in kind, regardless of the nature of the joint title, provided it may be done without detriment to any of the joint owners or of their interests in the estate; and even then the property may be sold and the proceeds divided according to the interests of the respective owners, unless the property is such that to divide it in kind or to sell it would violate some public policy, or offend the public sense of decency or propriety. In substantiation of the above we refer to the case of *Kean v. Tilford*, 81 Ky. 600, and to section 2348 of the Kentucky Statutes, which says:

"Joint tenants may be compelled to make partition; and when a joint tenant dies, his part of the joint estate, real or personal, shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtesy, dower or distribution."

So strongly has the right of one joint owner to a partition of the jointly owned property become entrenched in the law that the right has become a favored one with the courts, and they are reluctant to deny it, and will not do so, unless there is some impelling necessity therefor. Illustrating such judicial attitude toward the subject we take this excerpt from 20 R. C. L. 716:

"Courts should be, and are, adverse to any rule which will compel unwilling persons to use their property in common. The rule of the civil, as of the common law, that no one should be compelled to hold property in common with another, grew out of a purpose to prevent strife and disagreement. And additional reasons are found in the more modern policy of facilitating the transmission of titles, and in the inconvenience of joint holding. The early remedy was limited in its scope, but has been developed until, as has been said, practically the right of partition exists without regard to its difficulties."

Some of the courts in upholding this right decline altogether to enforce an agreement for a perpetual joint occupancy of the property, upon the ground that it is "an unreasonable restraint on the enjoyment and use of the property." 20 R. C. L. 717; 30 Cyc. 187; *Mitchell v. Starbuck*, 10 Mass. 5; and *Haeussler v. Missouri Iron Co.*, 110 Mo. 188, 19 S. W. 75, 16 L. R. A. 220, 33 Am. St. Rep. 431. But we are not called upon to adopt that rule, which we think is contrary to the holding of a majority of the courts. See notes to the *Haeussler Case* in 16 L. R. A. 220; notes to the case of *Wakefield v. Van Tassell*, 95 Am. St. Rep. 207, on page 218; and notes to the case of *McInteer v. Gillespie*, Ann. Cas. 1913E, 400, on page 403. We refer to it only for the purpose of showing the inclination of the courts to disallow any curtailment of the right of partition, unless the grounds therefor are clearly established.

An examination of the terms of the will (assuming their relevancy here), as well as the terms of the settlement deed, convinces us that neither of them, nor the two combined, are sufficient to show any contractual or other binding provision denying the right of partition to any of those having the right to occupy the farm known as "Arcadia" or the mansion thereon, which is the only property involved in this suit. The central idea of both the will and of the settlement deed is to make provision for a home for each of the beneficiaries and to give to each of them the right to live and to dwell upon the premises or some portion thereof, and "without preference to equality or provision" and "without neglecting the welfare and comfort of any of them." There is nothing found in either of the muniments of title confining the occupancy therein provided for to solely and exclusively a joint one, and the terms and provisions thereof may be as effectually executed and carried out by a separate occupancy (provided the property may be separated into sufficiently equal parts) as by a joint one. Keeping in mind the inclination of the courts, as above outlined, and guided thereby, we unhesitatingly conclude that there is nothing in the plain and unambiguous terms of either the will or the settlement deed which would curtail, much less deny, the right of the occupants to partition (in kind) the premises involved, provid-

ed it can be done without detriment to the premises or to the interests of either joint owner, which fact, as we have seen, is true in this case and seems to be admitted by defendant.

[3, 4] But it is insisted that the proof is sufficient to show that it was a part of the agreement between the parties to the settlement deed that only a joint right of occupancy was transferred to the grantees therein, and that neither of them should ever have the right to enforce a partition of the premises, and that the proof is also sufficient to show that such portion of the agreement was omitted from the deed through oversight and mistake. Assuming that the plea of limitations to the right to reform that deed is not available (but upon which we do not express an opinion), we are unable to take the view of the testimony contended for by counsel for defendant. As was naturally to be supposed, some of the Shelby children sided with plaintiff, while others aligned themselves with the defendant. The latter and some of her witnesses said that they understood at the time the settlement deed was made that no partition should ever be made of the premises, but only a few of them go to the extent of saying that such was a part of the agreement. Plaintiff and her witnesses testified that no such subject was ever mentioned, much less was it agreed to as a part of the contract. Their testimony strikes us as being the more natural, because at the time of the execution of that deed the unfortunate storm which proved the destruction of amicable occupancy was not in the minds of the parties and perhaps was not dreamed of, much less anticipated. It is a fundamental rule, often applied by this court, that written contracts will not be reformed, because of fraud or mistake, in the absence of clear and convincing proof of the existence of the alleged grounds therefor. We do not think the testimony in this case measures up to that standard, and no reformation of the contract should be decreed.

[5, 6] But it is further insisted that the parties themselves by their contemporaneous acts and conduct construed the settlement deed as providing for only joint occupancy and against separate occupancy, or the right of partition. As a foundation for this contention the fact of continued joint occupancy by the beneficiaries under the settlement deed until shortly after the death of Miss Tevis Shelby (a period of about 19 years) is cited and relied on. In reply to this contention we might say: First, that contemporaneous construction is never relied on in the absence of ambiguity in the language sought to be construed, and the cases cited and relied on by counsel for defendant announce no contrary doctrine; secondly, there was nothing, so far as this record shows, during that entire period of joint occupancy, to test the construction of

the terms of the settlement deed. So far as appears, the beneficiaries were living in perfect peace and harmony, and there was no occasion to discuss or consider the right of separate occupancy in the event that the then prevailing concord between the occupants should cease to exist. The mere fact that the beneficiaries peaceably occupied the premises without calling in question the right of either to a separate occupancy (there being no occasion for it) cannot be said to constitute such contemporaneous construction as would influence the court in interpreting the meaning of the settlement deed.

[7] Neither are we impressed with the contention that plaintiff's temporary absence from the premises, especially under the circumstances, deprives her of the remedy of partition. Very analogous facts are found in the case of *Holt's Executor v. Deshon*, 126 Ky. 310, 103 S. W. 281. This court in that opinion not only upheld the right of one of the joint beneficiaries to partition the premises, but further said that their temporary absence therefrom would not forfeit their interest therein, since the will under which they held (containing language very similar to that found here) only required that they make the premises their residence, "but they may be absent from the place for business or pleasure temporarily, provided they do not take up a permanent residence elsewhere." Plaintiff, under the facts proven in this case, never took up a permanent residence elsewhere so as to forfeit her interest in the premises.

Having arrived at these conclusions, it necessarily follows that the court erred in denying plaintiff the relief sought, and the judgment is reversed, with directions to set it aside, and, if the parties cannot agree upon a division of the premises without it, the court will appoint commissioners for that purpose and proceed to partition the property in accordance with the practice provided therefor, and for such other proceedings consistent with this opinion as may be necessary for the granting of the relief prayed for in the petition; but plaintiff will not be allowed to lease or rent any portion of the mansion house that may be allotted to her.

## HOME INS. CO. v. CHOWNING.

(Court of Appeals of Kentucky. June 24, 1921.)

### 1. Pleading $\S$ 34(4, 6)—Construed after judgment so as to support judgment.

Before judgment a pleading is construed strongest against the pleader, but after judgment it should be so construed, if possible, as to sustain the judgment, where no objection was made to it before the trial was completed.

### 2. Pleading $\S$ 433(4)—Averment of ownership of insured building held sufficient after judgment.

An averment in an action against a fire insurance company that the company issued to plaintiff a policy on "plaintiff's one-story shingle roof farm dwelling house" was a sufficient allegation of ownership, where no objection was made to it before judgment.

### 3. Insurance $\S$ 328(5)—Option did not pass title to insured building.

A contract of sale of an insured house, which was but an option, did not pass any title or interest in the property to the grantee, and did not divest insured of title to the property within a provision that the policy should be void on change in title or interest of insured.

### 4. Appeal and error $\S$ 909(2)—Presumed that insured's title to insured building was complete.

Where title of insured was not disputed or questioned by the pleadings in an action to recover under a fire policy, but other issues were made on which trial was had, it will be presumed that plaintiff's title was complete.

### 5. Insurance $\S$ 665(3)—Issuance of policy prima facie evidence of title.

Issuance of a policy of fire insurance is prima facie evidence of title in the insured.

### 6. Property $\S$ 9—Possession prima facie evidence of ownership.

In an action on a fire policy, a prima facie case of ownership of realty in insured is made by proof of possession.

### 7. Insurance $\S$ 328(5)—Execution of contract of sale and surrender thereof no change of title or interest under fire policy.

Execution by insured of a contract of sale of the property, which was surrendered and canceled by the parties to it before a fire, did not bar the insured's right to recover on fire policy, although the policy provided that it should be void on change in the title or interest or possession.

### 8. Insurance $\S$ 378(1)—Possession of house by tenant did not bar recovery under fire policy where known to agent.

Where insured was not in possession of house at time of issuance of fire policy, and such fact was well known to the insurance company through its agent, who solicited and wrote the policy before the same was issued, and the company through its agent was notified of a change of tenants, and consented thereto before the fire, the insurance company cannot contend that insured cannot recover on the policy by reason of his not being in possession of the property at the time of the fire, in violation of the terms of the policy.

Appeal from Circuit Court, Spencer County.

Action by C. M. Chowning against the Home Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gordon & Laurent and Frank M. Drake, all of Louisville, and John K. Todd, of Shelbyville, for appellant.

Edwards, Ogden & Peak, of Louisville, and S. K. Baird, of Shelbyville, for appellee.

**SAMPSON, J.** This appeal is from a judgment of the Spencer circuit court in favor of appellee, Chowning, and against the appellant, Home Insurance Company, enforcing a fire insurance policy for \$600 on a farm residence destroyed by fire in 1917. The company admits the issue of the policy, collection of the premiums, and destruction of the insured building by fire, but is defending on the grounds that plaintiff, Chowning, was not the owner of the property at the time of the issue of the policy, or (2), if he was at that time such owner, he later, and before the fire occurred which destroyed the residence, divested himself of all insurable interest therein, and is not, by reason of the terms of the policy, entitled to collect the insurance. The policy contains a provision which reads:

"It is stipulated and agreed that, if any false statements are made in said application or otherwise, or if the assured without written consent hereon, has now, or shall hereafter, procure any other contract of insurance, whether valid or not, on any of said property, or if the property or any part thereof shall hereafter become mortgaged or incumbered; or upon the commencement of foreclosure proceedings; or in case any change shall take place in the title or interest or possession (except by succession by reason of the death of the assured) of the property herein named; or if the assured shall not be the sole or the unconditional owner in fee of said property, \* \* \* then in each and every one of the above cases this policy shall be null and void."

The insurance company first contends that the court erred to its great prejudice in giving, over its objection, a peremptory instruction to the jury to find for the plaintiff, because the averments of the petition were and are not sufficient to support the judgment. This contention was not made below, nor was a demurrer filed to the petition. The averment in the petition of ownership of the insured property is very meager and unsatisfactory. This averment in substance is that the insurance company issued and delivered to plaintiff, in consideration of a named premium, a \$600 policy of fire insurance on "plaintiff's one-story shingle roof farm dwelling house." This allegation is not traversed, but rather admitted. Had a general demurrer been filed to the petition, the court no doubt would have sustained it, but none was interposed.

[1, 2] Before judgment a pleading is construed strongest against the pleader, while after judgment it is the rule to so construe the pleading, if possible, as to sustain the judgment where no objection was made to it before the trial was completed. We think

this salutary rule may be invoked here to sustain an otherwise defective pleading. Here it accords with the facts, for it is manifest from the whole record that Chowning was in fact the fee-simple owner of the insured property at the time the policy of insurance was issued in 1915, and until after the fire, unless he divested himself by a written contract which he admits he made with one Goodlet for the sale of the property in question. This writing is in the nature of an executory contract for the sale of the property to Goodlet, but by this action Chowning seeks to reform it so as to make it evidence all the terms of the agreement which he alleges it should have contained, and which constitute a mere option to Goodlet to purchase the property at a stated price, but which option was never exercised by Goodlet. The proof fairly sustains this contention of Chowning, and the trial judge sitting as a chancellor, reformed and found the alleged contract to be an option only.

[3] If it be admitted that the contract was but an option to Goodlet to purchase the property, no title or interest in the property passed to Goodlet, nor was Chowning divested of title to the property within the meaning of the terms of the policy of insurance copied above. *German Fire Ins. Co. v. Duncan*, 140 Ky. 27, 130 S. W. 804.

[4-6] Where the title of the plaintiff to the insured property is not disputed or questioned by the pleadings, but other issues are made on which a trial is had, it will be presumed that plaintiff's title was complete. It is the rule that the issue of a policy to the insured by the company on the property is prima facie evidence of title in the insured. A prima facie case of ownership is made by proof of possession. 19 Cyc. 941.

[7] However, if the contract was one for the sale of the property to Goodlet, it was never consummated, and the title to the property never passed to Goodlet, the contract being surrendered and canceled by the parties to it before the fire. If the sale had been actually consummated between Chowning and Goodlet, but later, and before the fire, Goodlet had resold and conveyed the property to Chowning, the contract of fire insurance would not have been avoided by such sale and resale of the property, notwithstanding the policy contains a clause providing for such annulment if the ownership of the insured property should change. In the case of *Germania Fire Ins. Co. v. Turley*, 167 Ky. 58, 179 S. W. 1059, Ann. Cas. 1917C, 931, we held that a policy of fire insurance was not avoided by reason of a sale of the property if, at the time of the fire, the title and possession was again in the insured as at the time the policy was issued.

We are clearly of the opinion that Chowning was in fact and law the owner of the in-



sured property, both at the issue of the policy and at the date of the fire. This contention is supported by the evidence of Goodlet, who says he had merely an option to purchase, and took it only in the hope he could find a purchaser and turn the property at a profit, but, failing to do so, returned the written contract to Chowning and canceled the contract long before the fire, and Chowning had placed the property in the hands of a real estate agent for sale, and thus it stood at the time the fire destroyed the building.

[8] It is also urged by the insurance company that Chowning was not in possession of the property at the time of the fire, and this was a violation of the terms of the policy which would prevent a recovery. Chowning did not live in the property or near it at the time the policy was issued, and this fact was well known to the insurance company, through its agent, who solicited and wrote the policy, before the same was issued. Moreover, the evidence shows that the company, through its agent, was notified of a change of tenants, and consented thereto before the fire.

Having arrived at the conclusion that Chowning was the owner of the insured property both at the time of the issue of the policy and the occurrence of the fire which destroyed the building, we are of the opinion that the trial court correctly directed the jury to find and return a verdict for appellee, Chowning, there being no other real issue in the case.

Judgment affirmed.

# VAUGHAN, Secretary of State, v. ROBERTS.

(Court of Appeals of Kentucky. Sept. 30, 1921.)

## 1. Statutes $\S$ 225 $\frac{1}{4}$ —Acts enacted on same subject at same session construed together.

Two acts enacted on same subject at same session of the General Assembly should be construed together, and one should not be held inconsistent with other if they can be fairly read otherwise.

## 2. Elections $\S$ 141—Statute making primary election candidates ineligible as candidates by petition for same office at general election held inapplicable to office of circuit judge.

Ky. St.  $\S$  1550, subsec. 6, as amended by Acts 1920, c. 156, making primary election candidate, who has filed "application or declaration" as to party affiliation and support of party nominees, where defeated, ineligible as a candidate for the same office by petition at the general election, under Ky. St.  $\S$  1453, held inapplicable to a candidate for the office of judge of the circuit court, in view of amendment of Ky. St.  $\S$  1550, subsec. 6, by Acts 1920, c. 99, excepting nominations for judges

from the operation of chapter 156, and making it unnecessary for a candidate for such office to file the declaration as to party affiliation.

Appeal from Circuit Court, Franklin County.

Mandamus by R. B. Roberts against Fred A. Vaughan, Secretary of State, to compel him to receive and file a petition nominating petitioner for office. Writ granted, and defendant appeals. Affirmed.

Chas. I. Dawson, Atty. Gen., and E. C. O'Rear, of Frankfort, for appellant.

John D. Carroll, of Frankfort, for appellee.

FURT, C. J. The appellee, R. B. Roberts, on the 14th day of September, 1921, which was more than 45 and less than 75 days, previous to the regular election in November, 1921, tendered and offered to file in the office of the Secretary of State a petition, which was signed by a requisite number of legal voters of the thirty-third judicial district, nominating him for the office of circuit judge, as an independent candidate, or candidate of the independent party, and requesting that his name be placed upon the ballot to be used at the regular election under the emblem of his picture or photograph. The Secretary of State, for reasons hereinafter stated, being of the opinion that appellee was not eligible to have his name upon the ballot as a candidate for circuit judge at the November election, declined to receive or file the petition or to cause appellee's name to be printed upon the ballots as an independent candidate in accordance with the request of the petition.

The appellee, by proper proceedings in the circuit court, secured a writ of mandamus against the appellant, requiring him to receive the petition and to file same as of the date tendered, and to cause appellee's name to be printed upon the ballots to be used at the November election, 1921, as an independent candidate for judge of the circuit court, in the district, under the emblem designated in the petition, and, from the judgment granting the writ of mandamus, the appellant has appealed.

The appellant assigns as reasons why the mandamus should not have been granted (1) that the petition which was offered to be filed was insufficient under section 1453, Ky. St., and (2) that the appellee, having been a candidate at the primary election, held on August 6, 1921, for the nomination of the Republican party for judge of the circuit court in the thirty-third district, and, having been defeated, he was not eligible, and could not be permitted to run as a candidate for the same office at the ensuing November election, either as an independent or otherwise, or at least he was without right to have his name printed upon the ballot as such a candidate.

As to the first reason, an examination of the petition tendered to the Secretary shows that it substantially complies with the requirements of section 1453, Ky. St., and is sufficient under that section to require the name of the appellee to be placed upon the ballots, at the ensuing November election, according to its request.

The second reason is based upon the provisions of chapter 156, Session Acts of the 1920 General Assembly. That act purports to be an amendment to subsection 6, § 1550, Ky. St., and the act consists of subsection 6, § 1550, *supra*, as it existed before the amendments of 1920, with the following language in addition, *viz.*:

"No applicant or candidate for any public office in the state of Kentucky, who shall have filed his application or declaration under said section, and who shall have been defeated for the nomination for any office thereunder, shall be eligible or permitted to run for the same office for which he was a candidate under said section at any general election in this state to be held during the same year in which his said application and declaration was so filed, and in which he was a candidate in any primary election under said act." All acts and parts of acts in conflict with this act are hereby repealed."

The appellee having been an unsuccessful candidate for the nomination for circuit judge of the Republican party, at the primary election held on August 6, 1921, the Secretary of State was but within his rights in refusing to cause his name to be printed upon the ballots to be used at the November election, as a candidate for that office, if the above provision, quoted from chapter 156, *supra*, is valid and applicable to the facts. The appellee, however, contends that the quoted provision is void, because it is in contravention of section 130 of the Constitution, in that it undertakes to add to the qualifications necessary to hold the office of judge of the circuit court, as prescribed by the Constitution, and further, in effect denies to the people of the district a free and fair election, contrary to section 6 of the Constitution.

[1] It is unnecessary, however, to determine whether the above-quoted provision of chapter 156, *supra*, is or is not void, as in contravention of any constitutional provision, since we have concluded that it has no application to the present state of facts. At the same session of the General Assembly which enacted chapter 156, *supra*, there also became a law chapter 99 of the Session Acts of the legislative assembly of 1920. The latter act also purports to be an amendment of subsection 6 of section 1550, Ky. St., but, it is in reality a statute prescribing a different mode of nominating a candidate for a judge of the circuit court and a judge of the Court of Appeals, by a political party, from that prescribed by chapter 156, *supra*, or that prescribed by the original terms of subsec-

tion 6, § 1550, Ky. St., and prescribing different qualifications to make one eligible for candidacy for a party nomination than the qualifications prescribed by chapter 156, *supra*. It at least has the effect of excepting the nominations for circuit and appellate judges from the operation of subsection 6 of section 1550, *supra*. These two acts, having been enacted upon the same subject and by the same session of the General Assembly, should be construed together, and the intention of the Legislature ascertained from a consideration of both, and they should not be held inconsistent with each other, if they can be fairly read otherwise. 38 Cyc. 1151; 25 R. C. L. 1062; *Willson v. Hahn*, 131 Ky. 444, 115 S. W. 231; *Lambert, etc., v. Board Trustees, etc.*, 151 Ky. 725, 152 S. W. 802, Ann. Cas. 1915A, 180. The Legislature should be considered, in enacting such statutes, to be actuated by the same spirit in the enactment of each, and to be carrying out the same policy.

[2] It will be observed that by the terms of subsection 6, section 1550, as amended and re-enacted by chapter 156, *supra*, before one can be a candidate for a nomination in a primary election, he must be a member of the party of which he seeks a nomination; he must have affiliated with the party, and supported its nominees, as defined in the act; and, as a necessary prerequisite to having his name printed upon the ballots to be used in the primary election, he must file a notification and declaration, subscribed and sworn to by him, in which he must swear that he resides at a certain place, and if in a city where registration is required, that he is a registered voter; that he believes in the principles of the party, whose nomination he seeks; that he intends to support its principles and policies, and vote for its nominees at the coming general election; that he has affiliated with such party and supported its nominees at the last general election, or was prevented from doing so by some sufficient reason; that, if nominated, he will accept the nomination and not withdraw; that he will not violate any law pertaining to elections, and, if elected to the office at the general election, he will qualify as such officer. In addition to such sworn declaration, he must also file the affidavits of two reputable electors, to the effect that they have affiliated with the party and supported its nominees at the last general election, are personally acquainted with the applicant, know him to be a discreet citizen, and to the best of their knowledge has affiliated with and supported the party as defined by the primary election law, and that his residence is stated correctly in his notification and declaration, and they believe him to be qualified to fill the office he seeks.

It will be observed that the written instrument which this section requires to be filed by one proposing to become a candidate

in a primary is termed in the act, in some places, a "notification and declaration," and in another, "said application and declaration," and the person who files it is termed an "applicant," and that it uses the terms "notification and declaration" and "application and declaration" as describing the prerequisite to be placed upon the ballot. It will also be observed that the amendatory section of subsection 6, of section 1550, supra, as re-enacted and embraced in chapter 156, supra, says that "an applicant or candidate," "who shall have filed his application or declaration under said section and who shall have been defeated for any office thereunder," shall be ineligible, and not permitted to "run for the same office for which he was a candidate under said section at any general election \* \* \* to be held during the same year in which his said application or declaration was so filed. \* \* \*"

So it seems that the amendment to subsection 6, § 1550, supra, embraced in chapter 156, supra, only applies to candidates under that section as amended, and only to such candidates who, in order to get a place upon the ballots, are required to file the "notification and declaration" or the "application and declaration" described and required by subsection 6, § 1550, supra. By its very terms it has no reference to a candidate in the primary, who shall not have filed his "application or declaration, under said section," and who was not a "candidate in a primary election under said act." By the very terms of subsection 6, § 1550, supra, the name of no one could be printed upon the ballots as a candidate for a party nomination, who was not a member of such party, and to that end an applicant was required to subscribe and swear to and file the application or notification and declaration required by the act; and hence no one could be a candidate for a nomination for any office by a political party not his own, and neither could the members of a party vote for or nominate a candidate for an office who was not a member of the party, and who had not affiliated with and supported the party. To enable a political party to nominate a candidate for the office of judge of the circuit court or a judge of the Court of Appeals other than a member of the party, and to enable the various political parties to nominate the same person as the candidate of each, and to enable the name of a nominee to be printed upon the ballots to be used at the general elections under the emblems of as many or of whatever party should nominate him, and in fact to enable the name of a person to be printed upon the ballots as candidate for one of these judicial offices, by whatever method the law will permit the name of a person to go upon the ballot, and thus attempt to divorce the election of such judges from partisan rancor, and to induce the voters to select judges with reference to their fitness and qualifications for the office, in-

stead of political considerations, the Legislature enacted chapter 99, supra. It will be observed that the first clause of the amendment to subsection 6, § 1550, supra, as embraced in chapter 99, supra, declares that none of the provisions of subsection 6, § 1550, supra, shall apply to candidates for judges of the Court of Appeals, and for judges of the circuit courts.

It is then provided that any eligible person may become or be proposed as a candidate for nomination by any and every political party having a ticket to be voted for in the district, but the person shall not be required to seek the nomination or nominations, nor to make any declaration of party loyalty or support, as a prerequisite to his name being printed upon the primary ballots. Nor shall he, as a prerequisite of candidacy for nomination, be required to have registered as a voter, nor to have affiliated with any party. The nomination or nominations for these judicial offices is proposed, not by the candidate filing an "application, or notification and declaration" as required by subsection 6, § 1550, supra, but either by a resolution of a party committee or by the application of two reputable electors of any political party, which resolution or application shall be filed with the proper officer. The names of the successful candidates in the primary for these judicial positions shall appear on the ballots, used at the general election, under the emblems of as many parties as have nominated them, and, in addition, may appear upon the ballots by the petition of voters, and in fact in as many ways as the law will permit. In such a primary election, if a person is successful in securing the nomination of one party, but is defeated for the nomination of another party, by the express words of the statute, he may appear as a candidate under the device of the party which nominates him, and also upon the petition of voters, which would necessarily be as an independent.

Hence, a candidate for a nomination for judge of the Court of Appeals or a circuit court is not a candidate under subsection 6, § 1550, supra, but is a candidate under said subsection as amended by chapter 99, supra, and hence the amendment as embraced in chapter 156, supra, does not apply to him. Only candidates under subsection 6, § 1550, are required, as a prerequisite, to file an "application and declaration," as provided for by that section, and they are the only candidates, when defeated in the primary election, who are not "eligible, and shall not be permitted to run for the same office" at the general election, if said provision is valid, which is not decided.

Chapter 156, supra, is general in its terms, and applies to all persons, who may be candidates in a primary, while chapter 99, supra, applies only to persons who may be candidates for judge of the Court of Appeals and

of circuit courts. Construing them as one act, it is very plain that the legislative intention was that, while all other candidates in a primary were governed by the provisions of subsection 6, § 1550, Ky. St., the candidates in primary elections for the judicial positions above named should be excepted from the operation of the provisions of that subsection; and, as before stated, chapter 90, *supra*, so declares. There would be no other way to construe these two acts upon the same subject, and enacted at the same session of the General Assembly, consistently with each other. Carrying out the policy of the Legislature in regard to candidates for judges of the circuit court and judges of the Court of Appeals, the Legislature, in enacting the amendment to subsection 6, § 1550, *supra*, embraced in chapter 156, *supra*, did not include candidates for these judicial offices in terms, but expressly excluded them from its operation, by making it apply only to such candidates in a primary election as were required by law as a prerequisite to candidacy to file a "notification, application, and declaration" under subsection 6, § 1550, and who did file same and were candidates under that section, and not to candidates in a primary, who were not candidates under that section. The quoted portion of chapter 156, *supra*, having no application to such a candidate as appellee, and no inhibition in chapter 90, *supra*, being imposed upon him from appearing as an independent candidate upon the ballots at the general election, his rights in the matter are governed by the principles announced in the opinions of this court in *Napier v. Roberts*, 172 Ky. 227, 189 S. W. 206, and *Francis v. Sturgill*, 163 Ky. 650, 174 S. W. 753.

The judgment is therefore affirmed.

SAMPSON, J., not sitting.

## PROCTOR v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. June 24, 1921.)

### 1. Appeal and error § 351 (2)—Transcript may be filed after the two-year period.

Where judgment was entered in circuit court on March 16, 1918, and January 27, 1920, plaintiff appellant filed a copy of judgment in clerk's office of the Court of Appeals, and summons was issued for the appellee, and on July 14th transcript was filed in clerk's office, which was more than 20 days before first day of second term of Court of Appeals after granting of appeal, a motion to dismiss the appeal was without merit.

### 2. Appeal and error § 427—No showing that summons on appeal was not served on agent.

An appeal will not be dismissed on ground that summons issued by the clerk of Court of

Appeals was not served on an agent of the appellee, where there is nothing in record tending to show that such person was or was not appellee's agent, except return by sheriff, which shows the person on whom it was served was such an agent, no affidavit being filed, and there being nothing on which to base the claim that he was not such agent except the bare statement of counsel in their written motion to dismiss the appeal.

### 3. Appeal and error § 799—Appeal not dismissed on bare statement of counsel in motion.

An appeal by plaintiff from an alleged insufficient judgment will not be dismissed on bare *ex parte* statement of counsel in written motion to dismiss appeal that plaintiff collected the judgment during the pendency of the appeal, without anything in the record to show it, even assuming such collection would be good grounds for dismissing the appeal.

### 4. Champerty and maintenance § 5(6)—Contract between attorney and client held champertous and void.

A contract between attorney and widow concerning an action by the widow as administrator against a railroad for damages for husband's death held champertous and void, as being prepared with a design on part of attorney to put whole litigation and whole estate of the dead man in his custody and control, and to place the widow wholly within his power, and subject to his dictation, and requiring mutual consent of attorney and widow to compromise with railroad.

### 5. Champerty and maintenance § 5(6)—Contract between attorney and client held invalid as a whole.

Contract between attorney and widow concerning estate of husband and action for his death held invalid as a whole, portion fixing contingent fee being inextricably involved with and dependent upon champertous features.

### 6. Trial § 370 (1)—No hearing before jury after agreement that chancellor enter judgment.

After final submission of equitable action for judgment, and after argument of case by counsel, it was too late to ask for a continuance and for a hearing before a jury of an issue out of chancery, especially when complaining party had expressly agreed that chancellor enter judgment on whole case.

### 7. Judgment § 252 (5)—Recovery on quantum meruit in action on void contract where prayer was for all proper relief.

In an action by plaintiff's attorney against defendant to recover compensation specified in a contract with plaintiff, plaintiff and defendant having compromised the case, chancellor properly permitted recovery by attorney on a quantum meruit, although the contract between the attorney and the plaintiff was champertous and void, where the attorney in his petition alleged the value of his services, and the prayer of his petition prayed for all proper relief, under Civ. Code Prac. § 90.

Appeal from Circuit Court, Warren County.

Action by B. F. Proctor against the Louisville & Nashville Railroad Company. Judg-

ment for defendant, and plaintiff appeals, and defendant is granted cross-appeal. Affirmed.

J. H. Hazelrigg, of Frankfort, and B. F. Proctor and Herdman & Roper, all of Bowling Green, for appellant.

Sims, Rodas & Sims, of Bowling Green, and Benj. D. Warfield, of Louisville, for appellee.

TURNER, C. In November, 1911, Claude Strange, an employé of the L. & N. Railroad, was killed in an accident, and shortly thereafter his widow employed appellant, a practicing lawyer, to bring and prosecute an action for damages against the railroad company. The widow subsequently qualified as administratrix, and thereafter appellant did institute such suit in the Logan circuit court, and on a trial in that court plaintiff was awarded a verdict for \$15,000 in damages, upon which judgment was entered. But the railroad company prosecuted an appeal to this court from that judgment, and the same was, in December, 1913, reversed by this court and sent back for another trial. *L. & N. R. Co. v. Strange's Adm'r*, 156 Ky. 439, 161 S. W. 239.

After the reversal of that judgment, and in July, 1914, the railroad company, without knowledge or consent of appellant, compromised with the administratrix for the sum of \$5,000, and the payment of the court costs, and, in addition, agreed with her at the time that it would pay to appellant, as her attorney, such sum, if any, as he might be entitled to in law. This is an ordinary action by appellant against the railroad company and Mrs. Strange, wherein he prays that—

"The settlement of July 25, 1914, be declared void, and that plaintiff and defendant, Strange, be permitted to prosecute the claim for the death of her husband, or that plaintiff be given judgment for one-half the judgment, interest, and damages the same as if the judgment had been affirmed in the Court of Appeals, to wit: \$10,000, with 6 per cent. interest from date of reversal, to wit, December 13, 1913, and for all proper relief."

In his petition the plaintiff sets out in terms not only the original contract entered into between him and Mrs. Strange, dated December 26, 1911, but also sets out three amendatory or supplemental contracts thereafter entered into between them referring to the same subject-matter, two of the latter being entered into after the judgment in the circuit court, and while the cause was pending on appeal in this court, and the last having been entered into, as alleged, on the 6th day of January, 1914, but which bears date the 11th of March, 1914, and after the reversal of the judgment.

The original and the amendatory contracts so set out in the plaintiff's petition are as follows:

"This obligation witnesseth: That I have this day employed B. F. Proctor to adjust by suit or compromise a claim for myself and infants against the Louisville & Nashville Railroad Company for the death of my husband, who was killed while acting as brakeman on November 22, 1911. Said Proctor is to have control of the claim and I am to give all the assistance in my power to him. I am to qualify as administratrix with the approval of said Proctor, and he is to see that my bond is made, and is to control the funds, if any, belonging to the estate and any sum recovered for said injury and death, till paid by order of court to the (persons entitled) thereto. This claim is not to be compromised without the mutual consent of said Proctor and myself. If it is compromised without his consent he is to receive a sum equal to five thousand dollars and if compromised by him without my consent he is to pay me ten thousand dollars or I may demand two-thirds of what he compromised for if I prefer.

"It is agreed that for his services said Proctor shall otherwise receive a sum equal to one-third received for said injury and death, if compromised before suit, but if suit is brought, he is to receive a sum equal to one-half received. This contract shall be ratified by any administrator appointed. This December 26, 1911."

The first amendatory contract is as follows:

"In order to accommodate me and to get support for myself and children till my claim against the L. & N. R. R. Co. is finally settled I do hereby agree to pay B. F. Proctor any and all sums of money furnished me or for my benefit with six per cent. interest and to pay to Judge S. R. Crewdson the sum of four hundred dollars for his services and the sum of four hundred dollars to Hazelrigg & Hazelrigg, and if my cause is appealed to the Supreme Court \$800.

"It is further agreed that said Proctor is entitled to a sum equal to one-half of the \$15,000 for which judgment was rendered in my favor in the Logan circuit court with one-half such damages and interest as may be recovered in the appeal, and from his one-half, which I hereby assign him, he is to pay back to me one-half the sum paid Judge Crewdson and one-half sum paid Hazelrigg & Hazelrigg, if any.

"It is further agreed that said Proctor will go my security and assist me in procuring the loan of twenty-five dollars per month beginning with October, 1913, and continuing until my claim is finally settled, at which time I am to pay and discharge same with interest with other sums due or to become due to said Proctor.

"It is agreed that this cause is not to be settled or compromised without our mutual consent, if it is done, then each agrees to pay the other the full amount of what would have been received if the judgment or judgments had been paid in full as now or hereafter rendered. This September 30, 1913."

The second amendatory contract is as follows:

"This obligation made and entered into this the 9th day of December, 1913, between B. F. Proctor and Nora Strange in person and as administratrix of Claude Strange witnesseth:

That the said Strange being in reduced circumstances, owing to the death of her husband, and without sufficient means to live upon, B. F. Proctor hereby agrees to stand as her surety for twenty-five dollars each month, beginning with this date.

"This contract is to end when the case now pending against the L. & N. R. R. Co. is settled. It is further agreed that said Strange is now indebted to said Proctor for money advanced to her and for rent of his house to this date, which she is to pay when her case is settled as heretofore agreed, and it is further agreed that no settlement will be made with the railroad company without the mutual consent, that is, said Proctor cannot settle without the consent of said Strange, and said Strange cannot settle without the consent of said Proctor. This December 9, 1913."

The third amendatory contract is as follows:

"This instrument witnesseth: That the Louisville & Nashville Railroad Company having made a proposition to my attorney B. J. Proctor to pay the sum of \$15,000 to settle my claim prosecuted as administratrix of Claude Strange, together with the claim of W. H. Stewart's administratrix, I now authorize my attorney to make a proposition to compromise my said claim independent of the claim of Stewart's administratrix, and said Proctor is authorized to settle my claim at \$15,000 and all costs, including costs in the Court of Appeals, and is not to accept anything less without my written consent. In the event of a settlement the Louisville & Nashville Railroad Company is to draw a voucher payable to said Proctor and myself jointly and out of this sum I am to receive \$7,500 as administratrix, and said Proctor is to receive the same sum, and we are to divide the fees of Judge Crewdson and Judge Hazelrigg as heretofore agreed. Said Proctor has been furnishing me money at the rate of \$30 per month payable monthly to live upon, and he agrees to continue to furnish that sum till my case is finally settled, and out of the sum paid me I am to satisfy any money advanced to me as heretofore agreed. It is further agreed that if said Proctor wishes to do so he may accept a less sum than \$15,000 from the company for a settlement but is to pay me the \$7,500, and if I accept a less sum I am to pay him the \$7,500 unless he consents in writing to accept less. Witness my hand this the 11th day of March, 1914."

The plaintiff, while asking in his prayer for the relief as above set forth, alleged in the petition that his services so rendered in that action were reasonably worth \$10,000.

The answer of the railroad company, after denying the value of the services and that the settlement with Mrs. Strange was procured by fraud, in a second paragraph relies upon the terms of the original and supplemental contracts as being champertous and void, and alleges that the same were made solely for the use and benefit of the plaintiff, and had for their object, not the protection of his client in the presentation and prosecution of her claim, but were made and dictated by him for the sole purpose of pecuniary advantage to himself.

The defendant, Nora Strange, in her answer denied that the contract of settlement had been procured from her by fraud or misrepresentation, and expressed a desire to have the same confirmed. She further denied that the company, through its attorneys, at the time of the settlement agreed with her to pay her attorney any amount, except that it was understood at the time that under the law in this state her attorney could, if he desired, and if her contracts were valid and enforceable, compel the railroad company to pay him one-half the amount received by her.

The issues were completed by reply and rejoinder, and the lower court, having transferred the case to the equity docket, thereafter entered a judgment denying to the plaintiff the right to any recovery under his contracts, and holding them as a whole to be champertous and void, but on quantum meruit giving him a judgment against the railroad company for the sum of \$1,800. To that judgment each party excepted, and the plaintiff having filed his transcript and prosecuted an appeal to this court, the defendant has been granted a cross-appeal. In this court appellee has entered a motion to dismiss the appeal upon three grounds, the consideration of which was passed to the merits.

[1] The first ground is wholly without merit; the judgment was entered in the circuit court on March 16, 1918, and on January 27, 1920, the plaintiff filed a copy of the judgment in the clerk's office of this court and a summons was issued thereon for the appellee, and on the 14th day of July thereafter a transcript of the record was filed in the clerk's office, which was more than 20 days before the first day of the second term of this court after the granting of the appeal. *McCallister's Adm'r v. Stanley et al.*, 186 Ky. 836, 218 S. W. 237.

[2] The second ground is that the summons issued by the clerk of this court was not served on an agent of the company; but it is only necessary to say, as to this contention, that there is nothing in the record intimating or tending to show that such person was or was not its agent except the return on the process by the sheriff of Warren county, which shows the person upon whom it was served was such agent in that county. No affidavit is filed here, and there is nothing upon which to base the claim that he was not such agent except the bare statement of counsel in their written motion to dismiss the appeal.

[3] The third ground is that the appeal should be dismissed because appellant, as set forth in the motion, is said to have collected the \$1,800 judgment during the pendency of this appeal; but in this, as in the other, we are left wholly to the ex parte statement of counsel in the motion, without anything in the record to show it, and for that

reason we deem it unnecessary to determine whether or not, if he had collected it, it would be good grounds for dismissing the appeal. Upon a motion to dismiss an appeal or to quash a summons which issued from this court, from the very nature of things we must accept the record as it appears; and, there being no affidavit filed in support of such motion, but only a recital in the written motion of a state of fact not disclosed by the record, the same will be overruled. It follows from what we have said that the motion to dismiss the appeal is overruled.

[4] Considering first the original contract of employment, it may be safely said that it discloses upon its face that it was wholly dictated by appellant, and prepared with a design to put the whole litigation and the whole estate of the dead man in his custody and control, and to place the widow, who subsequently was administratrix, wholly within his power and subject to his dictation. It not only expressly says that appellant is to have the control of the claim, but in terms restricts the widow's right, guaranteed by law, to qualify as administratrix of her deceased husband, and in connection with that restriction is the agreement upon his part to see that her bond as such administratrix is made, in the event he should thereafter decide that she might exercise her right under the law to qualify. This agreement to make her bond in the event he should desire her to qualify, taken in connection with the attempted restriction upon her right so to do, must have been intended to place her further under his control; for if she had insisted upon qualifying in opposition to his wishes, he might have prevented her qualifying by declining to make the bond, which it is apparent throughout the record she could probably not have made in any other way.

In addition, it was provided therein that he should have the control, not only of any fund which might be realized from a successful assertion of a claim for the death of the deceased, but of any other funds belonging to the estate, until such time as those funds might be distributed by an order of court. He was not only to control and manage in his own way the suit for Strange's death, but he was to have control of that fund when it might be recovered, and any other fund belonging to his estate before such recovery. That is, he was to be attorney, administrator, and sole adviser until such time as he might see proper to have the fund distributed. Not only so, but in addition he provides that the claim is not to be compromised without the mutual consent of himself and the widow, thereby taking from her the right to do that which the law guarantees her—namely, to settle or compromise her own litigation; and by so doing he was not only depriving her of a right given by

law, but he was contracting in opposition to a wholesome, well-recognized public policy which encourages the settlement and compromise of disputes and controversies.

But if there is in this contract one provision that is more vicious than all the others, it is the additional provision that, if she should compromise without his consent, he was to receive a \$5,000 fee. An analysis of this provision will quickly disclose that she was thereby restricted and prevented from compromising her claim for less than \$5,000, for if she did so she would have it all to pay him; in fact, if she had compromised for less than that amount, under a strict interpretation of the contract, she would still owe him the difference between that amount and any less amount she might have accepted, and she and her children would have been left without compensation.

But it is contended by appellant that the objectionable features of this contract may be eliminated and disregarded, and that he should then be permitted to recover upon the contract as thus emasculated, and he relies upon the cases of Newport Rolling Mill Co. v. Hall, 147 Ky. 598, 144 S. W. 760, and Louisville Ry. Co. v. Burke, 149 Ky. 437, 149 S. W. 865. In the Hall Case it was only held that, in a contract between an attorney and a client, wherein it was provided that neither party should settle the claim without the presence or consent of the other, this being the only objectionable feature in it, that it might be eliminated, and the plaintiff permitted to recover under the terms of the contract. In the Burke Case it was agreed by the client that he would not compromise the claim without the advice and consent of his attorney, and that, if he did so for a sum less than \$500, the attorney's fee should be \$250; and the court held in that case that the agreement not to compromise was void, and that, the client having compromised for \$50, the attorney might recover only half of that amount.

It will be observed that in each of those cases there was merely an agreement upon the part of the client not to compromise without the consent of the attorney; but neither of those cases had many of the objectionable features which we have here.

In the Hall Case the court, in holding that the contract there was severable, said:

"The general rule is that, if the obnoxious feature of a contract can be eliminated without impairing its symmetry as a whole, the courts will be inclined to adopt this view as the one most likely to express the intention of the parties; but if the good and bad are so interwoven that they cannot be separated without altering or destroying the general meaning and purpose of the contract, the good must go with the bad, and the whole contract be set aside."

[5] Let us analyze this contract under that rule, and see whether any part of it can be

upheld. If we eliminate from this contract the power which Proctor evidently sought—not only to control the litigation and the manner of its conduct; not only to control who should or should not be the personal representative—if we eliminate from it the control of the whole funds of the estate, which he manifestly sought to control; if we eliminate from it the agreement by the widow not to compromise without his consent; and eliminate from it her agreement that, if she should compromise it without his consent, she should pay him a \$5,000 fee—there is left the bare employment by the widow of the appellant, fixing a contingent fee. In this case the bare contract of employment and the fixing of the fee are so inextricably involved with and dependent upon the objectionable features which we have enumerated that the whole contract must be held to be invalid.

The contract involved here is much more far-reaching than the ones involved in either the Hall or the Burke Cases; here not only was there an agreement by the client not to compromise without the consent of the attorney, but the attorney sought the control and management of the litigation, and full control of the selection of an administratrix, and full control for an indefinite period of all funds belonging to the estate. Under this contract the client had no voice in the management of the litigation, and could not control or direct the manner of the prosecution of the case; under this contract the widow could not qualify as administratrix without his consent, and could receive no part of any sum recovered until an indefinite time in the future; that is, at such time as the attorney might cause an order of distribution to be made. To expurgate from the contract all the objectionable features would leave it unrecognizable, and would so far change the tenor and effect of it as that we cannot assume it would have been entered into by the parties at all in such form.

There is nothing in any of the amendatory or supplemental contracts which relieves the original contract from any of its objectionable features; there is no provision in any one of them which tends to alleviate or make less objectionable the vice in the original instrument. On the contrary, it may be said, without going into the amendatory contracts, that they evidence throughout the persistent purpose of appellant to carry out his original idea of control and domination of the whole litigation and to tighten his hold

and increase his control of the administratrix and the whole subject-matter of the litigation. On this branch of the case we are in accord with the opinion of the chancellor below that the original contract was wholly void as against public policy, and that there can be no recovery on it.

The plaintiff entered a motion for an issue out of chancery, and for a jury trial; but before this motion was acted upon the whole case was finally submitted for judgment, and in the argument the plaintiff himself and his counsel discuss fully the question as to the value of his services on quantum meruit theory, as well as his right of recovery under the contract, and in the argument it was expressly agreed by them that the court should try the case and enter a judgment. Thereafter, however, the plaintiff filed a brief before the trial judge wherein it was insisted that if the case was to be settled on quantum meruit, there should be an order of continuance and a jury trial directed. This the court properly refused to do, and overruled the motion.

[6] Clearly, after the final submission of an equitable action for judgment, and after the argument of the case by counsel, it is too late to ask for a continuance, and have a hearing before a jury of an issue out of chancery, and especially when the party had expressly agreed for the chancellor to enter a judgment on the whole case.

[7] On the cross-appeal it is insisted by appellee that, inasmuch as the plaintiff sought no recovery on quantum meruit, the court erred to its prejudice in entering the judgment for \$1,800. It will be remembered that the plaintiff in his petition alleged the value of his services, and the prayer of his petition prayed for all proper relief. So that the chancellor, when he came to enter a final judgment on a suit to recover on a contract which was void, and upon which there could be no recovery, having before him evidence of the value of the service that appellant had rendered and the prayer for all proper relief, even though he held that the contract sued upon was void, adjudged that the attorney had not forfeited his right to compensation, and that he was entitled to a recovery on quantum meruit, and properly adjudged such a recovery. Civil Code, § 90. Proctor Coal Co. v. Tye & Denham, 123 Ky. 381, 96 S. W. 512.

The judgment is affirmed on the original and cross appeals.



## LOUISVILLE &amp; N. R. CO. v. CRAFT.

(Court of Appeals of Kentucky. June 14, 1921.)

## 1. Limitation of actions §55(5)—Action for trespass to land held not barred by the five-year statute.

Where an injury to land occurred in the fall of 1911 and suit was brought on July 3, 1916, it cannot be said that the cause of action was barred by the five-year statute.

## 2. Eminent domain §266—Railroad company held liable for injuries to adjoining land irrespective of negligence.

A railroad company, entering on land outside of its right of way, removing soil therefrom, and causing a direct injury to plaintiff's mill by blasting stones into the river and changing the flow of the water so as to drown the mill, is liable irrespective of negligence.

## 3. Eminent domain §281—Acquiring right of way by condemnation gives railroad company no rights on adjoining lands.

Where a railroad company, having successfully brought condemnation proceedings acquiring a right of way through plaintiff's land, while constructing the railroad, enters upon and causes damage to plaintiff's land, *held*, that such damages are not covered by the price paid for the right of way.

## 4. Eminent domain §303—Where injury to real property is continuing, party acquiring title has right of action for resulting damages.

In an action against a railroad company for blasting rocks into a stream and causing injury to plaintiff's mill, *held*, that plaintiff is entitled to recover all the damages that resulted to the mill after he acquired title to the property by partition.

## 5. Trial §261—Erroneous request for instruction requires the court to give proper instruction.

Where a party offers an instruction which is refused by the court because of defect in form or substance, it is the duty of the court to give proper instructions on the point attempted to be covered by the instructions offered.

## Appeal from Circuit Court, Letcher County.

Action by Archelus C. Craft against the Louisville & Nashville Railroad Company and another. From judgment for plaintiff, defendants appeal. Affirmed in part, and reversed and remanded in part.

B. D. Warfield, of Louisville, and Morgan & Harvie, of Whitesburg, for appellants.

Hays & Newman, and D. D. Fields, all of Whitesburg, for appellee.

CLAY, J. Plaintiff, Archelus C. Craft, brought suit against the Louisville & Nashville Railroad Company and the Lexington & Eastern Railway Company to recover dam-

ages for the excavation and removal of soil from his land, and for injury to his mill caused by blasting rocks into the river and changing the flow of its waters. The jury fixed the damages for the injury to the land at \$50, and for injury to the mill at \$750. The defendants appeal.

The facts are these: Joseph E. Craft was the owner of a tract of land lying on the North fork of the Kentucky river in Letcher county. Upon his death in October, 1910, the land descended to his wife, Rosa Craft, and his heirs, including plaintiff. Thereafter the land was partitioned and conveyed by the special commissioner to the respective owners by deed dated April 27, 1912.

Before the land was partitioned, the railroads brought condemnation proceedings to acquire a right of way through the land. The suit resulted in a verdict fixing the damages at \$3,500, which the companies paid. While constructing the railroad, the companies entered upon the land outside of their right of way and made an excavation about 50 feet wide and 150 feet long, and removed the soil therefrom and destroyed a valuable apple tree. It further appears that they blasted rock into the river and thereby changed the flow of the water in such a way as to drown the mill.

[1] It is first insisted that the action was barred by the statute of limitations. In reply to this contention, it is sufficient to say that the injury occurred in the fall of 1911, and the suit was brought on July 3, 1916, and therefore within five years from the time the cause of action accrued.

[2, 3] Another contention is that the damages were included in the compensation paid for the right of way. Clearly this is not a case of incidental damages growing out of the prudent construction and operation of the railroad. On the contrary, it is a case where the railroad companies entered upon land outside of the right of way and removed the soil therefrom, and also caused a direct injury to plaintiff's mill by casting stones into the river and so changing the flow of the water as to drown the mill. In such a case, the railroad company is liable, irrespective of the question of negligence (*Langhorne v. Turman*, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. [N. S.] 211), and such damages are not covered by the price paid for the right of way (*Madisonville, H. & E. R. Co. v. Renfro*, 127 S. W. 508; *Childers v. L. & N. R. Co.*, 74 S. W. 241, 24 Ky. Law Rep. 2375).

[4] The further point is made that the injury to the mill occurred before the land was partitioned, and that plaintiff either acquired the title subject to the injury, or, as there were four heirs to the property, he was entitled to recover only one-fourth of the

damages. We had occasion to consider a similar question in the case of *Turner v. J. M. Brooks & Sons*, 151 Ky. 310, 151 S. W. 948, L. R. A. 1916E, 958, where the facts were as follows: J. M. Brooks & Sons blasted rocks into the river and so diverted the flow of the stream as to cause it to run over the land of plaintiff and injure their mill and other property. Plaintiffs purchased the property from J. J. Huff, and the blasting was done while he owned the property. After Huff sold the property, he brought suit against Brooks & Sons to recover damages for the injury to the property. He compromised the suit for the sum of \$55. The point was made that plaintiffs purchased the property in its depreciated condition and were not entitled to recover. In denying this contention, the court said:

"Defendants insist that as the blasting was all done, and the property permanently injured, prior to the time of its purchase by plaintiffs, the right of action for such injury was in Huff alone, and that as plaintiffs purchased the property in its depreciated condition, they are not entitled to recover. If this were a case of a permanent structure, lawfully and properly built, the contention of the defendants would be sound, for in that event there could be only one recovery for all damages, past, present, and future, and the vendor, Huff, alone would be entitled to recover. *L. & N. R. R. Co. v. Lambert*, 110 S. W. 305, 33 Ky. L. Rep. 199; *L. & R. R. Co. v. Orr*, 91 Ky. 109 [15 S. W. 8, 12 Ky. L. Rep. 756]; *Hay v. City of Lexington*, 114 Ky. 669 [71 S. W. 867, 24 Ky. L. Rep. 1495]; *Richmond v. Gentry*, 136 Ky. 319 [124 S. W. 337, 136 Am. St. Rep. 255]; *Stickley v. C. & O. Ry. Co.*, 93 Ky. 323 [20 S. W. 261, 14 Ky. L. Rep. 417]. But even in the case of a permanent structure, if the structure be unlawfully or negligently built, and by reason thereof injury is inflicted from time to time, there may be recurring recoveries. *City of Louisville v. Coleburn* [108 Ky. 420, 56 S. W. 681] 22 Ky. L. Rep. 64; *Klosterman v. C. & O. R. Co.* [56 S. W. 820] 22 Ky. L. Rep. 192; *Finley v. Williamsburg* [71 S. W. 502] 24 Ky. L. Rep. 1333; *Madisonville, Hartford & Eastern R. Co. v. Graham*, 147 Ky. 604 [144 S. W. 737]. This is not a case of a structure. The act of the defendants in blasting the stone into the river, and permitting it to remain there to the injury of others, was not based on any semblance of right. Being unlawful and wrongful from the very outset, we see no way in which it may become rightful as to the owners of the land, so long as any recurring injury occurs, unless by release or grant, or the payment of a sum covering all damages, past,

present, and future. Until this be done, or the nuisance be abated, recoveries may be had for each recurring injury. As recoveries may be had for each recurring injury, it follows that the right of action for each recurring injury is in the owner of the premises at the time the injury results, and a payment to a former owner after he has parted with title for injuries resulting to the property while owned by him is no defense to an action by a subsequent owner for injuries to the premises occurring after his purchase."

Under this rule, plaintiff was entitled to recover all the damage that resulted to the mill after he acquired the entire title, and his right of recovery being so limited by the instructions, the railroads have no cause for complaint.

[5] In submitting the issue of the injury to the mill, the court authorized the jury to find for the plaintiff "such sums in damages, if any, he has sustained thereby since the 27th day of April, 1912, so the sum so found, if anything, does not exceed the sum of \$1,000, the amount claimed in the petition." Though defendants offered an incorrect instruction on the measure of damages, no instruction other than the above was given. It has long been the settled practice that if a party offers an instruction which is refused by the court because of defect in form or substance, then it is the duty of the court to give a proper instruction on the point attempted to be covered by the instruction offered. *West Ky. Coal Co. v. Davis*, 138 Ky. 667, 128 S. W. 1074. It was error under the facts of this case not to follow this practice and to give a correct instruction on the measure of damages. In view of another trial, we deem it proper to say that the court should have told the jury in substance that if they found for the plaintiff under instruction No. 4, they should find such a sum in damages as would reasonably compensate plaintiff for the diminution in the value of the use of the mill.

We find no error in that part of the judgment awarding plaintiff \$50 damages for the destruction of his apple tree and the injury to his land caused by the excavation.

Wherefore that part of the judgment awarding plaintiff \$50 damages is affirmed, while that part of the judgment awarding him damages in the sum of \$750 for injury to the mill is reversed, and cause remanded for new trial consistent with this opinion.

**HENDERSON TELEPHONE & TELEGRAPH CO., Inc., et al. v. OWENSBORO HOME TELEPHONE & TELEGRAPH CO. et al.**

(Court of Appeals of Kentucky. June 24, 1921.)

Master and servant  $\Rightarrow$  389—Master who has not paid compensation cannot recover for injuries to servant.

Under Workmen's Compensation Act (Ky. St. Supp. 1918, § 4890), providing that where injuries are caused by third persons, an employer, having paid the compensation or become liable therefor, may recover in his own name or that of the employé from the person in whom liability exists, an employer, who has neither paid nor become liable to pay, has no right of action, in his own behalf nor for the indemnity company which paid the award, against a third person causing injury to an employé.

Appeal from Circuit Court, Davless County.

Action by the Henderson Telephone & Telegraph Company, Incorporated, and another, against the Owensboro Home Telephone & Telegraph Company and another. Cause dismissed, and plaintiffs appeal. Affirmed.

E. B. Anderson, of Owensboro, Fred Forcht, of Louisville, and W. Foster Hayes, of Owensboro, for appellants.

W. P. Sandidge, of Owensboro, for appellees.

SAMPSON, J. While operating its business under and in conformity to the Workmen's Compensation Law (Ky. St. Supp. 1918, §§ 4880-4987), appellant Henderson Telephone & Telegraph Company, Inc., was adjudged and directed by the Board of Workmen's Compensation to pay an injured employé named Graves about \$800 in weekly installments of \$12 each. Appellant company was insured as allowed by the Workmen's Compensation Act, with and by the Georgia Casualty Company, an indemnity insurance company engaged in that particular line of insurance. After the award of the Board of Compensation to Graves, the injured employé of appellant company, the said insurance company paid the same to Graves. Later this action was commenced by appellant Henderson Telephone & Telegraph Company, Inc., against the Owensboro Home Telephone & Telegraph Company, and Independent Long Distance Telephone & Telegraph Company, to recover the amount of the award made by the Workmen's Compensation Board and paid by the insurance company to Graves on the ground that the gross negligence of the two defendant companies in leaving exposed, at the place of Graves' employment, dynamite cartridges, a dangerous explosive which was the proximate cause of

the injury of Graves. An action may be maintained under section 4890, Kentucky Statutes, by any employer who has paid or become obligated to pay compensation to an injured employé, in his own name or that of the injured employé against a third person whose negligence was the proximate cause of the injury for which compensation was awarded, and this section of the statute is relied upon as authority for this proceeding.

The lower court sustained a demurrer to the petition of appellant on the ground that it was not the real party in interest, it not having paid the award to Graves, the payment having been made by the Georgia Casualty Company, which had issued the policy of insurance to the employing telephone company. To avoid this ruling of the court appellant company filed an amended petition in which it set up and admitted the fact that the entire payment of award to Graves had been made by the insurance company, and averred that the insurance company was a proper and necessary party to the action and asked that it be made party plaintiff and allowed to prosecute the action. About the same time the insurance company offered to and was allowed to file its petition to be made a party plaintiff, by which it adopted all the allegations of the petition of the original plaintiff, and asked that it be allowed to prosecute the action for its own use and benefit.

In addition to a traverse and plea of contributory negligence on the part of Graves, the separate answer of the two defendants contained a plea in abatement of the right of either the telephone company or the insurance company to maintain the action. A demurrer to this latter plea was overruled, and a motion to strike both the amended petition of the telephone company, and the petition to be made a party by the insurance company, were sustained and these pleadings stricken. The plaintiff declining to further plead, the petition was dismissed, and this appeal results.

This court, in the case of *Book v. City of Henderson*, 176 Ky. 785, 197 S. W. 499, had occasion to and did construe, in part, section 4890, Kentucky Statutes which is a part of the Workmen's Compensation Act, and in so doing said:

"It will be seen, from the above quotation from the act, that an employé, injured by the negligence of a third party, may, at his option, claim compensation from the employer under the provisions of the act; or proceed at law by civil action against the negligent third party to recover damages; or, third, proceed both against the employer for compensation and against such other third person to recover damages. The third option is, however, limited by the provision that he shall not collect from both; and it is this limitation upon the third option we are called upon to construe.

"It is the contention of appellee that, although the employé has the right to proceed against both the employer for compensation and the third party for damages, necessarily by separate and distinct proceedings, one before the Workmen's Compensation Board under the act and the other by action in court, he may not collect any amount from one without waiving his right to proceed against the other; while appellant contends the limitation is only upon his right to collect double damages, in whole or in part, for the injuries he has received. \* \* \* If it had been the intention of the Legislature to require an injured employé, as many such acts in other states require, to elect whether or not he would proceed against the employer or the negligent third party, it would have given only the first two options set out in the act. But, having given him the option of proceeding against either or both, it is not reasonable to believe that the Legislature thereby meant that, in order to avail himself of his right to proceed against both, he must forego, until the end of the litigation with the negligent third party, which might be protracted, the acceptance of small weekly benefits awarded against the employer under the Workmen's Compensation Act. \* \* \*

"We, therefore, conclude that the proper construction of this limitation upon the right of an injured employé to proceed against both, that he shall not collect from both the employer and the negligent third party, is, that to the extent he collects from one he may not collect from the other; from which it follows, the lower court erred in overruling the general demurrer to the fourth paragraph of the answer and in dismissing the petition."

Under section 4890, Ky. Statutes, there can be no question of the right of an employer who has paid or become obligated to pay an award of the Board of Compensation to an injured employé to bring and maintain in his own name or that of the injured employé an action against a third person whose negligence was the proximate cause of the injury to the employé to whom compensation was awarded, to recover a sum not in excess of the award but can the insurance company which issues the policy, to the employer indemnifying him against loss on account of such accidents be subrogated to the rights of the employer and allowed to bring in its own name, or that of the employer or the injured employé, an action against the third party whose negligence brought about the injury, and recover the amount or any part thereof paid by it on the award? That is the exact question in this case, and one we have not before considered, nor one which has been often considered by other courts so far as we are advised. Unqualifiedly, we must hold under the plain and express terms of the statute that the employer who has neither paid nor obligated himself to pay the award to an injured employé has no right of action against a third party whose negligence was the proximate cause of the injury of the employé, for the language of the act is:

"The employer, having paid the compensation or having become liable therefor, shall have the right to recover in his own name."

The payment or obligation to pay the award on the part of the employer is a condition precedent to his right to maintain the action against a third party. The statute gives no right of action in such case to the insurance company either in its own name, or that of the employé to recover the amount paid on the award from the negligent third person who caused the injury from which the award was made. So if such right of action exists it is on equitable grounds of subrogation and not by statute in this state. The statutes on this subject are not the same in all the states. We can conceive no equitable reason why the insurance company should have such right of action against a third person. The employer in conjunction with many others pays to the insurance company a sum larger than that which is required to satisfy all such claims for indemnity, and the insurance company only appropriates from such fund such part as is necessary in the given case to satisfy the award. It has lost nothing whatever. In fact, it has applied a part, only, of a common fund to the satisfaction of an award which it undertook, in consideration of the deposit of such fund and the profits to be derived therefrom, to satisfy. Appellants in their brief admit as much, saying:

"Not only does the statute not give the right of action to an insurance company, but perhaps no equitable reason why it should have such right. The employer in a given case, together with other employers, pays to the insurance company a fund greater than the losses it will sustain. In paying a claim for the employer therefore the insurance company simply appropriates money paid for that purpose. It has, therefore, no equitable right of compensation from a third person who may be in default."

But it is insisted that the employer, being at a constant expense in providing or maintaining a fund for the payment of such claims, is properly given by the statute a right of action against the tort-feasor to recoup the loss sustained. The employer by the statute has the right only when he has paid or obligated himself to pay such award, and in no other case. The mere fact that he has paid an insurance premium does not operate to give to him the right to maintain such action, and the statute cannot be so construed. Where he does not pay or obligate himself to pay the award of the board to the injured employé neither he nor the insurance company have a cause of action against the third party causing the injury, but the injured employé may have such action even though he accepts compensation from the employer, and if he recover a judgment greater than the award he can have only the excess and not the whole amount,

for the extent of the award it would be double damages or compensation, which is not allowable. If the judgment be only equal to or less than the award, the injured employé having already received or been allowed that amount cannot, under the express terms of the statute, take the benefits of the judgment; nor is there any one else entitled to take the benefit of such judgment in cases where the award was paid by the insurance company and not by the employer. Neither the employer nor the insurance company having suffered a loss is not entitled to take the benefit of the judgment. In states where the insurance companies are entitled to recover against a negligent third party the statute is so worded as to confer the right and not as in the Kentucky Statute which by implication excludes the insurance company from the right.

The trial court made no mistake in holding appellant without right to prosecute the action and in dismissing their petitions.

Judgment affirmed.

### DAMRON v. JOHNSON.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

#### 1. Elections §151—Five-day period allowed for filing contest runs from completion of tabulation of votes.

The five days allowed for filing of primary election contest under Ky. St. § 1550, subsec. 28, runs from completion of tabulation of votes by election commissioners, and not from issuance of certificate of nomination.

#### 2. Elections §151—Rejection of amendment to notice of contest so as to supply jurisdictional fact held error.

In primary election contest, under Ky. St. § 1550, subsec. 28, rejection of amendment to notice of contest merely disclosing when election commissioners completed tabulation of the votes so as to show jurisdictional fact that notice was filed within following five-day period, tendered before the court passed upon the question of jurisdiction, held error.

#### 3. Time §10(1)—Sunday included within time in which act may be done only if period exceeds a week.

Generally, Sunday is included in the number of days within which an act may be done if the period exceeds a week, but is not included if the time is less than a week.

#### 4. Time §10(1)—Sunday not included within five days allowed for filing of primary election contest.

Sunday is not included as one of the five days allowed, after tabulation of votes, for filing of notice of contest under Ky. St. § 1550, subsec. 28.

#### 5. Elections §151—Notice of election contest held sufficiently definite as to place.

Notice of primary election contest under Ky. St. § 1550, subsec. 28, fixing the place for contestee to appear and defend as "the courthouse in Pikeville, Pike county, Ky.," held sufficiently definite as to place.

#### 6. Elections §154(12)—Court of Appeals will not render final judgment in primary election contest where there was no trial of issues of fact.

In primary election contest, under Ky. St. § 1550, subsec. 28, the Court of Appeals, on reversal of judgment dismissing the contest without a trial of the case on the issues of fact involved, will not render a final judgment, but will reverse the judgment and remand the case.

#### 7. Elections §154(6)—Contestant's failure to file proof before judgment not available on appeal where point not raised in trial court.

In primary election contest, under Ky. St. § 1550, subsec. 28, contestant's failure to file proof before judgment is not available on appeal, where the point was not raised in the lower court.

#### 8. Elections §154(10)—Trial court has discretion in granting additional time for taking proof.

In primary election contest under Ky. St. § 1550, subsec. 28, the trial court has discretion in granting additional time for taking proof if the ends of justice demand it.

Appeal from Circuit Court, Pike County.

Election contest by Luther Damron against J. M. Johnson. Judgment of dismissal, and contestant appeals. Reversed and remanded, with directions.

Joseph D. Harkins, of Prestonsburg, for appellant.

J. J. Moore and Willis Stanton, both of Pikeville, for appellee.

CLARKE, J. At the primary election held on August 6th of this year, appellant and appellee were candidates for the Republican nomination for sheriff of Pike county. Appellant received 1,279 votes and appellee 5,834 votes, according to the official count, and the certificate of nomination was awarded to appellee.

On August 16th appellant served notice of contest on appellee, stating therein his grounds of contest and warning appellee to appear at the courthouse in Pikeville on August 19th to defend the contest, as required by subsection 28 of section 1550, Kentucky Statutes.

On the day named, the regular judge being engaged in court elsewhere in his district and unable to attend, appellee filed in the office of the clerk of the circuit court a motion to quash the return on the notice, a special demurrer, and, without waiving the

demurrer or motion to quash, he also filed a motion to strike, a general demurrer, and a response controverting every material allegation of the grounds of contest stated in the notice, which is the approved practice under such circumstances.

The regular judge did not return to Pikeville until August 29th and then entered an order that he was disqualified and declined to try the case. The Governor thereupon designated a special judge to try the case who appeared for the purpose on September 5th. Appellant then tendered an amendment to the notice and grounds of contest which the court upon objection by appellee refused to file. On the next day the court sustained the motion to quash and the special demurrer and dismissed the contest, whereupon appellant executed supersedeas bond and has appealed.

[1] The notice of contest did not disclose when the election commissioners completed the tabulation of the votes and ascertained the result, which rather than the issuance of a certificate of nomination fixes the time from which the five days allowed for filing a contest begin to run. *Ward v. Howard*, 177 Ky. 38, 197 S. W. 506; *Lay v. Rose*, 177 Ky. 303, 197 S. W. 921.

It was to supply this omission that appellant offered to file the amendment refused by the court, and whether or not the court erred in refusing to permit same to be filed is the first question for decision.

The primary election law provides, and this court has frequently decided, that no new grounds of contest can be filed by the contestant after the expiration of the five days allowed for serving notice of contest, but there is no provision of law denying the right to amend where no new grounds of contest are asserted and the amendment is seasonably offered; and this court has frequently recognized a right so to do. *Johnson v. Little*, 176 Ky. 505, 196 S. W. 156, Ann. Cas. 1918A, 70; *Kash v. Hurst*, 189 Ky. 233, 224 S. W. 757. In the latter case the court refused an offered amendment because it came too late and contained new matter of contest, but said:

"Reasonable indulgence, consistent with the statutory requirements, should be accorded both parties in the preparation and conduct of election contest cases, in order to enable them to present every fact or issue having any bearing on the contest, the aim of the court being to arrive at the real facts. The rights \* \* \* of the parties are mutual, and the court must not so far indulge the one litigant as to work a hardship or injustice to the other."

[2] The amendment offered here did not attempt to assert any new ground of contest or to correct the one stated in the original notice except by stating a jurisdictional fact necessary to any contest that had been inadvertently omitted. It was tendered before the court passed upon the question of juris-

diction, occasioned no delay, and in no way misled or worked a hardship or injustice upon the other litigant. Such an amendment would have been allowed in any other litigation under similar circumstances, and we are of the opinion the court erred in rejecting the amendment offered by contestant here.

The only case cited on this point by appellee is *Lay v. Rose*, supra, in which the question was not presented or discussed. That case does not even hold as contended that in the absence of a statement in the original notice of the time when the election commissioners ascertained the result of the election, it will be conclusively presumed they did so on the day fixed in the statute, which in this case was August 9th. It is only there said that in the absence of a showing "on the face of the papers" when the result was ascertained "the legal presumption is that they performed this duty on the day designated by the statute." It does not even suggest that this presumption referred to cannot be overcome by pleadings, but rather strongly implies that it may be done by using the term "face of the papers" rather than "the original notice."

The amendment states that the election commissioners were in session tabulating the vote, etc., on August 9th, 10th, 11th, and 12th, but the certified copy of their proceedings states they were in session only on August 9th, 10th, and 11th, and shows that the votes were tabulated and the result of the election ascertained on the 11th. A stipulation of facts on this question, however, rather indicates that the tabulation of votes made on the 11th was only tentative and the result of the election was not finally determined by the election commissioners until the 12th, but we may assume it was on the 11th, since even so the notice of contest was served in time. The 11th of August was Thursday, and since the statute provides that the notice must be served "within five days from the time the election commissioners" shall have acted, it is clear, as agreed by counsel, that that day must be included in computing the five days. Thus computed, it was actually six days before the notice was served on the 16th, but a Sunday intervened, and if this be excluded, as contended by contestant must be done, then there were but five days and the notice was in time.

[3, 4] The general rule is that if the time within which an act may be done exceeds a week, Sunday is included, but, if it is less than a week, Sunday is not included. 26 R. C. L. 751; 38 Cyc. 333, note 76; note to *State v. Michel*, 78 Am. St. Rep. 378. This rule has been adopted and uniformly observed in this state so far as we can ascertain. *Roettger v. Riefkin*, 130 Ky. 197, 113 S. W. 88; *Id.*, 113 S. W. 902; *Geneva Cooperage Co. v. Brown*, 124 Ky. 16, 98 S. W. 279, 30 Ky. Law

Rep. 272, 124 Am. St. Rep. 868. And it was approved and applied in an election contest case with reference to the time provided by statute for filing petition and issuing process thereon in *Lowery v. Stotts*, 188 Ky. 251, 127 S. W. 789. There appears no valid reason why it should not apply in such cases; hence we conclude that the intervening Sunday should be excluded and the notice served upon August 16th was in time, even if the time be reckoned from August 11th. The only cases relied upon to support appellee's contrary contention are *Price v. Russell*, and *Coleman v. Morgan*, 154 Ky. 824, 159 S. W. 578; but the question was not raised or discussed and the results would not have been altered in either case had the question been raised. We cannot therefore accept these cases as authority upon the matter or as in conflict with the rule as uniformly observed in this jurisdiction and quite generally elsewhere.

[5] It is further insisted that the notice in fixing the place for contestee to appear and defend "at the courthouse in Pikeville, Pike county, Ky.," is not sufficiently definite as to place; but this insistence is so clearly without merit as not to require discussion. See *Wheeler v. Patrick*, 233 S. W. 747, this day decided.

It therefore results that the court erred in sustaining the special demurrer and the motion to quash.

[6] It is insisted, however, that the judgment dismissing the petition should be affirmed because of the failure of contestant to offer any evidence to sustain his grounds of contest, which were controverted by appellee's response; that this court has no power to reverse and remand such a contest for retrial, but must finally dispose of it. Such, however, is only the case where the issues are finally decided in favor of one party or the other as could be and was properly done by this court in *Price v. Russell* and *Coleman v. Morgan*, supra, relied upon by contestant on this point. What was said and done in those cases necessarily related to the facts as there presented and can have no applicability to so different a state of case as is now presented. Besides the language of the statute (subsection 28 of section 1550) is not susceptible of a construction to give to this court the right to decide the issue of fact where same not only had not been decided by the court below but a final trial of the issues by this court is impossible. The language of the statute is that, "If on the trial of such contest (in this court) the issue is finally decided in favor," etc., this court shall make all necessary final orders.

This court cannot on the record made up below, there being no evidence introduced on either side and the case having been submitted only on the special demurrer and the

motion to quash, try the contest or finally decide the issue; hence this provision of the statute with reference to final orders by this court was clearly not intended to apply and never has been applied to such a state of facts. On the other hand, it has been the uniform practice of this court to reverse and remand for trial where the case went off below erroneously on a demurrer or other preliminary motion and without a trial of the contest as is attested by the following cases and others that might be cited. *Wheeler v. Patrick*, supra; *Thurman v. Alvey*, 233 S. W. 749, decided September 23, 1921.

[7, 8] The fact that contestant's proof ordinarily should have been filed before the judgment was entered under the statute as construed in *Lay v. Rose*, supra, is not here available, where the failure was not taken advantage of below by a motion to submit or otherwise, since the trial court has a discretion in granting additional time for taking proof if the ends of justice demand it, and this court cannot undertake to pass upon that question until it has been raised before and passed upon by the trial court.

Wherefore the judgment is reversed, and the cause remanded for further proceedings consistent herewith. Mandate will issue immediately.

SAMPSON, J., not sitting.

## WHEELER v. PATRICK.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

### 1. Elections $\S$ 151—Primary election contest notice held sufficient.

Notice of primary election contest under Ky. St.  $\S$  1550, subsec. 28, requiring contestee to answer "in the Floyd circuit court in the courtroom in Prestonsburg, Ky.," held sufficient as to place where contestee was required to appear.

### 2. Elections $\S$ 154(12) — Court of Appeals will not decide contest on reversal of judgment of dismissal for want of jurisdiction, but will remand proceeding.

In primary election contest, under Ky. St.  $\S$  1550, subsec. 28, the Court of Appeals, on appeal from judgment of dismissal for want of jurisdiction, without the evidence having been introduced, will not decide the contest and certify the result to the proper officers, but, on reversal of judgment, will remand the proceedings.

Appeal from Circuit Court, Floyd County.

Election contest by C. B. Wheeler against A. T. Patrick. Judgment of dismissal, and contestant appeals. Reversed and remanded, with directions.

C. B. Wheeler and John N. Hamilton, both of Prestonsburg, for appellant.

Joseph D. Harkins, of Prestonsburg, for appellee.

CLAY, J. C. B. Wheeler and A. T. Patrick entered the August primary for the purpose of being nominated by the Republican party as its candidate for the office of circuit judge of the Thirty-First judicial district composed of Floyd and Knott counties. Patrick was awarded the certificate and Wheeler instituted a contest. Patrick, the present incumbent of the office, being disqualified, the Governor appointed a special judge to hear the case. Being of the opinion that the contest notice was insufficient, the special judge entered a judgment dismissing the proceeding for want of jurisdiction. Wheeler appeals.

The statute provides that the notice shall be served in the same manner as a summons from a circuit court, and shall warn the contestee of the time and place, when and where, contestee shall be required to answer and defend the contest. Kentucky Statutes, § 1550, subsec. 28. The notice which was served on Patrick contained the following:

"Contestee is a resident of Floyd county, and is therefore called upon and required to answer herein in the Floyd circuit court in the courtroom in Prestonsburg, Ky., on Thursday, September 28, 1921."

[1] The notice was held insufficient because it warned the contestee to answer in the courtroom instead of the clerk's office. We are not disposed to take such a narrow view of the statute. The essential feature of the notice with respect to the place where the contestee must answer is the court, and where the particular court and the county in which it sits are designated in the notice, that is sufficient. If these requirements are met, then the contestee may file his motions and pleadings in the clerk's office if the court is not in session, or in the courtroom if the court is in session. Here the notice required the contestee to answer in the Floyd circuit court, and the mere fact that the words "in the courtroom" are added, or the words "in the circuit clerk's office" were not used in place of the words "in the courtroom," in no wise affected the validity of the notice. It follows that the lower court erred in dismissing the action for want of jurisdiction, because the notice was insufficient.

[2] As the judgment below was erroneous, it remains to determine what disposition shall be made of the case. Both parties are claiming that under the statute this court has no power to reverse the judgment, but must finally decide the contest and certify the result to the proper officers, and each is claiming that he is entitled to a judgment in his favor on the face of the pleadings. It is only where the issue has been finally decided in favor of one of the parties that this fact

shall be certified to the proper officers. Kentucky Statutes, § 1550, subsec. 28; Price v. Russell, 154 Ky. 824, 159 S. W. 573. This procedure will not be followed where, as here, the contest was dismissed for want of jurisdiction, and the parties have been deprived of an opportunity to take and introduce their evidence. Damron v. Johnson, 192 Ky. 350, 233 S. W. 745. In such a case the judgment will be reversed with directions to hear and determine the case in the manner provided by statute.

The motion to quash the bond and discharge the supersedeas is overruled.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

SAMPSON, J., not sitting.

### FLANARY v. CHARLES.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

Appeal from Circuit Court, Pike County.

Election contest by W. E. Flanary against W. Charles. Judgment of dismissal, and contestant appeals. Reversed and remanded.

John D. Carroll and Hazelrigg & Hazelrigg, all of Frankfort, and E. D. Stephenson, of Pikeville, for appellant.

J. J. Moore and Willis Staton, both of Pikeville, for appellee.

QUIN, J. This is a contest for the Republican nomination for judge of the Pike county court. At the primary held August 6, 1921, according to the face of the returns certified by the election commissioners, appellant and contestant received 2,920 votes, appellee 3,280 votes, and a third candidate 984 votes. The lower court sustained a motion to quash the sheriff's return on the notice of contest on the ground that it was served more than five days after the county board of election commissioners canvassed and tabulated the vote. The petition and notice of contest were dismissed, and appellee Charles declared the nominee for the office aforesaid. Complaining of this judgment, contestant appeals.

The facts in the case of Damron v. Johnson, 233 S. W. 745, this day decided, and which involve the Republican nomination for sheriff of Pike county, are practically identical with those found in the instant record; both grew out of the same primary election. The points discussed in that opinion as to whether Sunday should be excluded in the computation of time for the service of notice and of contestant's failure to offer any evidence are the same as raised on the present record. The reasoning of the opinion in the case *supra* is controlling here.

The judgment is accordingly reversed, and the cause remanded for further proceedings; the mandate to issue immediately.

SAMPSON, J., not sitting.



## THURMAN v. ALVEY.

(Court of Appeals of Kentucky. Sept. 23, 1921.)

1. Pleading  $\Leftrightarrow$  1—Purpose is to inform opposing litigant of grounds of complaint or defense.

The purpose in pleading is to inform the opposing litigant with reasonable certainty of the grounds of complaint or defense, so that he may be prepared to meet them on the trial.

2. Elections  $\Leftrightarrow$  151—Notice of primary election contest held insufficient.

Notice of primary election contest under Ky. St. § 1550, subsec. 28, on the ground that a large number of ineligible persons were knowingly permitted to vote, held insufficient, in that it did not state the names of the ineligible voters, and give the facts rendering them ineligible.

3. Elections  $\Leftrightarrow$  151—Notice of primary election contest held sufficient to charge fraud, mistake, or oversight in counting or certifying votes.

Notice of primary election contest under Ky. St. § 1550, subsec. 28, stating that "an accurate, fair, and impartial count of the ballots legally cast" would have shown that contestant received more legal votes than contestee, held sufficient to charge that there was a mistake, oversight, or fraud in counting or certifying the votes.

4. Elections  $\Leftrightarrow$  154(9½)—Pleadings in primary election contest sufficient if grounds are set forth with reasonable clearness.

In view of Ky. St. § 1550, subsec. 36, providing for liberal construction of primary election act, the pleadings of the parties in a primary election contest should not be construed according to the strict common-law rules, but should be held sufficient when allegations set forth with reasonable clearness the grounds relied on.

Appeal from Circuit Court, Marion County.

Election contest by W. H. Thurman against Willie E. Alvey. Judgment of dismissal, and plaintiff appeals. Reversed, with directions.

H. W. Rives, of Lebanon, for appellant.

H. S. McElroy, of Lebanon, for appellee.

THOMAS, J. The appellant and appellee were opposing candidates in the August, 1921, primary election for the Democratic nomination for the office of jailer of Marion county. The officers of the election returned, and the board of election commissioners for the county certified, that the appellee, Alvey, received in that election 942 votes, and that the appellant, Thurman received 913 votes, and the certificate of nomination was issued to the appellee. Two days after the county board canvassed the votes and awarded their certificate of nomination to the appellee, the

appellant served notice of contest on him pursuant to the provisions of subsection 28 of section 1550 of the Kentucky Statutes, and two days thereafter and within the time prescribed in that subsection another notice of contest was served on appellee setting up an additional ground to the one stated in the first one, and each of them cited the appellee to appear and make defense on the 17th day of August thereafter. The appellee appeared at the appointed place and upon the day stated in the notices and entered motion before the circuit judge of the district, who heard the cause to strike from the files the second notice served, upon the grounds: (a) That it was in the nature of an amendment to the first notice and that it was incompetent for such an amendment to contain new or additional grounds of contest; and (b) that the additional grounds stated therein were not sufficiently specific and did not meet the requirements of the law in that particular. Those grounds were that in certain named precincts "a large number of persons ineligible to vote in said Democratic primary were knowingly permitted and procured to cast their ballots for you (appellee) for the said nomination," and which is alleged in the notice amounted in the aggregate to more than the plurality reported and certified for the appellee. The court sustained the motion and struck from the files the second notice. Thereupon appellee filed a demurrer to the first notice which the court sustained and dismissed the proceedings, and to obtain a review of the rulings of the court appellant prosecutes this appeal.

[1, 2] Whether ground (a), which was sustained by the court, is or is not sound, we need not determine, since there can be no doubt of the propriety of the court's ruling in sustaining ground (b). The purpose in pleading, whether it be styled a notice or be designated by any other name, is to inform the opposing litigant with reasonable certainty the grounds of complaint or defense so that he may be prepared to meet them on the trial. In furtherance of that purpose, it has been uniformly held by us that in election contest cases where the ground was the casting of ineligible votes, the pleader should name the persons whose votes he questions upon that ground as well as the facts which rendered them ineligible. *Weller v. Muenninghoff*, 155 Ky. 77, 159 S. W. 632; *Horton v. Botts*, 158 Ky. 11, 164 S. W. 352; *Clark v. Robinson*, 159 Ky. 25, 166 S. W. 801; *Francis v. Sturgill*, 163 Ky. 650, 174 S. W. 753; *Thompson v. Stone*, 164 Ky. 18, 174 S. W. 763; *Johnson v. Little*, 176 Ky. 505, 196 S. W. 156, Ann. Cas. 1918A, 70; *Hardy v. Russell*, 181 Ky. 287, 204 S. W. 145; and *Kash v. Hurst*, 189 Ky. 233, 224 S. W. 757.

We therefore conclude that, in the absence of an offer of appellant to amend his

second notice, the court properly struck it from the record.

The sole ground of contest stated in the first notice was that the appellant received more legal votes in the primary election for the nomination for the office involved than did appellee, and that "an accurate, fair, and impartial count of the ballots legally cast for each of us would have shown that I (appellant) received more legal votes than you (appellee) received, and that I (appellant) was therefore justly and legally entitled to the certificate of nomination"; and further that "a count of all the votes I (appellant) received and those received by you (appellee) will show that I (appellant) duly received more votes at said primary election than you (appellee) did, for the nomination that both of us were seeking." The court was of the opinion that the statements in the notice did not sufficiently charge mistake, oversight, or fraud in the counting or certifying of the votes to authorize it to open the ballot boxes and recount them upon the trial of the contest, provided it was shown that they had been preserved with the requisite integrity.

In the case of *Snowden v. Flanery*, 159 Ky. 568, 167 S. W. 893 (which was a contest growing out of a regular November election), the only ground alleged by the contestant was that the officers of the election, by mistake or oversight, counted and certified for the contestee more votes than he in fact received and a less number of votes for contestant than he in fact received, and that those corrections would give the contestant a majority of the votes cast. The first question before the court in that case was whether the allegations were sufficient to authorize a recount of the votes in the contested precincts (which in this case are all of them in the county), and in disposing of that question the opinion says:

"Upon a thorough and full consideration of the question, the court has reached the conclusion that a recount may be had upon the naked allegation of mistake in the counting and certifying of the vote; and, in a large measure, we have been aided in reaching this determination by the fact that we believe a most salutary influence will be exercised in favor of the honesty of elections and in the prevention of election frauds by the promulgation of the ruling herein announced.

"The trend of the best modern thought is along the lines of establishing beyond cavil the absolute fairness and honesty of the elections whereby is indicated the will of that large percentage of the people of the commonwealth who do not actively participate in the operation of the election machinery further than the casting of the individual vote, to the end that the people shall have an abiding and confiding faith in the integrity of their elections, respect for the officers chosen at those elections, and show willing obedience to the law as administered by them."

[3] The question therefore for our determination is whether the language in the above quotations, taken from the notice, is sufficient to charge in effect that there was a mistake, or oversight, or fraud in counting or certifying the votes which were cast for the appellant and appellee in the August primary for the Democratic nomination for the office of jailer of the county, and to inform appellee with reasonable certainty of the grounds of contest so as to enable him to make defense thereto. Upon thorough consideration (but not without some hesitation), we have concluded that the answer should be in the affirmative. The notice alleges in effect that the officers of the election in the several election precincts of the county inaccurately, unfairly, and with partiality counted and returned the ballots cast in the race for nomination for jailer of the county. Those charges could not be true, unless the election officers acted under a mistake or by oversight or through fraud on their part in making the inaccurate or unfair return. We do not understand it to be imperatively necessary to employ the words "mistake," "oversight," or "fraud" in election contest proceedings; it only being necessary that the allegations are sufficient to clearly imply a charge of either of them to make the pleading good on demurrer. This being true, the case comes directly within the doctrine of the *Snowden* Case, supra, and the court erred in sustaining a demurrer to the first notice.

[4] We are aware that there is a dictum contrary to the views above expressed in the opinion in the case of *Pace v. Reed*, 138 Ky. 605, 128 S. W. 891; but it is based upon an erroneous quotation made from the case of *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257, 24 Ky. Law Rep. 1099, 25 Ky. Law Rep. 435. The learned judge who wrote the opinion in the *Pace* Case was evidently misled into making the supposed quotation from the *Edwards* Case through error of counsel in preparing their briefs in the former case. However this may be, the *Snowden* opinion is the latest utterance of this court upon the subject; and it must also not be overlooked that each of the cases referred to was a contest of a regular election where the pleadings required are the same as are required in other actions, while this proceeding is only contesting the nomination in a primary election where the initial pleading is only a notice and which under the statute is required to state only "the grounds of such contest." Subsection 36 of section 1550 is a part of the act providing for primary elections for the nomination of candidates to be voted for at the regular November election and, consequently, is a part of the same act providing for the character of contest now under consideration. It says, in part:

"This act shall be liberally construed so as to carry out its purpose, and give to the voters of the different parties an opportunity to select their candidates."

The evident purpose of the act is that the candidate receiving the highest number of votes shall be awarded the nomination; and the only way that the voters of the different parties may be given "an opportunity to select their candidates" is for their votes to be counted as cast. There is therefore expressly enjoined upon this court, by the act itself, the duty of so construing it in its entirety as to carry out the purposes mentioned. A portion of the act, as we have seen, is subsection 23 providing for contests, and we think the express injunction contained in the act, for its liberal construction, requires of us that we should not construe the pleading of the parties according to the strict common-law rules, but rather that we should hold the pleading sufficient (which in this case is the notice of contest) when its allegations set forth with reasonable clearness the grounds relied on. Of course, where the statute is clear and explicit as to the exact step which shall be made, or the precise action that shall be taken, it should be followed. In that part of the act providing for a contest there is no specific provision as to the particularity with which the grounds shall be alleged. We therefore conclude that where, as in this case, the language states by clear implication the grounds relied on, it will be sufficient.

Wherefore the judgment is reversed, with directions to overrule the demurrer to the first notice and for proceedings consistent with this opinion.

### SWANER v. BARNETT.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

1. Elections  $\S$  154(9½)—Same exactitude in pleading not required in primary election contests as in ordinary suits.

The same exactitude and particularity in pleading will not be required in primary election contests as in ordinary suits at law.

2. Elections  $\S$  151—Notice of primary election contest held sufficient.

Notice of primary election contest, alleging that, by reason of fraud or mistake of election officers in counting ballots and certifying result, the returns were erroneous, that certificate of election officers registered a false result because of fraud or mistake, and that contestant in fact received the highest number of legal votes for the nomination, and that such result would be shown by a recount of the ballots, held sufficient, in view of Primary Elec-

tion Act (Ky. St.  $\S$  1550, subsec. 36), to charge fraud or mistake of election officers producing a wrongful result.

3. Elections  $\S$  154(1) — Ballots erroneously counted for contestee deducted from his total, though not cast for contestant.

In primary election contest, ballots erroneously counted for contestee will be deducted from his total, though they had not been cast for contestant but for other candidates.

### Appeal from Circuit Court, Laurel County.

Election contest by G. W. Swaner against W. H. Barnett. Judgment of dismissal, and contestant appeals. Reversed, with instructions.

H. C. Clay, of London, for appellant.

John D. Carroll, of Frankfort, George Brock, of London, and H. H. Tye, of Williamsburg (A. Tye Siler, of Williamsburg, of counsel), for appellee.

TURNER, C. Appellant and appellee, together with several others whose names do not appear, were candidates at the August primary, 1921, for the Republican nomination for jailer of Laurel county.

The returns as certified from the various precincts disclosed that appellant and appellee were the two leading candidates; the appellee receiving 789 votes, and appellant 779.

Accordingly, the county board of election commissioners issued a certificate of nomination to appellee.

Appellant, within the time prescribed by law, gave his notice of contest to appellee, who, at the time fixed, filed his response, which was merely a traverse; there being no counter grounds stated.

At the time of the filing of the response a general demurrer was filed by the appellee to each paragraph of the notice, and to the same as a whole.

On a hearing, the only evidence introduced, other than that of the clerk and his deputy, tending to show the preservation and integrity of the ballots, was the counting of the ballots in the eight precincts designated in the notice; and the court adjudged that—

"This cause being submitted on the evidence, the court finds from the evidence that at said primary election the contestant, G. W. Swaner, received at said election in Laurel county 784 legal votes, and that the contestee, W. H. Barnett, received at said election in said county 777 legal votes; but the court further finds that under the pleadings in this case the contestant is not entitled to have any reduction in number of the votes certified for contestee, to wit, 789, by the election commissioners, for the reason that it is not alleged as a ground of contest that contestee did not receive that number of votes in said county, and there being no evidence that any of the votes cast or counted for contestee, W. H. Barnett, were,

in fact, cast for contestant, contestant is not entitled to receive the certificate of nomination herein."

And then the court proceeded to dismiss contestant's proceeding, and he has appealed.

The recount in the only precincts involved showed that appellant received more legal votes than appellee, but the court having dismissed appellant's contest because, in its opinion, his pleadings were insufficient, there is presented only the question of the sufficiency of the notice.

The contestant, after stating in the preliminary part of his notice that he contests the nomination of appellee and the vote certified for appellee at the primary, subdivides his notice as shown by the figures thereon into 1, 2, 3, and 4, without disclosing whether he intends those subdivisions to be considered as separate paragraphs, stating separate grounds of contest; but the demurrer filed by the contestee went to each of them as separate paragraphs and to the notice as a whole.

That they were not intended as separate grounds of contest is apparent, however, from the fact that in his first subdivision, No. 1, he sets out only the holding of the election and the purpose for which it was held, the facts showing his eligibility, and his compliance with certain provisions of the statute. Clearly this could not have been intended as a ground of contest, for the mere fact that he was a Republican, of required age, and otherwise eligible to the office, could not have been intended as a good reason why he was entitled to the nomination and the contestee was not.

[1] In this situation, therefore, we shall, as the circuit judge appears to have done, treat the whole notice as one paragraph and pass upon its sufficiency in that light; and particularly will we do this in the light of the provision in the primary act (Ky. St. § 1550, subsec. 36) that "this act shall be liberally construed so as to carry out its purpose, and give to the voters of the different parties an opportunity to select their candidates." And further, in pursuance of the rule heretofore announced in such cases, that in primary election contests the same exactitude and particularity in pleading will not be required as in ordinary suits at law. *Thurman v. Alvey*, 233 S. W. 749, Sept. 23, 1921.

The notice of contest, among other things, contains this allegation, to wit:

"Contestant avers and charges that the finding of the said board of election commissioners as between him and W. H. Barnett is erroneous and not true, in that the contestee, W. H. Barnett, did not receive the largest number of legal votes cast for any candidate for the Republican nomination for jailer at the primary election in said county, but that this contestant received the largest number of legal votes cast for any candidate for the Republican nom-

ination for jailer of Laurel county in the said primary election."

And later, after giving the names of the eight precincts in which he charges the returns were erroneous, he further alleges that the officers who conducted the election in those precincts "either through mistake, ignorance, fraud, or oversight, he does not know which, failed to correctly count and certify the correct and true number of votes cast for him as such candidate, or the true number of votes cast for the contestee herein, in that the said election officers erroneously counted and certified as having been cast for contestant (meaning contestee) W. H. Barnett a number of votes which were actually cast for this contestant and which the said election officers should have counted and certified as having been cast for this contestant, and said election officers failed to count or certify for contestant all the votes that were cast for him at said election in either of said precincts." And again it is alleged in the notice:

"The contestant says that the county board of commissioners upon the canvass of the returns of the various voting precincts of Laurel county declared that contestee, W. H. Barnett, received ten votes more than contestant for said office of jailer, but contestant says that upon an inspection and recount of said ballots it will be found that the contestant has received a greater number of votes than contestee."

[2] We then have, in effect, an allegation in the notice that, by reason of the fraud or mistake of the election officers in counting the ballots and certifying the result, the returns in the eight designated precincts were erroneous and not true and that their certificate in fact registered a false result because of such fraud or mistake, and that contestant in fact received the highest number of legal votes for that nomination, and that this result will be shown by a recount of the ballots in those precincts. And it is not to be doubted that the notice of contest was sufficient under the rule laid down in the case of *Snowden v. Flanery*, 159 Ky. 568, 167 S. W. 893, and the case of *Thurman v. Alvey*, above referred to.

It is true, as recited in the judgment of the lower court, that there was no express allegation that the contestee, Barnett, did not receive as many as 789 votes, which were certified for him by the officers of the election; but it is likewise true that there was an allegation that the contestant received more legal votes than the contestee, and that by reason of the fraud or mistake of the election officers in the precincts named that result had been reversed; and under this allegation it matters not whether the contestee received more or less votes than 789, if the evidence shows that upon a recount, to which the contestant was entitled under the allegations, he, and not the contestee, was entitled to the nomination.

Under the pleadings the distinct issue was made, although in a circuitous way, that by reason of fraud or mistake of the election officers a wrongful result was reached, and because of their counting of ballots for contestee to which he was not entitled, and because of their failure to count for contestant ballots which should have been counted for him, a correct result was not reached.

It is true that, after alleging in the notice that contestant had received the highest number of legal votes cast for any candidate, and that contestee had not received the highest number of legal votes, it is further alleged that in the official count, by reason of fraud or mistake, in the named precincts the ballots which were erroneously counted for appellee had been cast and should have been counted for appellant.

[3] But the fact that the evidence showed that while some of those ballots were erroneously counted for appellee they had not, in fact, been cast for appellant but for some of the other aspirants, furnishes no good reason why they should not be deducted from appellee's total, although they were not to be added to appellant's.

The notice in this case, when taken all together, could not have been misunderstood; it with reasonable accuracy notified the contestee that appellant claimed that he had received more legal votes than appellee had in the primary because in certain precincts ballots were wrongfully counted for appellee which, when deducted from the number of votes properly counted for him, would give appellant the highest number of votes.

The result showed that the contestant's allegation was only partially true; that ballots had been wrongfully counted for appellee which had not been actually cast for him, but which had not been cast for appellant, as alleged, but for some other candidate; but when the votes so wrongfully counted for appellee are deducted from his total, the result is that appellant has received the highest number of votes.

Keeping in mind not only the language but the spirit of the statute and the rule of this court adopted in harmony therewith not to give technical construction to pleadings in such proceedings, we find that the notice was sufficient for all practical purposes and that appellant was the rightful Republican nominee for jailer of Laurel county at the August primary.

The judgment is reversed, and it is the judgment of this court that G. W. Swaner is the Republican nominee for jailer of Laurel county at the approaching November election, and the clerk of this court is instructed to certify this fact to the proper office.

SAMPSON, J., not sitting.

## WILLIAMS v. HOWARD.

SAME v. DAVIS, Judge.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

### 1. Appeal and error $\S$ 78(3)—Order sustaining demurrer held not a "final order."

An order sustaining a special demurrer to petition in primary election contest is not a "final order," as it does not in terms or effect dispose of or end the contest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

### 2. Appeal and error $\S$ 76(1) — "Final judgment or order" defined.

A "final judgment or order" is such as at once puts an end to the action by declaring that plaintiff has either entitled himself, or has not, to recover the remedy sued for; it disposes of the merits of the case, and settles the rights of the parties under the issues made by the pleadings, or disposes of the case and puts the parties out of court.

### 3. Mandamus $\S$ 4(1)—Held proper remedy for order sustaining demurrer to petition in primary election contest.

Where an order sustaining a special demurrer to a petition in a contest of a primary election was not appealable and the conditions show a right to mandamus, and where a determination of an appeal from a dismissal of the action would be too late for the election, a writ of mandamus is the only effective remedy and will issue.

### 4. Mandamus $\S$ 28—Writ may be issued to inferior court to compel a decision, but not to control discretion.

Under Const.  $\S$  110, giving the Court of Appeals power to issue such writs that may be necessary to give it general control of inferior jurisdictions, while mandamus will not issue to control the exercise of discretion by judge of an inferior court, even if discretion was improperly exercised, it will issue to compel the judge of an inferior court to pass upon a question upon which such discretion should be exercised.

### 5. Mandamus $\S$ 39—Writ will issue to trial court in case of order sustaining demurrer to petition in primary election contest to compel final disposition on merits.

Where a special demurrer to a petition in a primary election contest was sustained and mandamus is the only adequate remedy for contestant, a writ will issue to compel the judge of the inferior court to make such an order in connection with the sustaining of a special demurrer as will finally dispose of the case.

Appeal from Circuit Court, Harlan County.

Action by B. M. Williams against M. W. Howard. From an order sustaining special demurrer, plaintiff appeals and petitions for a writ of mandamus against W. T. Davis, Judge. Appeal dismissed and writ granted.

John D. Carroll, of Frankfort, and Hall, Jones & Lee, of Harlan, for appellant.

N. R. Patterson, of Pineville, for appellee.

SETTLE, J. B. M. Williams and M. W. Howard, the former styled appellant, and the latter appellee, in the caption of this opinion, were, with others, candidates at the August primary election, 1921, for the Republican nomination for the office of county judge of Harlan county and the canvass by the county board of election commissioners of the votes returned from the several precincts of the county by the election officers thereof resulted in its declaring Howard the Republican nominee for the office in question, and awarding him the certificate of such nomination. Thereupon, Williams, claiming to have received a majority of the legal Republican votes cast in the primary and, by reason thereof, to be entitled to the Republican nomination for the office of county judge, by the due filing and service upon Howard within five days after the issuance to him of his certificate of nomination, of the required statutory notice particularly setting forth the grounds thereof, instituted against the latter in the Harlan circuit court a contest attacking his right to such nomination and asserting his own right to same. The filing of the notice of contest was accompanied by the filing of a petition setting forth the same grounds of contest contained in the notice.

Following the service upon him of the notice of contest, the contestee, Howard, within the time required by the statute for responding to same, filed thereto a pleading styled:

"Special Demurrer. General Demurrer. Motion to Strike. Response to Grounds of Contest and Counter Contest and Grounds thereof."

In the beginning paragraph of this pleading it was stated, however, that the contestee entered his appearance only for the purpose of insisting upon his special demurrer to the notice of contest and petition of the contestant which had been filed with it. The special demurrer went to the jurisdiction of the court and judge thereof, and was, upon the submission of the proceeding thereon, sustained by the court; it being, in substance, declared by the order manifesting this ruling, without stating the reasons therefor, that neither the Harlan circuit court nor judge thereof had jurisdiction to "hear and determine the contest attempted to be set up in the petition and notice."

An exception was taken by the contestant, Williams, to this ruling, and an appeal prayed and granted. He has filed in this court a transcript of the record from the circuit court as in taking an appeal, and asks of us a review and the reversal of the order of the circuit court sustaining the special demurrer to its jurisdiction.

[1, 2] We think it clear that an appeal will not lie from this order; therefore it cannot be reviewed, because it is not a final order as it does not in terms or effect dispose of or end the contest. "A final judgment or order is such \* \* \* as at once puts an end to the action by declaring the plaintiff has either entitled himself, or has not, to recover the remedy sued for; it disposes of the merits of the case, and settles the rights of the parties under the issues made by the pleadings, or disposes of the case and puts the parties out of court." *Harrison v. Stroud*, 150 Ky. 797, 150 S. W. 993; *Alexander v. De Kermel*, 81 Ky. 345; *Comith v. L. & N. R. R. Co.*, 29 S. W. 331, 16 Ky. Law Rep. 484; *Maxwell's Trustee v. England*, 115 Ky. 783, 74 S. W. 1091, 25 Ky. Law Rep. 143; *Trade Discount Co. v. Cox & Co.*, 143 Ky. 516, 136 S. W. 901; 3 Blackstone, Com. 497.

As this court has appellate jurisdiction only of final orders and judgments of inferior courts, we cannot, as asked by Williams, entertain the appeal attempted to be prosecuted by him from the order complained of; hence his appeal is dismissed. He, however, also seeks at the hands of this court another remedy, viz., the writ of mandamus, and to that end has filed a petition against the judge of the Harlan circuit court, containing the grounds relied on for its issuance, to compel the latter to enter such an order or judgment in the contested election proceeding, as will finally dispose of same and constitute an appealable order.

[3] The remedy afforded by the writ is the only remedy open to Williams, if indeed that will prove adequate; his right to such relief is abundantly shown in the grounds set forth by the petition for the writ, and are not discredited or overthrown by any ground of resistance to the writ interposed by the demurrers or response of the circuit judge. Moreover, if the writ should go, the necessity for an immediate granting of it is obvious, as otherwise the trial of the election contest would be so delayed that Williams, even if successful on the trial thereof, would scarcely have time to get his name on the ballot for the November election. Furthermore, if the judge of the circuit court should, in obedience to the writ of mandamus, merely add to the order sustaining the special demurrer already entered words dismissing the contest, Williams would be compelled to appeal from it in order to obtain a review by us of that part of it sustaining the demurrer; and if it should be reversed and the case remanded, there would have to follow in the court below a trial of the contest on its merits, and if an appeal should be taken by either party from the judgment then rendered, it can readily be seen that determination of such appeal before the November election would be doubtful. The primary election statute seems to contain no provision for averting the injury thus threatened the rights of the con-

testant; and as the order causing the threatening conditions is not an appealable one and cannot be reviewed, this court is powerless to give him relief, except through the writ of mandamus.

[4] While under the authority conferred upon it by section 110, Constitution, this court has power to issue "such writs as may be necessary to give it general control of inferior jurisdictions," it will only issue the writ of mandamus to compel action on the part of a judicial officer; but \* \* \* if such officer has a discretion over the subject matter the writ will not issue to control such discretion, although it may have been improperly exercised. If, however, there be a refusal to act upon the subject-matter or to pass upon the question upon which such discretion is to be exercised, then the writ may be used to enforce obedience to the law. But when the question has been passed upon the writ will not be used for the purpose of correcting the decision." *Speckert v. Ray*, Judge, 166 Ky. 622, 179 S. W. 592, 4 A. L. R. 603; *Board Trustees v. McOrory*, 132 Ky. 89, 116 S. W. 326, 21 L. R. A. (N. S.) 583; *J. B. B. Coal Co. v. Halbert*, Judge, 169 Ky. 687, 184 S. W. 1116; *Comth. v. McCrone*, 153 Ky. 296, 155 S. W. 369.

[5] We may not therefore by the writ of mandamus direct the judge of the Harlan circuit court to change his ruling or set aside his order respecting the sustaining of the contestee's special demurrer to the contestant's notice of contest or petition, compel him to take jurisdiction of the contest, or direct him to try or finally dispose of it on its merits; but we have the power to compel him by the writ to make such order in addition to and connection with the sustaining of the special demurrer as will be a final order disposing of the case. And as it is alleged in the petition of Williams, and admitted by the respondent judge, that he has refused to make or enter such an order as above indicated, the writ of mandamus is granted to compel him to do so. But the appeal prosecuted by the contestant, Williams, from the present order, is dismissed.

SAMPSON, J., not sitting.

#### HUFF v. HOWARD.

SAME v. DAVIS, Judge.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

Appeal from Circuit Court, Harlan County.

Action by W. C. L. Huff against M. W. Howard. From order sustaining a special

demurrer to the petition, plaintiff appeals and petitions for a writ of mandamus against W. T. Davis, Judge. Appeal dismissed and writ granted.

Zeb A. Stewart, of Lexington, for appellant.

SETTLE, J. These two cases, the first an appeal, and the second a petition for the writ of mandamus, are companions to those of *Williams v. Howard and Williams v. Davis*, Judge, 233 S. W. 753, both disposed of in another and single opinion of this court this day handed down. The appellant, and petitioner, Huff, like Williams, is claiming to have received, by a majority of the legal Republican votes cast in the primary election of August, 1921, the Republican nomination for county judge of Harlan county, which the board of election commissioners of that county awarded by their canvass of the vote and certificate to M. W. Howard.

Huff by duly filing and causing to be served upon Howard, within the time required by the primary statute, a notice, accompanied by petition, both containing divers grounds, entered against the latter in the Harlan circuit court and before the respondent, Davis, as judge thereof, a contest for the nomination in question, at the same time attacking the right of Williams to the same. It does not appear from the record before us that the notice of contest was served upon Williams. To Huff's notice and petition a special demurrer interposed by the contestee, Howard, was sustained by the respondent judge, as in the contest of *Williams v. Howard*, which is shown by an order, in all respects similar to that entered in the latter case. Huff has attempted to appeal from that order; and also by his petition filed, as previously stated, in this court against Davis, judge, prays that he be compelled by a writ of mandamus from this court to enter such an order or judgment in his court as will be final and dispose of the contest.

As the remedy sought is the same as in the case of *Williams v. Davis*, Judge, the ruling complained of the same, and the petitioner, Huff, is equally entitled on the same grounds to the relief granted Williams, it is only necessary to further say that this case must be and is controlled by the principles and reasoning set forth in the opinion of that case. Therefore Huff's appeal for the same reasons must be and is dismissed as was that of Williams. But for the purposes and to the extent indicated in that opinion, he is granted the writ of mandamus prayed in his petition.

SAMPSON, J., not sitting.

**WILLIAMS v. HOWARD.****HUFF v. SAME.**

(Court of Appeals of Kentucky. Oct. 11, 1921.)

**Elections** ⇨ 151—Notices of contests held sufficient to give court jurisdiction.

Under Ky. St. § 1550, subsec. 28, providing that a notice to contest a primary election must be given in writing to a person whose election is contested stating the grounds of contest and that on its return shall be adopted and tried by the judge of the circuit court of the county in which the contestee resides or is served, notices of contests setting forth grounds and warning the contestee that the contestants had filed contest suits in the clerk's office, and to appear and defend, are sufficient; the contestants' rights not being prejudiced by the fact that they filed contest suits which was unnecessary and unauthorized.

**Appeal from Circuit Court, Harlan County.**

Actions by B. M. Williams against M. W. Howard and W. C. L. Huff against M. W. Howard. From judgment sustaining special demurrers on the ground that notices of election contest were not sufficient to confer jurisdiction, contestants appeal. Judgment in each case reversed and remanded.

See, also 233 S. W. 753, 755.

John D. Carroll, of Frankfort, and Hall, Jones & Lee, of Harlan, for B. M. Williams.  
Zeb A. Stewart, of Lexington, for W. C. L. Huff.

J. S. Forester, of Harlan, and N. R. Patterson, of Pineville, for M. W. Howard.

**CLAY, J.** These two appeals involve the same question and will be considered in one opinion. B. M. Williams, W. C. L. Huff, and M. W. Howard were candidates at the August primary for nomination by the Republican party for the office of county judge, and Howard was awarded the certificate of election. Thereupon Williams and Huff each filed a separate suit against Howard in the Harlan circuit court contesting Howard's election, and in addition thereto, each of them had served upon Howard, within the time required by the statute, a notice of contest. To each proceeding the circuit court sustained a special demurrer on the ground that the notice of contest was not sufficient to confer jurisdiction and entered judgment dismissing the proceeding. The contestants appeal.

The material parts of Williams' notice of contest are as follows:

"The contestee, M. W. Howard, will take notice that the contestant, B. M. Williams, has this day filed in the office of the clerk of the Harlan circuit court his petition in equity, by which petition he contests the right of the con-

testee, M. W. Howard, to the Republican nomination for the office of county judge of Harlan county, to be voted for at the regular November election, 1921, and his grounds of contest, as set forth in said petition, are as follows:" (Then follows a statement setting forth Williams' candidacy and qualifications for the office, and numerous grounds of contest.)

The notice concludes as follows:

"And the contestee is warned and required to answer and defend such contest at the temporary circuit court clerk's office and now being used as the clerk's office of the Harlan circuit court on North First street (formerly used as the office of American Railway Express Company opposite First State Bank) in the city of Harlan, Kentucky, on Aug. 18, 1921.

"This August 13, 1921.

"B. M. Williams, Contestant."

The material parts of Huff's notice of contest are as follows:

"The contestee, M. W. Howard, will take notice that the contestant, W. C. L. Huff, has this day filed in the office of the clerk of the Harlan circuit court his petition in equity, a copy of which is attached hereto, and in which petition he contests the right of the contestee, M. W. Howard, to the Republican nomination for the office of county judge of Harlan county, Ky., to be voted for at the regular November election, 1921, and in which he challenges and contests the right of the contestee to the Republican nomination of the Republican party for said office of county judge at the primary election held in Harlan county, Ky., on August 6, 1921, and contests and challenges the right of the contestee to the certificate of nomination issued and awarded to him by the county board of election commissioners of Harlan county, Ky., August 9, 1921, and filed by contestee in the office of the clerk of the Harlan county court, upon the grounds that the contestee" (then follow the grounds of contest).

The notice concludes as follows:

"The contestee is warned and required to answer and defend such contest at the temporary circuit court clerk's office, and now being used as the clerk's office of the Harlan circuit court on North First Street (formerly used as the office of the American Railway Express Company, opposite the First State Bank) in the city of Harlan, Ky., on Wednesday, August 17, 1921."

Subsection 28, § 1550, Kentucky Statutes, provides the following method for contesting nominations:

"Any candidate wishing to contest the nomination of any other candidate who was voted for at any primary election held under this act shall give notice in writing to the person whose nomination he intends to contest, stating the grounds of such contest, within five days from the time the election commissioners shall have awarded the certificate of nomination to such candidate whose nomination is contested. Said notice shall be served in the same manner as a summons from the circuit court, and shall warn the contestee of the time and place, when



and where the contestee shall be required to answer and defend such contest, which shall not be less than three, nor more than ten days after the service thereof. Such contest shall be tried by the judge of the circuit court of the county in which the contestee resides or is served. Upon return of said notice properly executed as herein provided, to the office of the circuit clerk of the county in which said contestee resides or is served with such notice of contest, it shall be the duty of the clerk of the circuit court to immediately docket said cause and to immediately notify the presiding judge of the circuit court of said county that such contest has been instituted."

The argument in support of the trial court's ruling is as follows: The method of contesting nominations is exclusive. The only way to begin the proceeding is to serve the notice of contest within the required time, and have it returned to the office of the proper circuit clerk, who will then docket the cause. There is no authority whatever for filing a contest suit. The notices in question did not advise the contestee that the contestants proposed to contest his nomination by the notices served, but merely apprised the contestee that they had filed unauthorized suits in the clerk's office, and warned him to appear and defend those suits, and not the contests instituted by the notices. For these reasons it is insisted that the notices were insufficient to confer jurisdiction. It is apparent from the records that the contestants were in doubt as to the proper procedure, and adopted both methods in order to avoid any mistake. Of course, if it be determined that

the notices themselves are sufficient, then contestants' right should not be prejudiced by the mere fact that they did something else that was unnecessary and unauthorized. It may be conceded that if the grounds of contest had not been set out in the notices, and it was necessary for the contestee to resort to the suits before he could ascertain what the grounds of contest were, there might be some merit in the contention that the notices were not sufficient. However, no such case is presented. The notices themselves show a clear purpose to contest the nomination. They set forth the grounds of contest and notify the contestee when and where to appear and defend the contests. Giving the notices a liberal construction, as we must do under the settled rules of this court in view of the fact that proceedings for contesting nominations are hurriedly instituted, and are therefore of an informal character, we conclude that the notices were sufficient to inform the contestee that his nomination of county judge was being contested upon certain designated grounds, and that it was necessary for him to appear on or before a certain day in the Harlan circuit clerk's office, and defend the contests. It follows that the circuit court erred in dismissing the proceedings for want of jurisdiction.

The judgment in each case is reversed, and cause remanded for proceedings consistent with this opinion.

SAMPSON, J., not sitting.

**BENSON v. STATE. (No. 123.)**

(Supreme Court of Arkansas. Sept. 26, 1921.)

1. Intoxicating liquors  $\S$ 236(19) — Evidence held to sustain conviction for making intoxicating liquor.

Evidence held to sustain conviction for making intoxicating liquor.

2. Intoxicating liquors  $\S$ 233(1) — Authorship of letter informing prohibition officers as to location of still held immaterial.

In prosecution for making intoxicating liquor, exclusion of testimony as to authorship of letter giving federal prohibition enforcement officer information as to the location of a still held proper as against contention that defendant was entitled to ascertain who his enemies were; the authorship of the letter being immaterial.

3. Criminal law  $\S$ 665(2) — Refusal to put prohibition officer under the rule with other witnesses held not error.

In prosecution for making intoxicating liquors, court's refusal to put prohibition enforcement officer who had searched defendant's premises under the rule along with the other witnesses held not error.

4. Criminal law  $\S$ 394 — Testimony of officer as to facts found on defendant's premises admissible though search was without warrant.

In prosecution for making intoxicating liquor, the fact that federal prohibition enforcement officer had searched defendant's premises without a warrant or other process did not make his testimony as to facts discovered on the search inadmissible, even if a trespasser in making the search without the warrant or process.

5. Criminal law  $\S$ 1043(2) — General objection to instruction insufficient to raise question on appeal of whether it assumed fact.

In prosecution for making intoxicating liquor, instruction that defendant was guilty if he aided, abetted, encouraged, or advised the manufacture of the liquor, or, being present, was ready and consenting to aid and abet in its manufacture, or was interested in its manufacture, without proof that he "was the owner of the still or that he was receiving any pay for his services," will not on appeal be held erroneous as having assumed the existence of a still, where only objection to instruction at time of trial was a general objection.

6. Criminal law  $\S$ 763, 764(14) — Instruction held not a charge on sufficiency of evidence.

In prosecution for making intoxicating liquor, instruction specifying facts required to be found, without limiting the jury's consideration of such facts, but instructing it to consider all the facts and circumstances proven, held not a charge on the sufficiency of the evidence.

7. Criminal law  $\S$ 865(1) — Instruction advising jurors to get together on a verdict held not erroneous.

Instruction that "I have not inquired of you how you stand or anything about it, but this

is an important case to B. (defendant) and an important case to your country, and you gentlemen have absolutely no interest in the matter, and you do not know anything about the matter, and I want you to get together. \* \* \* It shows good judgment for a jurymen to listen to his fellow jurors in giving their opinion" — held not erroneous, as advising individual jurors to make such sacrifice of their individual opinions as might be necessary to arrive at a verdict.

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

W. C. Benson was convicted of making intoxicating liquors, and he appeals. Affirmed.

Norwood & Alley, of Mena, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was convicted of making intoxicating liquors, and has appealed. He strongly insists that the testimony is insufficient to support the verdict; that the court erred in admitting testimony, and in instructing the jury, and in permitting a witness named Tisdale to remain in the courtroom during the progress of the trial when other witnesses had been put under the rule.

[1] Testimony tending to support the verdict was offered to the following effect: J. T. Tisdale, a federal prohibition enforcement officer, received information that a still was being operated. He applied to, and received from, the sheriff of the county, a diagram of appellant's premises, as Tisdale was not familiar with the roads in the section of the county where the still was supposed to be located. Accompanying this diagram was a letter of information and directions, which was not signed. Tisdale went to appellant's home and found appellant there with his wife. Tisdale was accompanied by his son and by one Hazel, a constable of the county. These officers searched appellant's house, and found a quart fruit jar about half or two-thirds full of moonshine whisky. Upon further search several jars, jugs, and bottles containing small quantities of whisky were found, and still other receptacles were found which were redolent of whisky. Before this search was made, appellant had stated that there was no whisky in his house. The officers testified that about 125 yards from appellant's residence and on his farm they found a cave which contained a still or where a still had been. The place was afire and had evidently been burning for some hours. They found there six barrels of mash, some of the barrels full, and others which had been burned were only partly full. The officers took appellant and his wife to the still and asked what it meant. Appellant's wife, in appellant's presence, suggested that the still had

been placed there by some enemy of her husband, because he was, as she expressed it, the "law," meaning thereby that her husband was the justice of the peace for that township. She made the same suggestion in regard to the whisky in her house. Appellant's explanation of the presence of the whisky in his home was that a doctor had prescribed and furnished this whisky for the use of his wife.

The field between appellant's house and the still had been freshly plowed, and there were tracks of a man and woman to and from the still and appellant's house, and there was a well-beaten path from appellant's back gate to the distillery. There were fresh wagon tracks from appellant's barn gate to the still, and appellant admitted he had made these tracks doing some hauling the day before.

The officers also observed that a sweet gum bush had been cut about four feet from the distillery walls. They also saw in appellant's smoke-house three one-gallon jugs, each containing a little whisky, and these jugs each contained a stopper made from a sweet gum bush of a size corresponding to the piece that was cut out of the bush near the distillery.

Tisdale testified that, as a prohibition enforcement officer, he had raided or captured about 500 stills and was familiar with the manufacture of whisky, and that the mash or beer found at appellant's place was intoxicating and ready to run. The officers further testified that some of the mash or beer that was found at the still had been boiled off or run through the still.

Hazel, the constable, testified that he found, between the homes of appellant and one Briscoe, which were about half a mile apart, a cooling trough and pipe bent for a worm for a still, and that a trail led from appellant's home to Briscoe's house. The trough and piping were found about 50 or 75 yards from this path and about half a mile from appellant's house.

Objections were made to the admission of most of this testimony. But we think it was all competent, and that it established the existence of a partly dismantled still, and we think the jury was warranted in drawing the inference that whisky had been manufactured at this still, and that appellant was a party to the operation of the still. It may be further added that Briscoe was the stepson and tenant of appellant.

Appellant offered the explanation that the excavation in the side of the hill—which the officers designate as a still—had been made while he was prospecting for ore, and he offered testimony tending to show that no whisky had been made on his place and that if any had been made it had been done without his knowledge or consent. The verdict of the jury reflects the fact, however, that this testimony was not credited by the jury.

[2] Appellant was not permitted to pursue his inquiry as to the authorship of the unsigned letter giving information to the officers about the location of the still. He excepted to the ruling of the court on the ground that if he had been permitted to pursue the inquiry as to the authorship of the letter he might have ascertained who his enemies were. No error was committed in this respect, as the only purpose of the letter was to enable its possessor to locate the premises. It performed that function and it was immaterial who wrote it.

[3] Exceptions were saved to the refusal of the court to put the witness Tisdale under the rule along with the other witnesses.

In the case of *Oakes v. State*, 135 Ark. 221, 229, 205 S. W. 305, 308, one Claude Duty, an attorney, had been specially employed to aid in the prosecution of the case then on trial. He was not placed under the rule as the other witnesses had been, and objection was made to his testimony on that account. We there disposed of the question by saying:

"The question as to whether any witness, or all the witnesses, shall be put under the rule is one that addresses itself to the sound discretion of the court, and that discretion was not abused in permitting Duty to testify. *Kirby's Digest*, § 8142; *Vance v. State*, 70 Ark. 272; *Hlass v. Fulford*, 77 Ark. 603; *St. L., I. M. & S. R. Co. v. Pate*, 90 Ark. 135."

[4] Tisdale made the search without a warrant, or other process, from any court specially authorizing him so to do. It is insisted, therefore, that as the search was illegally made, any evidence of guilt thus discovered was inadmissible in evidence. The authorities are against appellant on this proposition. Without inquiring or deciding what right Tisdale had to search appellant's premises, it suffices to say that the evidence of appellant's guilt thus discovered is not rendered inadmissible because Tisdale may have been a trespasser.

At page 2955 of volume 3 of *Wigmore on Evidence*, in the chapter on "Rules of Extrinsic Policy," Prof. Wigmore says:

"For these reasons it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored." *Starchman v. State*, 62 Ark. 538, 36 S. W. 940.

See, also, 8 R. C. L. p. 196; 24 R. C. L. § 22 of the article on Search and Seizure; 10 R. C. L. § 97 of the article on Evidence, and cases cited in the notes. See, also, numerous cases cited in the brief of the Attorney General.

[5] Among other instructions given by the court was one numbered 2, which reads as follows:

"It is not necessary that you should find that the defendant was the owner of the still, or that he was receiving any pay for his services. It is sufficient if you find beyond a reasonable doubt that the defendant aided, abetted, encouraged, or advised the manufacture of intoxicating liquors, or being present was ready and consenting to aid and abet in its manufacture, or was interested in its manufacture."

Only a general objection was made to this instruction, and it is now specifically objected that the instruction assumes that there was a still. We think the objection now comes too late. It was not the purpose of this instruction to tell the jury what constituted a still, but its purpose was to declare as a matter of law what connection one must have with a still being illegally operated to make him a party to the crime thus being committed. The general objection was not, therefore, sufficient to raise the question now presented. *Miller v. Ft. Smith Light & Traction Co.*, 136 Ark. 272, 206 S. W. 329.

After having had the case under consideration for some time, the jury returned into court for further instructions, whereupon the court orally charged the jury in part as follows:

"In determining the guilt or innocence of the defendant, the jury has a right to take into consideration the fact that moonshine whisky was found; the fact that a still was found near his home, if they so found; the fact that a path led to the same, if they so found; the fact that containers, containing small amounts of whisky, were found in his possession, if they so found, and that the same was upon his inclosure, if they so find; together with all other facts and circumstances, if any, proven. And if, upon the whole case, you believe him guilty, you will convict him."

[6] A general objection was made to the instruction at the time, and it is now insisted that it was erroneous as being a charge on the sufficiency of the evidence.

It will be observed that all the facts stated are recited hypothetically, except the fact that moonshine whisky was found (a fact which was not denied); but the court did not tell the jury that the facts there mentioned were sufficient, if true, to warrant a conviction. Nor did the court limit the consideration of the jury to those facts alone. On the contrary, the court told the jury to consider all the facts and circumstances proven in the case and to thus make up their verdict.

A very similar contention was disposed of by this court in the case of *Hogue v. State*, 93 Ark. 316, 124 S. W. 783, where it was said:

"The practice of framing separate instructions on distinct circumstances, and thus, as it is said, singling them out, is not commendable, and it has been held by this court in several decisions that it is not error to refuse such

instructions. *Carpenter v. State*, 62 Ark. 286; *Ince v. State*, 77 Ark. 418. But the giving of such an instruction is not prejudicial error where the court in the whole charge directs the jury to consider all the facts and circumstances proved in the case, and especially where, as in this case, the court instructs that the facts and circumstances in evidence shall be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence.' \* \* \*

[7] It is finally insisted that in the oral charge to the jury the court erred in its admonition to the jury to "get together" on a verdict. The language complained of reads as follows:

"Now, I want to say this: I have not inquired of you how you stand, or anything about it; but this is an important case to Mr. Benson, and an important case to your county, and you gentlemen have absolutely no interest in the matter, and you do not know anything about the matter; and I want you to get together. Sometimes we find a jurymen, or anybody else in life, that says a horse is 16 feet high, and they want to stand by it, right or wrong. It shows good judgment for a jurymen to listen to his fellow jurors in giving their opinion."

The insistence is that the effect of the court's admonition was to advise the individual jurors to make such sacrifice of their individual opinions as might be necessary to arrive at a verdict.

The court, of course, cannot give any such direction. But we do not think the instruction susceptible of that construction. In the case of *St. L. I. M. & S. R. Co. v. Carter* 111 Ark. 272, 284, 164 S. W. 715, 719, we said:

"The rule is well settled in this state that the trial court may detail to the jury the ills attendant on a disagreement and the importance of coming to an agreement. The trial judge should not, by threat or entreaty, attempt to influence the jury to reach a verdict. He should not, by word or act, intimate that they should arrive at a verdict which is not the result of their free and voluntary opinion, and which is not consistent with their conscience. He may, however, warn them not to be stubborn and to lay aside all pride of opinion and to consult with each other and give due regard and weight to the opinion of their fellow-jurors."

See, also, *Mallory v. State*, 141 Ark. 496, 500, 503, 217 S. W. 482; *Reed v. Rogers*, 134 Ark. 528, 534, 204 S. W. 978; *Whitley v. State*, 114 Ark. 243, 169 S. W. 952; *Jackson v. State*, 94 Ark. 169, 174, 175, 126 S. W. 843; *Southern Ins. Co. v. White*, 58 Ark. 277, 282, 24 S. W. 425.

We think the oral instruction did not transcend the trial court's right and duty as thus defined.

No error appearing, the judgment is affirmed.

## BRISCOE v. STATE. (No. 125.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

1. Criminal law  $\S$  394—Officers properly permitted to testify as to facts found in search of defendant's person and premises.

In prosecution for manufacturing intoxicating liquor, prohibition enforcement officers were properly permitted to testify to facts and circumstances discovered during the search of defendant's person, his residence, and the near-by residence of his mother, although there was no search warrant.

2. Criminal law  $\S$  665(2)—Refusal to put prohibition enforcement officers under the rule held not error.

In prosecution for manufacturing intoxicating liquor, action of court, in permitting prohibition enforcement officer and deputy sheriff who had assisted enforcement officer in making search of defendant's premises to remain in court room during the trial when all other witnesses had been excluded, held not error.

3. Criminal law  $\S$  1169(1)—Admission of prohibition enforcement officer's testimony as to his experiences in capturing moonshine stills generally, held prejudicial error.

In prosecution for manufacturing intoxicating liquor, in which the prohibition enforcement officer had testified as to facts and circumstances found in his search of defendant's person and premises tending to establish guilt, the admission of testimony by such officer as to his experiences in capturing moonshine stills and the habits of moonshiners generally in dismantling stills when the run had been completed, and hiding the worm, cap, boiler, and other parts at a distance from the still, held prejudicial error.

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

R. H. Briscoe was convicted of manufacturing and being interested in the manufacture of intoxicating liquor, and he appeals. Reversed and remanded.

Norwood & Alley, of Mena, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

HUMPHREYS, J. This is an appeal from a judgment of conviction and sentence to the penitentiary for one year of appellant, for manufacturing and being interested in the manufacture of ardent, vinous, malt, fermented, intoxicating, spirituous, and alcoholic liquor. Appellant was convicted upon circumstantial evidence. J. T. Tisdale, a United States government prohibition enforcement officer, being informed that appellant was interested in operating a still in Polk county, met appellant on the highway, near appellant's home, and searched his person, and found a pint of moonshine whisky

in his pocket; then proceeded to search appellant's home, and found nearly a gallon of moonshine liquor, also several pint bottles on a table, containing small amounts of it, also two sacks of sprouted or malt corn in the smokehouse, also a number of fruit jars containing small amounts of whisky, also a small joint of copper piping, for use as a worm in the manufacture of whisky, in the trunk of a Mr. Williams, a joint cropper of appellant; also found, some half mile from appellant's house, in the woods, a pipe bent in the shape of an "S" which had been used as a worm for a still, together with a cooling trough, which had been recently deposited there; also found, in a field at the Benson home, near appellant's, which was cultivated by appellant and Williams, a pit or cave covered with rib poles and shingles, which contained a furnace and pipe and six barrels, four large ones and two small ones, which barrels contained mash or beer, some of which had run out of the barrels onto the ground, and was a composition of distilled mash or beer. At the time the cave was discovered, the roof and entire contents thereof were on fire, and it was so hot that the revenue officer could not secure a sample of the mash or beer. Mrs. Benson was the mother of appellant, and, at the Benson home, containers were found with a small amount of moonshine whisky in them. A distillery set or furnace was also found some 50 yards below appellant's house, which had been out of use for some time.

These and other circumstances discovered during the search of appellant's person and the homes of appellant and Benson were detailed in the trial of appellant by Tisdale and his assistants in the search. The search was made without a search warrant. In the course of the trial, J. T. Tisdale, the government prohibition enforcement officer, was recalled for further examination, and the record reflects the following occurrence:

"It has been my (Tisdale's) experience when I capture moonshine stills, if they are not in operation—

"Mr. Alley: We object to that.

"Court: Go ahead. (Exceptions saved and noted.)

"Usually when they get through with these mountain distilleries they dismantle the still, and the worm, cap, and boiler, if there is any, are taken away and hid; and nine out of ten instances it is that way, and we have to make a considerable search away from the still to find them.

"Mr. Alley: I object to that evidence and move to exclude it. It is nothing more than an argument in the case.

"Court: He is just giving his experience with other stills. It is not an argument. I think that it is competent to show the way these wild-cat stills are generally run. (Exceptions saved and noted.)"

J. T. Tisdale and D. A. Hazel, a deputy sheriff who assisted Tisdale in making the search, were permitted to remain in the courtroom during the trial, over the objection of appellant, to which ruling of the court an exception was preserved. Appellant also preserved an exception to the ruling of the court over his objection permitting the witnesses who made the search to detail the facts and circumstances discovered during said search. Other exceptions preserved by appellant, relating to the sufficiency of the evidence and to instructions given and refused, appear in the record; but we deem it unnecessary to state them, as the case must be reversed and remanded for a new trial because incompetent evidence prejudicial to appellant was admitted.

[1] Appellant contends that the court committed reversible error in permitting J. T. Tisdale and his associates in the search to testify to facts and circumstances discovered during the search of appellant's person, his residence, and the residence of W. C. Benson. The court ruled adversely to the contention of appellant on this point in the case of *W. C. Benson v. State of Arkansas*, 233 S. W. 758.

[2] Again, appellant contends that the court committed reversible error in permitting J. T. Tisdale and D. A. Hazel to remain in the courtroom during the trial when all other witnesses had been put under the rule and excluded from the room. This point was also decided adversely to the contention of appellant in the case of *W. C. Benson v. State*, supra.

[3] Appellant also contends that the court erred in permitting witness Tisdale to testify what had been his experience in capturing moonshine stills and the habits of moonshiners generally in dismantling stills when the run had been completed, and hiding the worm, cap, boiler, and other parts at a distance from the still. The admission of these statements was, in effect, allowing the witness to bolster up his own evidence and calculated to give it undue effect, and, as he had testified to the circumstances and facts tending to establish the guilt of appellant, was necessarily prejudicial to him.

For the error indicated, the judgment will be reversed and the cause remanded for a new trial.

#### BROWN v. STATE. (No. 114.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

##### 1. Homicide $\S$ 124—Instruction on defense of property held properly refused.

In a homicide prosecution, where defendant claimed he had acted in defense of his property, instruction that the killing would have been justifiable or excusable if deceased "was

attempting to take away the property of the defendant" held properly refused, under *Crawford & Moses' Dig. § 2369*, defining as justifiable homicide killing in defense of habitation, person, or property against one who manifests the intent or endeavors by violence or surprise to commit a known felony; such statute not justifying killing merely to protect property, and being inapplicable unless the defendant is in possession of the property and the killing is necessary to prevent commission of a felony.

##### 2. Homicide $\S$ 309(1)—Instruction on manslaughter held properly modified to conform to statutory definition.

In a homicide prosecution an instruction on manslaughter, where the killing was voluntary held properly modified to conform to *Crawford & Moses' Dig. § 2355*, by requiring the killing to have been done in a sudden heat of passion apparently sufficient to make the passion irresistible.

##### 3. Homicide $\S$ 198—Testimony that deceased took possession of hogs belonging to other persons held immaterial.

In a prosecution for homicide committed during altercation as to ownership of hogs running wild in the woods, testimony as to efforts of deceased and his brother to take up hogs running in the woods belonging to other persons held immaterial except in impeachment of the brother as a witness.

##### 4. Witnesses $\S$ 270(2)—Restriction of cross-examination on immaterial matter held within court's discretion.

In a prosecution for homicide committed during altercation as to ownership of hogs running wild, in which defendant, on cross-examination of deceased's brother, had inquired as to whether the brother and deceased had not taken possession of hogs belonging to other persons, court's refusal to permit further examination on such subject after the brother had stated that the trouble with defendant had been the first trouble concerning hogs, and that he had not taken hogs of a named person, held within the discretion of the court.

##### 5. Homicide $\S$ 171(1)—Testimony as to what occurred at time of altercation between defendant and deceased admissible.

In a prosecution for homicide committed during altercation concerning ownership of hogs running wild in woods, it was competent for the state to show everything that occurred between the parties in the presence of each other at such time.

##### 6. Homicide $\S$ 156(2)—Testimony held admissible to show defendant's mental attitude toward deceased at time of firing shot.

In a prosecution for homicide committed during altercation as to ownership of hogs running wild, testimony that, after having shot and wounded deceased, defendant at first refused to permit others to put deceased in his wagon, but thereafter said, "Well, throw him in," held admissible to show defendant's mental attitude toward deceased at the time he fired the shot.

Appeal from Circuit Court, Independence County; Dene H. Coleman, Judge.

Peeler Brown was convicted of murder in the second degree, and he appeals. Affirmed.

W. K. Ruddell and S. M. Casey, both of Batesville, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

McCULLOCH, C. J. Appellant was tried under an indictment charging him with murder in the first degree in the killing of Will Britt, and was found guilty of murder in the second degree, his punishment being fixed by the jury at 21 years in the penitentiary.

Appellant and Britt were both, according to the evidence, residents of Independence county, and were farmers. The killing occurred in the woods between their respective places of residence. Appellant went into the woods with his brother, Elisha, and two neighbors or acquaintances named Coop, for the purpose of catching hogs running on the range. Britt claimed the right to take hogs on the range under a written assignment from one Rust, who asserted a "claim" to wild hogs. The party carried a wagon and team to haul the hogs out of the woods, and after catching and tying them they proceeded to load them into the wagon. Appellant came upon the scene with his two brothers, Jonah and Bill, and claimed the hogs as his own and demanded that Britt release the hogs. At that time there were two hogs loaded on the wagon and there were two others tied in another part of the woods. Britt refused to give up the hogs, and one of his party suggested that he be allowed to take the hogs home and that appellant bring replevin to settle the rights of the property, but this was declined by appellant, who was armed with a Winchester rifle, and fired two shots, one of them taking effect in Britt's chest. Britt ran away immediately after receiving the wound, and it was not known that he had been wounded until he was found lying in the weeds a short distance away when the wagon was moved and the party proceeded to leave the woods. Appellant's narrative on the witness stand of the circumstances immediately attending the killing was that when he demanded the release of the hogs Will Britt refused the request and proposed to "settle it there man to man," and that his brother Elisha walked from behind the wagon and also remarked, "We will settle it here." Appellant stated that he "stepped back and stumbled," and that when he came up he just threw his gun up and fired, and did not put it to his shoulder or take aim.

The case was defended on the ground that appellant acted in necessary self-defense in resisting the threatened assault of Britt, and also that in killing Britt he acted in defense of his property, the hogs which were found in Britt's possession. He invokes the application of the statute which defines justifiable homicide to be:

"The killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise, to commit a known felony." Crawford & Moses' Digest, § 2369.

The case was presented in the court below by appellant's counsel on the theory that the facts brought the case within the application of this statute, and one of the assignments of error relates to the refusal of the court to give the following instruction:

"You are instructed that under the laws of this state a man has a right to defend his home, his person, or his property against any one who intends or endeavors by violence or surprise to commit a known felony. And if you believe from the evidence in this case that the defendant, Brown, shot and killed the deceased, Will Britt, while the said Britt was attempting to take away the property of the defendant, Brown, then the killing would be what is known in the law as justifiable or excusable homicide, and you should acquit the defendant."

[1] This instruction is not, however, in accord either with the letter or meaning of the statute, and the court was correct in refusing to give the instruction. Nor do we think there is any evidence which would have justified a submission of appellant's right to commit the homicide on the ground of being in the defense of his property. It will be observed that the statute does not justify the slaying of a person merely for the protection of property, but the justification arises only when there is a manifest intention or endeavor "by violence or surprise to commit a known felony." A person has no right to slay another merely to protect his property unless he is in possession and the killing is necessary in order to prevent the commission of a felony. The mere fact that property is being wrongfully taken, or detained would not justify a homicide. Wharton on Homicide, (3d Ed.) pp. 390, 391; Utterbach v. Commonwealth, 105 Ky. 723, 49 S. W. 479, 88 Am. St. Rep. 329; State v. Tarter, 26 Or. 38, 37 Pac. 53; Hill v. State, 43 Tex. Cr. R. 583, 67 S. W. 506.

The undisputed facts in this case are that the hogs in controversy were not in the possession of appellant, but were in the possession of Britt and his party, who were about to haul them away, and that appellant was endeavoring to compel Britt to release the hogs. The property was not taken by Britt by violence or by surprise, but was taken up only under a claim of right. If the property was wrongfully taken, appellant's sole means of redress was an appeal to the law. He had no right to resort to force to regain possession. Therefore the court was correct in refusing to give not only the particular instruction referred to, but others on the same subject which were requested by appellant's counsel.

Instruction No. 3 requested by appellant reads as follows:

"You are instructed that the defendant had a right to defend his property against any one who attempted to carry it off, by violence or surprise; and if you believe from the evidence in this case that the defendant shot and killed the deceased while they were engaged in an altercation over the ownership of the hogs, and while the defendant was excited by the trespass on his property, and in the heat of passion caused by the attempt of the deceased and his confederates to carry off the hogs, which the defendant believed to belong to him, then the defendant could not be guilty of a higher grade of offense than manslaughter."

[2] The court modified this instruction, over appellant's objection, by striking out the first part of it relating to the right to defend property and by inserting the words "and that such provocation and passion was sufficient under other instructions given relative to manslaughter." The court was correct in striking out the first part of the instruction for the reasons we have already stated in regard to instruction No. 1, and was also correct in adding the words so as to conform the instruction to the law in regard to reduction of the degree of a homicide from murder to manslaughter where the killing is voluntary "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible." Crawford & Moses' Digest, § 2355. The homicide being unjustified, the degree was not reduced unless the facts brought it within the elements embraced in the definition of manslaughter.

[3] The court made a similar modification in instruction No. 5 requested by appellant's counsel on the subject of reduction of the degree of the offense from murder to manslaughter, and for the reasons stated above this modification was correct. The views we have expressed with reference to the right to kill in defense of property disposes of many of appellant's assignments of error concerning the rulings of the court on the admissibility of testimony. For instance, it is earnestly insisted that the court erred in refusing to permit appellant to introduce proof concerning other efforts of the Britt brothers to take up hogs found running in the woods that were shown to belong to other persons. Such testimony was wholly immaterial, except in impeachment of the surviving Britt as a witness, and the court did not improperly restrict the right of appellant to impeach the witness.

Complaint is also made that the court erred in refusing to permit appellant to prove the general reputation of the deceased and his brother by a witness named Wright. The court excluded the testimony on the ground that it was too remote in point of time and place, and in this we think the court was correct.

[4] It is further contended that the court

erred in refusing to permit appellant's counsel to interrogate Ellisha Britt on cross-examination concerning his own efforts in connection with his brother Will to take up hogs belonging to other persons. It appears from the record that appellant was permitted to ask the witness a number of questions on this subject, and, after the witness had stated that this was the first trouble that he had ever had about hogs and that he had not on a former occasion taken up the hogs of Joe Wright, the court refused to permit counsel to ask further questions on that subject. Witness had already answered the questions by stating that he had not taken up hogs belonging to Joe Wright, and it was within the sound discretion of the court to control the cross-examination and to determine to what extent the questions should be repeated. We do not think that there was any abuse of the court's discretion in this instance.

[5] It is contended that the court erred in permitting witness Coop to testify that just before the shooting occurred appellant's brother Jonah walked up to Will Britt and patted him on the shoulder and shoved him, saying, "You are going to turn the hogs out." All of this occurred, according to the testimony, in the presence of appellant and was a part of the controversy there between the two factions concerning the release of the hogs. We think it was competent to show everything that occurred there between the parties in the presence of each other.

[6] After Britt was found fatally wounded lying in the weeds, his brother and one of the Coops asked appellant's permission to put him in the wagon, which request appellant at first denied, saying that they must first go and turn loose the other hogs tied in the woods, but later said to them, "Well, throw him in," referring to the act of putting the wounded man into the wagon. This fact was admitted in evidence, and the ruling of the court is assigned as error, but we think it was competent as a part of the transaction to show appellant's mental attitude towards Britt at the time he fired the shot.

There are other assignments of error in regard to the introduction of evidence, which we do not find to be well founded, and are not of sufficient importance to call for a discussion.

From the viewpoint of appellant and accepting his version of the killing, there is much that can be said in the mitigation of his offense, but the jury has accepted the state's theory as to the circumstances attending the killing, and gave the defendant the extreme penalty imposed for the crime of murder in the second degree.

After careful consideration of the testimony, we are unable to say that the evidence does not justify the verdict.

Finding no error in the proceedings, the judgment is affirmed.



## AVEY v. STATE. (No. 124.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

**1. Criminal law §134(1)—Denial of change of venue on ground of prejudice of inhabitants of county held not abuse of discretion.**

In a murder prosecution, in which the defendant applied for change of venue on the ground of prejudice of the inhabitants of the county, and the examination of the affiants on whose affidavits defendant had based his application, on an inquiry as to their credibility, showed that they were advised as to the state of public sentiment in only 8 of the 24 townships in the county, denial of application held not an abuse of discretion.

**2. Witnesses §405(1)—Testimony of witness in murder prosecution as to relations with deceased may be contradicted.**

In prosecution for murder, where it was claimed that defendant, while riding with girl with whom he was claimed to have been intimate, shot her uncle, who attempted to induce her to leave defendant, and thereafter killed deceased, who had been with the uncle, and on cross-examination such girl denied that she was defendant's mistress, and that she had slept with defendant, her testimony could be contradicted; proof of motive not being a collateral matter.

Appeal from Circuit Court, Stone County; Dene H. Coleman, Judge.

Floyd Avey was convicted of murder in the first degree, and he appeals. Affirmed.

E. G. Mitchell, of Harrison, and S. M. Casey and Earl O. Casey, both of Batesville, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Assts. Atty. Gen., for the State.

SMITH, J. At the trial from which this appeal comes appellant was convicted of the crime of murder in the first degree for killing one Garfield Norman. He was given a life sentence in the penitentiary.

Two points are insisted upon for the reversal of the judgment of the court below. The first is that the court erred in refusing appellant a change of venue. The second is that the court erred in admitting certain testimony, and that the error was accentuated by giving an instruction covering this incompetent testimony.

The affidavit for the change of venue was made by certain residents of Stone county, the county in which the killing occurred. To ascertain the credibility of these affiants they were examined in open court. At the conclusion of this hearing the court announced its finding and decision as follows:

"Gentlemen, the law provides that when a person charged with a crime files the proper affidavit, complying with the statute, and setting

out that the minds of the inhabitants of the county, in which he is charged with the crime, are so prejudiced against him that he cannot obtain a fair and impartial trial, and this affidavit of two credible witnesses, that a change of venue must be granted.

"Now, the Supreme Court, in a number of cases, has defined what credible witnesses are, and among these definitions, or among the holdings of the Supreme Court, they say that the witness should have a sufficient knowledge of the facts to which he has made the affidavit to be a credible witness.

"Now, the witness Foster and the witness Roberts both show that they haven't sufficient information upon which to base the facts, and the further fact that Mr. Roberts stated that he didn't intend to say that this defendant couldn't get a fair and impartial trial. Mr. Foster didn't seem to understand the nature of the petition which he has signed, and he wouldn't say that the minds of the inhabitants of Stone county were prejudiced against the defendant. The witness Haley, however, has testified that in his community, that is, in Chalybeate township, in the southeastern part of the county, that such prejudice does exist. He states, however, that he hasn't been anywhere except at his own home and to town and to mill. Now, according to my understanding, as to that section of the county, he would be a credible witness; however, as to the county at large and the feeling in the entire county he has shown no knowledge whatever. The witness Johnson, while he made an additional affidavit, shows on examination that the affidavit was prepared by one of the attorneys in the case and then submitted to him, and he signed it. He shows that he has been nowhere but here and in Sylamore township. The witness Lamp testifies to conditions in Northwest township and Sylamore and Mountain View, the places where he has been. The witness Gower testifies that he has not been outside of Mountain View, and that he hasn't heard any one say that the defendant, Floyd Avey, cannot get a fair and impartial trial in this county. The witness Herrington has heard the matter discussed in Sylamore and Northwest townships, and seems to have heard very few people talk about it. The witness McGee says that the sentiment is usually against the defendant around Fox and Rushing, where he has been. Now, there is no question, I think, of the witness Conditt in and around the three townships down there. Now, none of the witnesses in this case have shown a general knowledge of the conditions all over the county, and, taking them all together, they have shown information—taking their affidavits and statements as true—they have shown more or less general knowledge of the conditions and of the prejudice existing in, I believe, all together they have shown the conditions in eight townships or communities in the county.

"I don't feel that unless a more general knowledge of the conditions existing in the county is shown—there being 24 townships in the county—that I would be authorized to grant this motion for a change of venue, and I would have to overrule it."

[1] It appears from the court's statement that he was properly advised as to his duty

and as to appellant's rights in the premises. The court limited the inquiry to an ascertainment of the credibility of the affiants as that term has been defined in frequent decisions of this court. He found the fact to be that these affiants, combined, were advised as to the state of public sentiment in only 8 of the 24 townships in the county, and that with information thus limited they were not credible persons within the meaning of the statute when they made an affidavit embracing and including the entire county. We cannot say that the court abused the discretion it was required to exercise in passing upon this question, nor can we say that he so far misapplied the testimony that his judgment must be reversed on that account. *Speer v. State*, 130 Ark. 457, 198 S. W. 113; *Hopson v. State*, 121 Ark. 87, 180 S. W. 485; *Dewein v. State*, 120 Ark. 302, 179 S. W. 346.

It was the theory of the state that immoral relations existed between appellant and one Vada Avey, a 16 year old woman, who had but recently married appellant's brother, a young man 18 years of age, and that John Stevens, in whose home Vada Avey had been reared, sought to break up this illicit relation. Vada Avey had been living at appellant's home, working for his wife, and it was the theory of the state that he induced his younger brother to marry her.

The testimony on the part of the prosecution tended to show that appellant and Vada Avey left home in the morning, and remained together until about 3 o'clock in the afternoon, at which time the killing occurred, and that they had traveled only a few miles during this time. Appellant and Mrs. Avey were riding double on a horse, appellant being in front and Mrs. Avey behind. While thus traveling they met John Stevens and his son Garland, who were riding horseback and traveling in company with Roy and Zed Satterfield and Garfield Norman. When the parties met, Stevens said to Vada Avey, "Get down, I want to talk to you a minute." She answered, "No, Uncle John, I don't want to get down." But Stevens was insistent, and she dismounted. Appellant also dismounted. Thereafter the testimony is in sharpest conflict. According to the testimony on behalf of the state appellant shot Stevens without any provocation except that he had been intercepted with Vada Avey, and an attempt was being made to induce her to leave him; and, further, that after shooting Stevens, appellant turned on Norman, who begged for his life, and assured appellant that he was his friend, but Norman was also killed. So far as the killing of Norman is con-

cerned the state's theory is that this was done to prevent Norman from being a witness against appellant for killing Stevens.

[2] Vada Avey gave testimony favorable to appellant, and tending to show that the killings were done in self-defense. Upon her cross-examination she was asked if she was not appellant's mistress. This she denied. She was then asked if she had not slept with appellant at the home of a Mrs. Wallace on a certain night. This she also denied. Thereafter the state called Mrs. Wallace and a Mrs. Brewer, and proved by each of them, over appellant's objection, that they had seen appellant and Vada Avey in his bed together at Mrs. Wallace's house on the occasion about which Vada Avey had been asked. In instructing the jury the court referred to this testimony, and told the jury that their consideration of it should be limited to the determination of the existence of a motive, and that if it did not tend to show the existence of a motive it would not be proper to be considered for any purpose.

It is the insistence of learned counsel for appellant that the relationship of appellant with Vada Avey was a collateral matter, and that, if it was proper to ask her at all concerning this relationship on her cross-examination to impeach her as a witness, her answer, whether true or false, was conclusive of the question so far as that trial was concerned. This would be true if the relationship between Vada Avey and appellant was, in fact, a collateral matter, and the only purpose of the inquiry had been to impeach her character as a witness. But there was a deeper purpose, to wit, the proof of a motive for the killing, and the proof of motive is not a collateral matter. *McCain v. State*, 129 Ark. 75, 195 S. W. 363.

This court has many times held that the state is not required to prove a motive to establish the guilt of one accused of homicide; but the court has also held that, as the absence of a motive is a circumstance tending to show innocence, the state may show the existence of a motive for taking the life of a decedent, to be considered with other facts and circumstances in determining the guilt or innocence of the accused. *Hogue v. State*, 93 Ark. 323, 124 S. W. 783, 130 S. W. 167; *Walker v. State*, 138 Ark. 517, 528, 529, 212 S. W. 319; *Scott v. State*, 109 Ark. 391, 159 S. W. 1095; *Ince v. State*, 77 Ark. 418, 88 S. W. 818; *Stokes v. State*, 71 Ark. 112, 116, 117, 71 S. W. 248.

No error appearing, the judgment is affirmed.

**THE FAMOUS STORE v. LUND-MAULDIN CO. (No. 127.)**

(Supreme Court of Arkansas. Sept. 26, 1921.)

**1. Sales §174—Buyer in default for goods delivered not entitled to delivery of balance.**

Buyer, having failed to pay for goods delivered when payment therefor was due, was not entitled to delivery of the balance of the goods covered by the contract.

**2. Appeal and error §197(4)—Complaint that issue was not within pleading cannot be made for first time on appeal.**

In seller's action for price of that portion of goods delivered, in which buyer cross-complained for damages for nondelivery of balance of the goods covered by the contract, buyer, having acquiesced in the issue of whether buyer first broke the contract by failure to make payment for goods delivered when due, thereby entitling seller to cancel contract as to balance of goods to be delivered, by failure to plead surprise as to such issue and ask for time to meet it, could not complain for the first time on appeal that such issue was not within the pleadings.

**3. Appeal and error §1056(6)—Exclusion of letter held harmless in view of evidence.**

In seller's action for price, in which buyer cross-complained for damages for seller's nondelivery of balance of goods, exclusion of buyer's letter ordering seller to ship balance of goods held harmless where buyer was in default in the payment of the purchase money for goods received, and was not in a position to insist upon the delivery of the balance of the goods.

Appeal from Circuit Court, Desha County; W. B. Sorrells, Judge.

Suit by the Lund-Mauldin Company against The Famous Store. Judgment for plaintiff, and defendant appeals. Affirmed.

H. H. Hays, of Arkansas City, for appellant.

Rogers, Barber & Henry, of Little Rock, for appellee.

**HUMPHREYS, J.** Appellee instituted suit against appellant in the Desha circuit court to recover \$181.40 for goods, wares, and merchandise sold and delivered by it to said appellant. Appellant admitted the indebtedness, but alleged by way of cross-complaint that appellee was indebted to him in the sum of \$1,848 by way of damages for the failure to ship all the goods ordered from appellee.

The substance of the cross-complaint is set out in appellant's abstract, and the allegations therein are:

"That on the 1st day of March, 1919, N. Dollar, the appellant, ordered from Lund-Mauldin Company, the appellee, 300 pair of shoes, particularly described in order No. 11 and invoice No. 849, attached to the cross-complaint, and marked Exhibit a-b-c.

"That the appellee, Lund-Mauldin Company, accepted said order and shipped a part thereof on the 8th day of March, 1919, and agreed to ship the balance on or about August 1, 1919, at the option of appellant, N. Dollar.

"That immediately after the shipment of March 8, 1919, of the shoes described in invoice No. 849 (which shipment was the basis of the original complaint) the Lund-Mauldin Company notified The Famous Store that because of the advance in labor and leather they could not make shipment of the balance of the order of March 1, 1919.

"That on the 25th day of July, 1919, the 1st day of August, 1919, and repeatedly thereafter, shipment of the balance of the order of March 1, 1919, was requested and demanded by The Famous Store and by N. Dollar.

"That the shoes so ordered, shipment of which was refused, advanced in price \$7 per pair between the date of the order and August 1, 1919, and that The Famous Store was forced to go into the open market to purchase shoes of the same kind, character, quality, and description at an advance of \$7 per pair over the contract price as fixed in the order of March 1st.

"That they had sustained damages in the sum of \$1,848, and prayed judgment therefor and their cost."

The amended reply to the cross-complaint denied each and every allegation contained therein.

The record reflects that the only witness who testified in the case was N. Dollar, the cross-complainant. On direct examination he testified, in substance, as follows:

"N. Dollar, doing business as The Famous Store, gave to the traveling salesman of the Lund-Mauldin Company, on the 1st day of March, 1919, an order for 288 pairs of shoes of the kind, description, size, and price set out in order No. 11, exhibited with his cross-complaint, and found fully set out at pages 11, 12, 13 of the transcript.

"That 36 pairs of these shoes were to be delivered immediately, and 252 pairs were to be shipped on or about August 1st.

"That the 36 pairs were shipped March 8, 1919, in one shipment of three boxes, each box containing 12 pairs, and were delivered in three separate installments, one box arriving March 14th, one box May 18th, and one box June 16th.

"That no bill of lading or other information showing delivery to the carrier was furnished the appellant by the Lund-Mauldin Company.

"That he made repeated requests and demands upon the Lund-Mauldin Company for shipment of the 252 pairs, and that such demands began July 25th, and extended to August 4th or 5th, and the only reason or excuse they gave for their failure and refusal to make shipment was the advance in the price of shoes.

"That the purchase price of the 36 pairs shipped March 8, 1919, was not due until 60 days from the receipt of the whole shipment.

"That because of the failure of the Lund-Mauldin Company to make delivery of the 252 pairs, the balance of the order, The Famous Store was compelled to go into the open market to purchase shoes of the kind, description,

and quality ordered from appellee, and that the same were purchased at an advance of \$4.50 per pair over the contract price."

On cross-examination N. Dollar made the following responses to the following questions:

"Q. The three cases for immediate shipment were shipped March 8th? A. Yes, sir; that is what the bill shows.

"Q. Attached to your cross-complaint as an exhibit is this invoice (handing witness paper) that shows your goods were shipped when? A. March 8, 1919.

"Q. March 8, 1919? A. Yes, sir.

"Q. When was that invoice due? A. It was due 60 days after receipt of the shoes.

"Q. Within 60 days? A. Yes, sir.

"Q. The first part of your installment that you say you got on March 14th, when was that due? A. The first one?

"Q. Yes; when was the first shipment due to be paid for? A. Within 60 days after I had received the goods.

"Q. You had one case in your store about March 14th? A. Yes, sir; I did.

"Q. Now, the second shipment, when was that due; 60 days from the date you received it, that would be July 18th, would it not? A. Yes, sir.

"Q. The first case you received, according to the express receipts, March 14th? A. Yes, sir.

"Q. Sixty days from that day would make it May 14th? A. Yes, sir.

"Q. That was when the payment for the first shipment was due—60 days from the day it was received. A. Yes, sir.

"Q. And the second shipment was May 18th; 60 days from that time would be July 18th? A. Yes, sir."

In testifying, N. Dollar offered a copy of a letter which he wrote to appellee on July 25th, which is as follows:

"July 25.

"Lund-Mauldin Company, 11th and Washington Ave., St. Louis, Mo.—Gentlemen: We know that there is an advance in shoes, and we are desirous of being protected on the shoes that we have under order from your house. We want you to ship these shoes C. O. D. by express at once.

"As we are needing these goods at the present time, trusting that you will give this your immediate attention, we beg to remain,

"Yours very truly,

"The Famous Store,

"Per \_\_\_\_\_."

The court excluded the letter, to which ruling appellant objected and preserved an exception.

At the conclusion of the evidence, the court peremptorily instructed, over the objection and proper exception of appellant, that appellant was not entitled to recover on his cross-complaint, and directed the jury to return a verdict for appellee upon his complaint, for the assigned reason that the undisputed evidence reflected that appellant first breached the contract by failing to pay for goods he

had received within 60 days after receiving same, and, for that reason, was not in a position to demand a shipment of the balance of the goods, and therefore not entitled to damages for the failure of appellee to ship them.

[1] Appellant contends that the court erred in giving the peremptory instruction, because, according to his version, the contract was not severable, and the evidence was not undisputed that appellee should pay the amount of each shipment within 60 days after received by appellant. While appellant testified both ways as to when the payment on the shipment of shoes received by him on March 14th, May 18th, and June 16th, became due, when pressed on cross-examination, he admitted that the payment for the shipment he received on March 14th fell due on May 14th, and that payment for the shipment he received on May 18th fell due on July 18th. After making such an admission, it does not lie in appellant's mouth to say the evidence is disputed upon that point. Appellant also stated in his evidence that his reason for refusing to pay for the first two bills of shoes received by him was because he concluded appellee was not going to carry out his contract according to agreement. Under the rule announced in *Harris Lumber Co. v. Wheeler Lumber Co.*, 88 Ark. 491, 115 S. W. 168, the contract in the instant case, as reflected by the evidence, was severable. Under the undisputed evidence in the instant case, as we view it, appellant committed the first breach of the contract, and continued to breach it unto the end by failing to pay the first two installments of the purchase money within the proper time after receiving the two shipments of goods, and, being himself in default, was in no position to maintain his cross-complaint. This court said in the case of *Harris Lumber Co. v. Wheeler Lumber Co.*, supra, that (quoting syllabi 3 and 4, 88 Ark. 491 [115 S. W. 168]):

"Where a vendee in a contract of sale willfully refused to pay an installment of the purchase money when due, the vendor was authorized to rescind the contract.

"A vendee who is himself in default in failing to pay an installment of the purchase money cannot insist upon performance by the vendor as a condition precedent to his performance."

[2] Appellant contends that he cannot be held to this breach for the reason that it was not pleaded in the answer or reply to the cross-complaint. The evidence as to the breach was introduced by appellee without objection on the part of appellant. It was within the discretion of the court to allow the breach to be pleaded and to treat the pleadings as amended to conform to the evidence. Appellant did not plead surprise at the new issue injected by the evidence and ask for time to meet it. Having acquiesced

in the issue and determination thereof, he cannot complain for the first time in the Supreme Court.

[3] Appellant contends that the court erred in refusing to admit the letter of July 25th in evidence. The letter was an order to ship out the balance of the goods, and its exclusion could not prejudice appellant, because he was in default in the payment of the purchase money on the orders theretofore received, and was therefore not in a position to insist upon the performance of the contract by the vendor.

No error appearing, the judgment is affirmed.

### MCCOOL v. STATE. (No. 126.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

1. Counties  $\S$  102—Indictment charging ex-treasurer with refusal to pay funds to successor held to sufficiently describe funds.

In prosecution of former county treasurer for refusal to pay over to his successor the public funds of the county in violation of Crawford & Moses' Dig. §§ 2832, 2835, 2836, description of the funds withheld as "public funds of Grant county" held a sufficient classification of the particular fund.

2. Counties  $\S$  102—General description of funds withheld by ex-officer sufficient.

In prosecution of an ex-officer for withholding public funds from his successor under Crawford & Moses' Dig. §§ 2832, 2835, 2836, indictment need not particularly describe the kind or denomination, date or number of the funds failed or omitted to be paid over to the successor, but a description in general terms is necessary, and it must appear from the description what funds were intended—whether county funds, municipal funds, school funds, etc.

3. Counties  $\S$  102—Indictment charging ex-county treasurer with withholding funds from successor held defective.

In prosecution of ex-county treasurer for withholding county funds from his successor in violation of Crawford & Moses' Dig. §§ 2832, 2835, 2836, indictment held fatally defective for failure to allege that county funds were in defendant's possession or under his control at the time when his term of office expired.

4. Counties  $\S$  102—County treasurer who misappropriates funds should be prosecuted for misappropriation and embezzlement, and not for withholding funds from successor.

An ex-county treasurer who misappropriated funds before the expiration of his term of office should be indicted for misappropriation or embezzlement of such funds, and not for failure or omission to pay them over to his successor at expiration of the term of his office, under Crawford & Moses' Dig. §§ 2832, 2835, 2836.

5. Counties  $\S$  102—Treasurer cannot be prosecuted for withholding from successor funds stolen from him or innocently lost.

County treasurer, if robbed of county funds, or if funds are innocently lost in some other way, cannot be prosecuted for withholding funds from successor under Crawford & Moses' Dig. §§ 2832, 2835, 2836.

Appeal from Circuit Court, Grant County; W. H. Evans, Judge.

E. E. McCool was convicted of willfully failing, neglecting, and refusing to pay over to his successor in office public funds, and he appeals. Reversed and remanded, with directions.

D. E. Waddell and R. R. Posey, both of Sheridan, and W. D. Brouse, of Benton, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

HUMPHREYS, J. Appellant, ex-treasurer of Grant county, was indicted, tried, and convicted in the Grant circuit court for willfully failing, neglecting, and refusing to pay over to his successor in office \$7,404.04 of the public funds of Grant county, his penalty therefor being assessed at 5 years' imprisonment in the state penitentiary. The indictment omitting the caption and signature, is as follows:

"The grand jury of Grant county, in the name and by the authority of the state of Arkansas, accuse E. E. McCool of the crime of failing to pay over public funds to his successor in office as county treasurer, committed as follows, to wit: The said E. E. McCool in the county and state aforesaid, on the 1st day of January, A. D. 1919, after having served and been the duly elected and legally qualified and acting county treasurer of Grant county, Ark., for three successive terms of office immediately before the said 1st day of January, 1919, and during that time had the care, custody, possession, and control of the public funds of said Grant county in said state of Arkansas, and that on the 1st day of January, 1919, W. D. Mathews, after being legally elected and qualified as the successor in office as county treasurer of the said E. E. McCool, and having legal authority to receive from E. E. McCool all public funds belonging to Grant county which had been placed in the hands and possession of the said E. E. McCool as county treasurer, and after proper demand, that the said E. E. McCool did unlawfully and feloniously fail, neglect, and refuse, and did willfully fail, neglect, and refuse to pay over to the said W. D. Mathews, as his successor in office, \$7,404.04 of the public funds of Grant county, which had during his administration of said office come into his hands and possession as county treasurer, and which he had not lawfully paid out for the uses and purposes for which they were collected and placed in his hands and possession, but that the said E. E. McCool did unlawfully and feloniously misappropriate and

embezzle the said public funds above mentioned against the peace and dignity of the state of Arkansas."

Appellant demurred to the indictment upon the following grounds:

(1) "That the statements of facts alleged in the indictment do not constitute a public offense."

(2) "That if the indictment does charge facts which constitute a public offense, it charges more than one public offense."

(3) "That the indictment does not contain a statement of facts constituting an offense in ordinary and concise language in such manner as to enable a person of common understanding to know what is intended."

The court overruled the demurrer, holding that only one offense was charged in the indictment, to wit: Willfully failing, neglecting, and refusing to pay over public funds of Grant county to appellant's successor in office, and also holding that the indictment properly alleged all the essentials of the crime charged as specified in sections 2832, 2835, and 2836 of Crawford & Moses' Digest, under which the indictment was drawn. Exceptions were properly saved, and one purpose of this appeal is to challenge the ruling of the court as to the sufficiency of the indictment in charging a willful failure to pay over public funds to appellant's successor in office. While the statutes referred to authorize charges of either embezzlement or a willful failure to pay over public funds the Attorney General concedes that the indictment in question does not attempt to charge embezzlement of public funds, and, after a careful reading of it, we agree with him in this regard.

[1, 2] The sole question, therefore as to the sufficiency of the indictment is whether it contains the necessary essentials to charge a willful failure or omission to pay over public funds of Grant county to appellant's successor in office. Appellant contends that the indictment is fatally defective for failing to describe the kind of public funds withheld. A particular description of the kind or denomination, date or number of the funds failed or omitted to be paid over to the successor in office by a retiring officer is not necessary, but a description in general terms is necessary under the provisions of section 2836 of Crawford & Moses' Digest. It must appear from the description what funds were intended—whether county funds, municipal funds, school funds, etc. The description of the funds in this indictment is insufficient as to all funds except the county funds. We think the designation in the indictment, "public funds of Grant county," necessarily means "county funds," and is a sufficient classification of that particular fund.

[3, 4] The indictment, however, is fatally defective in another respect. It is not alleged that any county funds were in the possession

or under the control of appellant at the time his term of office expired. The gist of the charge under the statute is a willful failure to pay over public funds under any classification in the possession or under the control of the retiring officer. If the retiring officer had misappropriated the funds before the expiration of his term of office he should have been indicted for misappropriation or embezzlement of such funds, and not for a failure or omission to pay them over at the expiration of the term of his office.

[5] So, also, under the statutes made the basis of this indictment, an ex-officer could not be prosecuted criminally if robbed of the funds, or if the funds were innocently lost in some other way. In construing section 2832 of Crawford & Moses' Digest, upon which this indictment was founded, this court said, in the case of Davis v. State, 80 Ark. 310 (97 S. W. 54), that (quoting the second syllabus)—

"An indictment of a county treasurer for failure to pay over public funds to his successor in office, which alleges that on a certain date he had funds belonging to a school district, and that on a subsequent date when his term expired he failed to pay over such funds to his successor, is defective in failing to state that he had such funds when his term expired."

Under the rule announced in that case, the demurrer to this indictment should have been sustained. In this view of the case, it is unnecessary to discuss whether the evidence was sufficient to sustain the verdict or the alleged errors in giving, refusing, and modifying instructions.

For the error indicated, the judgment is reversed and the cause remanded, with directions to sustain the demurrer to the indictment.

#### WINSTON v. STATE. (No. 117.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

1. Criminal law  $\S$  844(1)—Declarations of law in charge treated as separate instructions, though not separately numbered.

The declarations of law in the charge to the jury, though not separately numbered, must be treated as separate instructions on objection "to each and every instruction given by the court on its own motion."

2. Intoxicating liquors  $\S$  223(3) — Defendant, indicted for manufacture of whisky, cannot be convicted on proof that the liquor was not whisky.

Defendant, indicted for unlawfully manufacturing "whisky," could not be convicted on proof that he had manufactured intoxicating liquor other than whisky.

Appeal from Circuit Court, Faulkner County; Geo. W. Clark, Judge.

Chester Winston was convicted of unlawfully manufacturing whisky, and he appeals. Reversed and remanded.

J. Wendell Henry and P. H. Prince, both of Conway, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Atty. Gen., for the State.

WOOD, J. This is an appeal from a judgment of conviction on an indictment which charged that the appellant "unlawfully and feloniously did manufacture and unlawfully and feloniously was interested in the manufacturing of one pint of alcoholic, ardent, vinous, and intoxicating spirits, commonly called 'whisky.'" The appellant denied that he had manufactured any whisky. There was testimony from which the jury might have found that the appellant had manufactured whisky. There was also testimony from which the jury might have found that the appellant was engaged in the manufacture of "chock beer," and not whisky.

The court gave one instruction, which contained several independent propositions of law in separate paragraphs, but the paragraphs were not numbered. In one of the paragraphs the court instructed the jury in part as follows:

"The material allegations in the indictment are that the accused, within three years, and in Faulkner county, Ark., before the return of this indictment, unlawfully and feloniously manufactured alcoholic, ardent, vinous, and intoxicating liquors. To this indictment, defendant pleads not guilty, and that casts the burden upon the state of proving same beyond a reasonable doubt. If you find from the evidence in this case that the defendant did manufacture any intoxicating liquor used and drunk as a beverage—whether it contained 100 per cent. or one per cent. is immaterial under this statute—he would be guilty of violating this law."

[1] The appellant objected "to each and every instruction given by the court on its own motion." The court overruled the objection, to which ruling the appellant excepted. The objection was not en gros, but was to "each" instruction or declaration of law that the court gave. Although the several declarations of law were not separately numbered, yet each one of these declarations, which were independent and different in meaning, must be treated as a separate instruction.

[2] The term "whisky" in the indictment was descriptive of the offense, and it was incumbent on the state to prove the charge of manufacturing "whisky" as alleged. *Carleton v. State*, 129 Ark. 361, 196 S. W. 124, and cases there cited. See, also, *Shuffield v. State*, 141 Ark. 276, 216 S. W. 695. But, under the instruction given by the court, the jury was authorized to find the

appellant guilty if they found that he "unlawfully and feloniously manufactured alcoholic, ardent, vinous, and intoxicating liquors used and drunk as a beverage" whether such liquor was whisky or not. In other words, the jury was authorized to find, and under the testimony may have found, that the appellant manufactured intoxicating liquor called "chock beer" to be used and drunk as a beverage. The instruction was erroneous.

We do not discuss other assignments of error, because they may not arise on another trial. For the error of the court as indicated, the judgment is reversed, and the cause remanded for a new trial.

### McCABE v. STATE. (No. 113.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

1. Indictment and Information  $\S$  189(8)—Defendant may be convicted under indictment charging malicious homicide though killing was done in committing a felony.

An indictment charging malicious homicide does not include murder committed in the perpetration of or in the attempt to perpetrate one of the felonies mentioned in *Crawford & Moses'* Dig.  $\S$  2343, unless the element of malice aforethought is present in the commission of the crime, but under such an indictment there can be a conviction for homicide committed in the perpetration of or in the attempt to perpetrate a felony if the killing was done with malice aforethought.

2. Homicide  $\S$  269—Whether killing was done with malice aforethought is generally for the jury,

In a prosecution for first degree murder under *Crawford & Moses'* Dig.  $\S$  2343, the question of whether the killing was done with malice aforethought is generally for the jury, even though the killing was done in the perpetration of or in the attempt to perpetrate another felony of the kind mentioned in such statute.

3. Criminal law  $\S$  419, 420(10), 424(3) — Statements of codefendant, made in defendant's absence after commission of offense, not admissible.

In prosecution for murder, the admission of statements made by one who had been jointly indicted with defendant for the killing of the deceased made in the absence of the defendant after the commission of the crime, held reversible error, and such was hearsay.

4. Criminal law  $\S$  59(5) — Persons who are present aiding and abetting in commission of crime are "principals," and not "accessories."

Under *Crawford & Moses'* Dig.  $\S$  2311, persons who are present aiding and abetting in the commission of a crime are principal of-

fenders, and not "accessories," and must be indicted and convicted as "principals."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accessory; Principal.]

5. Criminal law §80, 424(3)—Confessions of principal admissible against accessory to establish commission of crime; acts of coparticipant after crime, in defendant's absence, inadmissible.

Under an indictment for being an accessory to a crime, any evidence admissible upon the trial of the principal including confessions is admissible against the accessory for the purpose of establishing the commission of the crime by the principal, but where a person is charged as principal the acts and declarations of a coparticipant in his absence, and after the consummation of the offense, are not admissible.

Appeal from Circuit Court, Sebastian County; John Brizzolara, Judge.

Thomas McCabe was convicted of murder in the second degree, and he appeals. Reversed and remanded.

John B. Hiner, of Ft. Smith, for appellant.  
J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

MCCULLOCH, C. J. Appellant was jointly indicted with one Willard Jones for the crime of murder in the first degree, alleged to have been committed by killing Robert Couch. On a severance, appellant was tried separately, and was convicted of murder in the second degree.

The evidence adduced by the state tended to show that, while appellant and Couch were walking through the railroad yards at Ft. Smith one night about 9:30 o'clock, in December, 1920, Couch was shot and killed by Willard Jones in an attempt to rob Couch. The theory of the state is that appellant and Jones had formed a conspiracy between them to kill Couch, and that appellant was present when Jones committed the homicide.

It is not charged in the indictment that the homicide was committed "in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or larceny," but it is charged that the killing was done by Jones and appellant "unlawfully, willfully, feloniously and with malice aforethought and with deliberation and premeditation." The statute defines murder in the first degree to be homicide—

"which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate, arson, rape, burglary, robbery or larceny." Crawford & Moses' Digest, § 2343.

[1, 2] An indictment charging malicious homicide does not include murder committed in the perpetration of or in the attempt to perpetrate one of the felonies mentioned in the statute, unless the element of malice aforethought is present in the commission of the crime; but under such an indictment there can be a conviction for homicide committed in the perpetration of or in the attempt to perpetrate a felony if the killing was done with malice aforethought. Rayburn v. State, 69 Ark. 177, 63 S. W. 356. Malice might exist in the commission of the homicide, even though the primary purpose of the offender is to commit another felony, and it is generally a question for the jury to determine whether or not the crime was committed with malice aforethought, even though it was done in the perpetration of or in the attempt to perpetrate another felony of the kind mentioned in the statute.

[3] After appellant was arrested he pointed out Jones to the officers as the man who had shot Couch, and the court permitted the officer to testify concerning statements made by Jones in appellant's absence and after Jones had been arrested. The statements of Jones to the officer, according to the latter's testimony, were very damaging to appellant, and, if the testimony was inadmissible, the ruling of the court in allowing it to be introduced necessarily calls for a reversal of the judgment. We are clearly of the opinion that the testimony is inadmissible, for at most it related only to the statements of a coconspirator in the absence of appellant after the consummation of the act, and was mere hearsay.

[4, 5] Appellant was indicted as a principal, and not as an accessory, and it was therefore not competent for the state to prove appellant's participation in the crime by Jones' admissions made in appellant's absence. Under our statutes persons who are present aiding and abetting in the commission of a crime are principal offenders, and not accessories, and must be indicted and convicted as principals. Crawford & Moses' Digest, § 2311. Under an indictment for being an accessory to a crime, any evidence admissible upon the trial of the principal, including confessions, is admissible against the accessory, for the purpose of establishing the commission of the crime by the principal. 16 Corpus Juris, 669. But where a person is charged as principal in the commission of a crime, the acts and declarations of a coparticipant in his absence and after the consummation of the offense are not admissible. The distinction is pointed out in the decision under a similar statute in the case of State v. Bogue, 52 Kan. 79, 34 Pac. 410. It is a well-settled principle in the law of evidence that acts and declarations of a coconspirator



are inadmissible against another in the latter's absence and after the consummation of the conspiratorial act.

For the error of the court in improperly admitting the testimony of the witness concerning statements of Jones in the absence of appellant, the judgment is reversed, and the cause remanded for a new trial.

### LEAKE v. STATE. (No. 120.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

1. Criminal law §402(1)—Loss of alleged forged instrument must be proved before admission of parol testimony as to contents.

In prosecution for uttering a forged instrument, the loss or destruction of the alleged forged instrument must be proved before the admission of oral testimony as to its contents.

2. Criminal law §402(1)—Sufficiency of foundation for admission of parol testimony as to contents of lost instrument a question for trial court.

The sufficiency of evidence as to the loss or destruction of alleged forged instrument, offered as a foundation for the introduction of parol testimony as to the contents of the instrument, is a question for the trial court.

3. Criminal law §1158(4)—Testimony offered as foundation for introduction of parol testimony as to contents of lost instrument reviewable on appeal.

The testimony as to the loss or destruction of an instrument, offered as the foundation for the introduction of parol evidence as to its contents, is subject to review on appeal.

4. Criminal law §402(1)—Prosecution must show diligence in search for lost instrument to warrant admission of oral testimony as to contents.

In prosecution for uttering a forged instrument, the prosecution as a foundation for oral testimony as to contents of such instrument must show that a diligent search has been made where it was most likely to be found, and that the prosecuting attorney has in good faith exhausted in a reasonable degree all the accessible sources of information which the nature of the case would naturally suggest.

5. Criminal law §402(1)—Foundation for admission of parol testimony as to contents of alleged forged instrument held sufficient.

In prosecution for uttering a forged order, evidence that a thorough search was made for the order at the clerk's office that outgoing prosecuting attorney was consulted as to where it might be found, and that a diligent search had been made and considerable money expended without success, held sufficient foundation for admission of parol testimony as to its contents; it being sufficient that all sources of information suggested by the nature of the case have been in good faith exhausted.

6. Criminal law §402(1)—Testimony as to inquiries of former prosecuting attorney as to whereabouts of lost instrument admissible.

In prosecution for uttering a forged instrument which had been in the hands of the former prosecuting attorney, but had disappeared at the time of the trial, the prosecuting attorney was properly permitted to testify that he had made inquiries of such former prosecuting attorney as to the whereabouts of the instrument.

Appeal from Circuit Court, Ouachita County; Geo. R. Haynie, Judge.

Huby Leake was convicted of uttering a forged instrument, and appeals. Affirmed.

Powell & Smead, of Camden, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

HART, J. Huby Leake prosecutes this appeal to reverse a judgment of conviction against him for the crime of uttering a forged instrument. The indictment charges the defendant with the crime of uttering a forged order drawn on George Gordon, a merchant of Camden, Ark., purporting to be signed by Will Blakely. At the time of the trial the state did not produce the instrument, but proved its contents by George Gordon and Will Blakely, and also proved by them that the defendant uttered the forged order in Ouachita county, Ark., within three years prior to the finding of the indictment.

As a foundation for the admission of the testimony of George Gordon and Will Blakely as to the contents of the alleged forged order, the state proved by the clerk of Ouachita circuit court that it was the custom of the prosecuting attorney in office, at the time the indictment in the present case was returned, to pin orders such as the one in the instant case in the grand jury book, and that the grand jury book was kept in the office of the circuit clerk; that the circuit clerk made a diligent search in his office for the grand jury book and the order in question, and has not been able to find it.

The present prosecuting attorney testified that, together with the circuit clerk, he made a diligent search for the grand jury book and the alleged forged order; that he made a special trip to El Dorado to see the prosecuting attorney who drew the indictment, and was unable to locate the grand jury book or the alleged forged order after having made a diligent search for the same. On cross-examination, the prosecuting attorney testified that he searched fairly thoroughly through a plunder room of the office of the attorneys for the defendant and was unable to find anything that looked like the grand jury book or the alleged forged order in question. The prosecuting attorney testified that he had gone to considerable expense,

and had made a diligent search for the alleged forged order, and had been unable to find the same.

[1-4] At the trial the defendant made objections to the admission of the testimony of Gordon and Blakely as to the contents of the alleged forged order on the ground that there was no proof of diligent search or of the loss or destruction of the original. The proof of loss of the alleged forged order being a matter preliminary to the admission of the oral testimony of George Gordon and Will Blakely as to its contents, the question of the sufficiency of the evidence was for the trial court, and of course the testimony offered on that question is subject to review on appeal. In order to show loss of the alleged instrument, it was necessary to prove that a diligent search had been made for it where it was most likely to be found. There is no general rule as to the degree of diligence in making the search; but the prosecuting attorney who alleged the loss was expected to show—

"that he has in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." *Wilburn v. State*, 60 Ark. 141, 29 S. W. 149 and *Simpson & Co. v. Dall*, 3 Wall. (U. S.) 460, 18 L. Ed. 265.

In the *Wilburn Case* the court said that the diligence exercised did not measure up to the standard laid down above. In that case the indictment charged the defendant with falsely pretending that he was the owner of a certain growing crop of cotton and corn. The defendant claimed that the court erred in allowing proof of the contents of a rent note executed to him, on the ground that the loss of the note had not been sufficiently established. On this point it was shown that the prosecuting attorney had, about an hour before the trial, gone to the persons supposed to have the rent note in their possession and asked them to make a search for it. As thorough search as could be made in the limited time was made, but the witness could not say that a thorough search had been made. In fact, he stated that the note must be among the papers of the firm, and that by further search they might possibly find it.

[5] In the present case a thorough search was made for the instrument in the clerk's office where papers of that kind were usually kept. The prosecuting attorney also made a special trip to consult with the outgoing prosecuting attorney as to the place where the instrument might be found. He testified that he made a diligent search and went to considerable expense to find the instrument, but could not do so. As we have already seen, reasonable search is sufficient, although it does not appear that every pos-

sible search has been made. There are no circumstances tending to show in the remotest degree that the instrument has been designedly withheld. All sources of information and means of discovery which the nature of the case would naturally suggest were in good faith exhausted by the prosecuting attorney in trying to find the alleged forged instrument.

Under the facts disclosed by the record we do not think the circuit court abused its discretion in finding that the instrument in question had been lost, and that secondary evidence of its contents was admissible. Hence, the assignment of error that the judgment should be reversed on account of the admission of the evidence of Gordon and Blakely as to the contents of the alleged forged order is not well taken.

[6] It is also insisted that the court erred in permitting the prosecuting attorney to testify that he had made inquiry of the outgoing prosecuting attorney as to the whereabouts of the instrument. There was no error in the action of the court in this respect. The prosecuting attorney was not permitted to testify what the former prosecuting attorney said to him about the instrument. The paper had been in the hands of the former prosecuting attorney, and it was perfectly proper for the prosecuting attorney to go to him, state the loss, and ask him where he should look for it. It was his duty to make a reasonable search for the paper in all places where it was likely to be found, and in order to do this it was perfectly proper for the present prosecuting attorney to go to the former prosecuting attorney, and asked him about the paper, and where he would be likely to find it.

No other assignments of error are urged to reverse the judgment, and, finding no error in the record, the judgment will be affirmed.

#### HESTER v. STATE. (No. 121.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

1. Criminal law §507(5)—Receiver of stolen goods an "accomplice" within rule requiring corroboration of accomplice testimony.

A defendant charged with burglary cannot be convicted on the uncorroborated testimony of one who received a part of the stolen goods knowing they had been stolen, for the purpose of helping to dispose of them; such person being an accomplice of the defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. Criminal law §368(3)—Statement of defendant's mother on day following burglary not admissible as *res gestæ*.

In a burglary prosecution, testimony as to a statement by defendant's mother, on the

day following the night of the burglary, that she was glad the defendant had been home on the night of the burglary, held not admissible; such testimony not constituting a part of the res gestæ.

Appeal from Circuit Court, Greene County; R. E. L. Johnson, Judge.

Ray Hester was convicted of burglary, and he appeals. Reversed and remanded.

Jeff Bratton and W. W. Bandy, both of Paragould, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

HART, J. Ray Hester prosecutes this appeal to reverse a judgment of conviction against him for the crime of burglary.

The first assignment of error is that the court erred in not telling the jury that Bill Woods was an accomplice, and that his testimony required corroboration in order to convict the defendant.

Among the witnesses for the state were Walter Cole, Bill Woods, and Gilbert Spillman. Walter Cole and Gilbert Spillman testified that they, in company with Ray Hester, broke into a mercantile establishment in Paragould, Greene county, Ark., in April, 1920, in the nighttime and took therefrom silk shirts, silk hose, shoes, underwear, collars and neckties worth between \$2,000 and \$3,000.

Walter Cole testified that they hid the goods under a certain house on the night the burglary was committed; that he told Bill Woods about the burglary before the goods were divided; that he also talked with Bill Woods about the burglary after the goods had been divided; that Bill Woods agreed to help him take his share of the stolen goods to Oklahoma; that they placed the stolen goods in grips, and that he and Bill Woods started to Oklahoma, and were arrested soon after they started; and that Bill Woods had part of the stolen goods in his grip at the time he was arrested.

Bill Woods testified that in a few days after the burglary was committed Walter Cole told him that Ray Hester, Gilbert Spillman, and himself had committed the burglary; that soon afterwards witness asked Ray Hester if they had divided the goods, and Hester replied that they had, and that some one had stolen his part. Witness then agreed with Walter Cole to help him carry his part of the stolen goods to Oklahoma for the purpose of disposing of them. Walter Cole and Bill Woods then started to Oklahoma, each carrying a grip with part of the stolen goods in it. Witness knew that the goods had been stolen at the time the storehouse in question was burglarized in Paragould, Ark., and he was going with Cole to Oklahoma to help him dispose of his share of them at the time they were arrested.

The court instructed the jury that Walter Cole and Gilbert Spillman were accomplices of the defendant in the burglary, but refused to instruct them that Bill Woods was also an accomplice, and that there could be no conviction upon his uncorroborated testimony.

This raises the question of whether or not the failure of the court to charge that Bill Woods was an accomplice and that under the statutes his testimony required corroboration, calls for a reversal of the judgment. The word "accomplice," as used in our statute requiring corroboration, has been construed by the court to include an accessory after the fact. *Edmonson v. State*, 51 Ark. 115, 10 S. W. 21, and *Stevens v. State*, 111 Ark. 299, 163 S. W. 778.

But it is insisted by the state that the receiver of stolen goods is not an accomplice of the person committing burglary at the time the goods are stolen. There is a division of the authority on this question. In *Murphy v. State*, 130 Ark. 353, 197 S. W. 585, the defendant was charged with the crime of larceny, and it appeared from the testimony that he had delivered some of the stolen goods to one "C." This court held that it was the duty of the court to tell the jury that, if "C." received the stolen goods with knowledge that they were stolen, she was an accomplice, and that a conviction could not be had unless her testimony was corroborated in the manner provided in the statute.

[1] In the light of the authorities cited it follows that Bill Woods was an accomplice of the person committing the burglary, so that the conviction of the one cannot be sustained on the uncorroborated testimony of the other. In this case it is not shown that the witness Bill Woods participated in the original taking, but it is not questioned that he received a part of the stolen goods, knowing they were stolen, for the purpose of helping dispose of the same. Thus the undisputed evidence places him in the attitude of an accomplice, and it was reversible error on the part of the trial court not to charge the jury on accomplice's testimony in the manner provided in the statute.

[2] In view of a new trial it is thought advisable to consider one other alleged error. It pertains to the refusal of the court to permit the mother of the defendant to give certain testimony in support of his defense of an alibi. On the day following the night of the burglary the father of the defendant came home and reported the fact of the burglary to his family at the dinner table. The defendant offered to prove that his mother at once stated that she was glad the defendant had been at home on the night of the burglary, because they could not accuse him of it, as they had done in the Bertig burglary.

It is claimed that this statement, made by the mother of the defendant, was a part

of the res gestæ, and should have been admitted in evidence. We do not agree with counsel in this contention. The burglary had been committed on the preceding night, and the stolen goods had been hidden. The statement of the mother had no connection whatever with the burglary, and could not be said in any manner to be associated with it. It was simply an utterance on her part relative to a past transaction, and constituted no part of the res gestæ. *Elder v. State*, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220, and *Spivey v. State*, 114 Ark. 267, 169 S. W. 949.

The mother of the defendant was permitted to testify that her son was at home on the night the burglary was committed, and to give in full her reason for recollecting that he was there on that night. This was as far as she was entitled to go, and the trial court committed no error in refusing the excluded testimony just referred to.

For the error in refusing to tell the jury that the witness Bill Woods was an accomplice, and charge the jury on an accomplice's testimony in the manner provided by the statute, the judgment must be reversed, and the cause will be remanded for a new trial.

#### WILLIAMS v. STATE. (No. 116.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

##### 1. Criminal law §822(11) — Instruction on burden of proof held not error.

In a homicide prosecution in which defendant claimed to have acted in self-defense, instruction on burden of proof, which was a literal copy of *Crawford & Moses' Dig. § 2342*, held not error, when read in connection with the other instructions, as against the contention that it ignored the rule that the burden of proof of the whole case was on the state.

##### 2. Homicide §302, 303—Refusal of instructions as to defendant's right to protect residence and property held proper.

In a homicide prosecution where defendant claimed self-defense, and the evidence on self-defense merely showed that deceased had threatened and was at the time seeking to take defendant's life, and there was no evidence that defendant shot deceased to protect his property or residence, refusal to grant instructions as to the defendant's right to protect his property and place of residence held proper.

Appeal from Circuit Court, Ouachita County; Geo. R. Haynie, Judge.

Luther Williams was convicted of voluntary manslaughter, and he appeals. Affirmed.

Powell & Smead, of Camden, for appellant. J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

WOOD, J. The appellant was indicted for the crime of murder in the first degree in the killing of one Burl Beard. He was convicted of voluntary manslaughter. Burl Beard lived at his father's home, which was about 200 yards from the home of Dorsey Warrent. In the early morning of October 15, 1920, Beard was out on the porch at his father's house when Warrent called to him, saying, "Come up here, Burl; I want to see you." Burl replied, "I can't; I have to help papa." Warrent called him again, and Burl put on his shoes, but did not lace them, and went to Warrent's. Warrent accused Beard of being around his house the night before, which Beard denied. The appellant, who had spent the night at Warrent's house, accused Beard of being around the house the preceding night. According to the testimony for the appellant, Beard became enraged at the appellant because he had accused him of being around the house of Warrent the night before, told the appellant that he lied about it, went back to his home, and returned to Warrent's. The mother of appellant went over to Warrent's home, and while she was there Beard returned and asked his mother for a key, and started to go in the yard, and his mother and Warrent tried to prevent him. He continued on to the steps of the house when appellant told him not to come any further. Beard made the next step, and the appellant shot him. Beard had his hand behind him, and stepped on the porch, and the appellant fired again. Beard had nothing in his hand. No weapon was found on his person.

Among others, the court on its own motion, gave the following instruction:

"No. 5. The killing being proven, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."

The court refused the following prayers of appellant for instructions:

"No. 7. You are instructed that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person, or property against one who manifestly intends or endeavors, by violence, or surprise, to commit a known felony; and, if the jury believe from the evidence in this case that the defendant shot and killed the deceased while in the defendant's home or place of habitation, or where the defendant was visiting, and that the deceased at the time he was shot

by the defendant was manifestly endeavoring to assault the defendant for the purpose of taking his life or doing him great bodily harm, then the defendant was not required to retreat, but had the right to stand his ground, and if it appeared to him, acting as a reasonably prudent person, to be necessary to shoot deceased to prevent such assault, then he is justified in so doing, and your verdict will acquit him therefor."

"No. 9. You are instructed that every man's house or place of residence shall be deemed and adjudged, in law, his castle. And a manifest attempt and endeavor in a violent, riotous, or tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein, shall be a justification for homicide. So, in this case, if you believe from the evidence that the house in which deceased was shot by defendant was the place of residence of defendant, whether he owned the house or not, and that the deceased, in a violent or threatening manner, entered said house, for the purpose of assaulting or offering personal violence to the defendant, then the defendant would be justified in shooting deceased, and you will find him not guilty."

[1] 1. Error is predicated on the ruling of the court in giving instruction No. 5, the contention being that the instruction was erroneous because it ignored the well-known rule of law that in criminal prosecutions the burden of proof upon the whole case is on the state. The instruction was a literal copy of section 2342 of Crawford & Moses' Digest. It must be read in connection with another instruction, which the court gave, and which appellant fails to abstract, and which reads as follows:

"You are instructed that while it is true that, the killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense only amounted to manslaughter, or that the accused was justified or excused in committing the homicide, yet you are told that it is a sufficient defense if the circumstances of mitigation or justification are such as would raise in your minds a reasonable doubt as to the defendant's guilt."

The instructions, when read together, do not conflict and conform to the decisions of this court in Johnson v. State, 120 Ark. 193, 179 S. W. 361; Brock v. State, 101 Ark. 147, 141 S. W. 756; Cogburn v. State, 76 Ark. 110-112, 88 S. W. 822; Tignor v. State, 76 Ark. 489, 89 S. W. 96; Petty v. State, 76 Ark. 515, 89 S. W. 465. The court did not err in giving the above instruction No. 5.

[2] 2. The court did not err in refusing appellant's prayers for instructions Nos. 7 and 9. These instructions under the evidence were abstract as appertaining to the home or property of appellant. Although Williams

was temporarily at the home of Warrent, there is nothing in the testimony that would warrant an inference that the appellant shot Beard because he was attempting to invade the home of Warrant, or that he shot him to protect his property. The testimony on behalf of appellant tended to prove that he killed Beard because the latter had threatened and was at the time seeking to take the appellant's life. There was therefore no testimony to warrant the court in submitting to the jury the issue as to whether or not the appellant killed Beard in the defense of his habitation or property. The only defense that appellant was justified in making under the evidence was that the killing was done in defense of his person, and this theory of the defense was fully and correctly covered in instructions which the court gave. We find no error in the court's rulings, and its judgment is therefore affirmed.

#### COPPERSMITH v. STATE. (No. 115.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

##### 1. Criminal law §598(5)—Refusal of continuance for absence of witnesses held proper in view of lack of diligence.

Where defendant was indicted January 27th, but did not procure the issuance of subpoenas for certain witnesses until March 24th, and, on the return of the subpoenas unserved, was not diligent in ascertaining the whereabouts of the witnesses so that their attendance could be procured, the court's refusal to grant defendant a continuance for absence of witnesses on the ground that defendant had not exercised proper diligence held proper.

##### 2. Criminal law §594(3)—Continuance properly denied where absent witnesses were evading service of process.

Where witnesses sought by defendant suddenly disappeared from their usual haunts and could not be located, the court was justified in concluding that they were evading the service of process, that there was no certainty of procuring their attendance at a future date, and was warranted in denying defendant's application for a continuance for their absence.

##### 3. Criminal law §761(13), 844(1)—Instruction held not to assume defendant's guilt in absence of specific objection.

In a prosecution for operating a gambling house, instruction requiring corroboration of the testimony of a certain witness held not to assume that defendant was connected with or interested in the operation of the gambling house, but if it did it was defendant's duty to make a specific objection thereto.

##### 4. Gaming §94(2)—Defendant charged with operation of gambling house cannot be convicted of gaming.

A defendant charged with operation of a gambling house cannot be convicted of gaming.

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Tony Coppersmith was convicted of operating a gambling house, and he appeals. Affirmed.

B. H. Randolph, J. A. Stallcup, and A. J. Murphy, all of Hot Springs, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

**MCCULLOCH, C. J.** The indictment against appellant returned by the grand jury of Garland county is for the offense of operating a gambling house in the city of Hot Springs. It is charged in the indictment that the gambling was conducted in a room in a certain hotel in the city of Hot Springs.

When the case was called for trial, appellant presented a motion for continuance in order to procure the attendance of two absent witnesses, George Brown and Whitey Jackson, and the ruling of the court in refusing to postpone the trial is the principal assignment of error urged here for reversal of the judgment. It is stated in the motion that each of the two witnesses would testify, if present, that the room in question was rented and occupied as a bedroom by Brown and that appellant did not occupy the room for any purpose nor operate a gambling game therein. It appears from the record and from the recitals of the motion for continuance that the indictment against appellant was returned by the grand jury on the 27th day of January, 1921, and that on March 24, 1921, the court set the case down for trial on April 5th; a subpoena being issued on that date for each of said witnesses. Brown was a resident of Garland county and Jackson was a resident of Pulaski county, and the subpoenas were issued respectively to those counties, but were subsequently returned unserved.

[1] Appellant alleged in his motion that the said witnesses were temporarily absent from their respective places of residence; that he had heard of their being in El Dorado, Ark., and had sent a subpoena to Union county, but that the same had not been returned up to the day of the trial. The motion contained a formal statement that the witnesses were temporarily absent and that their attendance upon the trial at a later date could be procured; that their absence was without the procurement or connivance of appellant, and that he could not establish the facts recited by any other witness. The court overruled the motion, and on a trial of the cause there was a conflict in the testimony as to who operated the gambling game in the room mentioned. There was testimony adduced by the state tending to show that appellant occupied the room and operated the game, and, on the other hand, there was tes-

timony introduced by the appellant tending to show that he had nothing to do with the operation of the game, but that the room was occupied by Brown and that Brown operated the game. We are of the opinion that the court was correct in finding that appellant had not exercised proper diligence entitling him to a continuance of the cause.

[2] Appellant was not justified in waiting until the case was set for trial in preparing his cause and in having his witnesses summoned. The indictment was returned and appellant was arrested on January 27th, but, according to his own statement, he did not set about the procurement of the attendance of the witnesses until March 24th, and even after that date it does not appear that he was diligent in following the matter up to the extent of ascertaining the whereabouts of the witnesses so that their attendance could be procured. Moreover, the fact that the witnesses suddenly disappeared from their usual haunts and could not be located justified the court in concluding that they were evading the service of process and that there was no certainty of procuring their attendance at a future date. We think that the ruling of the court can be sustained on either of these grounds and there should be no reversal of the judgment on account of the refusal to postpone the trial.

[3] Another assignment of error relates to the giving of the following instruction:

"You could not convict on the testimony of the witness Piovio alone; but if you believe that his testimony which tends to show that defendant was connected with and interested in the place, if it does tend to show that he was connected with it, is corroborated by other evidence tending to prove that defendant was interested in it, and you believe from all of the evidence in the case, including that of Piovio, that defendant was interested in the operation of a gambling house or room, you should find the defendant guilty."

The contention is that the court assumed in this instruction that appellant was connected with or interested in the operation of the gambling house. The instruction does not, we think, contain such an assumption of facts—certainly not in express terms—and if it could be construed by implication to contain such an assumption it was the duty of appellant to call the court's attention to it by a specific objection. *Brinkley Car Works & Mfg. Co. v. Cooper*, 75 Ark. 325, 87 S. W. 645; *Burnett v. State*, 80 Ark. 225, 96 S. W. 1007; *St. L. I. M. & S. Ry. Co. v. Evans*, 96 Ark. 547, 132 S. W. 648; *Hogue v. State*, 93 Ark. 316, 124 S. W. 783, 130 S. W. 167; *Miller v. Ft. Smith L. & T. Co.*, 136 Ark. 272, 206 S. W. 329.

[4] It is also contended that the court erred in refusing to give an instruction submitting to the jury the question of defendant's guilt or innocence of the offense of un-

lawful gaming. It is sufficient to say in response to this contention that an indictment for operating a gambling house does not include the offense of gaming and appellant could not properly have been convicted of the latter offense under that indictment. The court was therefore correct in refusing to submit to the jury the question of appellant's guilt or innocence of the offense of gaming.

Finding no error in the record, the judgment must be affirmed. It is so ordered.

### CAIN v. STATE. (No. 119.)

(Supreme Court of Arkansas. Sept. 26, 1921.)

#### 1. Gaming $\S$ 88(5)—Evidence held to sustain conviction.

Evidence held to sustain conviction for conducting and operating, and being interested in conducting and operating, a gaming house in violation of Crawford & Moses' Dig. § 2632.

#### 2. Criminal law $\S$ 823(4) — Instruction held not to authorize conviction for gaming at place other than one for which state elected to prosecute.

In prosecution for conducting a gaming house in a particular town in violation of Crawford & Moses' Dig. § 2632, an instruction, authorizing conviction of operating a gaming house at any place in such town, though the state elected to prosecute for conducting a gaming house at a particular place, held not ground for reversal, where the instruction was given before the state had made election, and where the court charged the jury after the state had made election that it could not convict defendant for operating a gaming house other than the one at such place, and that proof of similar offenses at about the same time at other places could only be considered as evidence in determining whether or not the defendant operated a gaming house at such particular place.

#### 3. Criminal law $\S$ 829(3) — Refusal of instructions covered by those given not error.

Refusal of instruction that unless state proved beyond reasonable doubt that defendant had some interest in the alleged gambling place, and that gaming was carried on there with his consent and knowledge he should not be convicted, covered by other instructions given by the court, held not error.

#### 4. Criminal law $\S$ 369(15), 370 — Evidence that defendant charged with gaming was interested in operation of other gaming houses admissible.

In a prosecution for operating a gaming house in violation of Crawford & Moses' Dig. § 2632, in which defendant disclaimed having any connection with the house, evidence that defendant operated gaming houses at other places in such city than the place for operation of which the state had elected to prosecute defendant held admissible, and such evidence also

tended to show knowledge that a gambling house was being operated.

#### 5. Criminal law $\S$ 369(15), 370, 371(1), 372 (1)—Evidence as to other crimes admissible to show identity, knowledge, intent, and system.

Generally, evidence of the commission of other crimes is admissible only when tending to establish guilt of the crime charged, or some essential ingredient thereof, but evidence of the commission of other crimes of a similar nature, about the same time, tends to show guilt of the crime charged, when it discloses a criminal intent, guilty knowledge, identifies the defendant, or is part of a common scheme or plan embracing two or more crimes so related to each other that proof of one tends to establish the other.

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Timothy Cain was convicted of conducting and operating, and being interested in conducting and operating, a gaming house, and he appeals. Affirmed.

Geo. P. Whittington and R. M. Ryan, both of Hot Springs, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

HART, J. Timothy Cain was indicted for conducting and operating, and being interested in conducting and operating, a gaming house in the city of Hot Springs, Ark. The defendant was indicted under the provisions of section 2632 of Crawford & Moses Digest, and prosecutes this appeal to reverse a judgment of conviction against him after a trial before a jury.

It is earnestly insisted by counsel for the defendant that the evidence is not legally sufficient to sustain a conviction.

The evidence on the part of the state tended to show that a gaming house was operated at No. 422 Malvern avenue in the city of Hot Springs in Garland county, Ark. The evidence tended to show that a crap game was run in the basement of the building, and that 40 or 50 people were found to be engaged in the game when a raid was made. There were buzzers in the basement, placed there for the purpose of warning the players that a raid was about to be made. The evidence tended to show that the place was run as a common gaming house.

The evidence on the part of the defendant tended to show that the place in question was known as the Pastime Pool Hall, and that it was operated by a man named Page, and that the defendant had nothing whatever to do with its operation.

[1] It is the contention of counsel for the defendant that the evidence on the part of the state is not sufficient to show that the defendant was interested in operating and

conducting the gaming house. We cannot agree with counsel in this contention. One witness testified that the defendant was frequently seen in the building where the gaming house was operated, and that when any squabble or unusual noise occurred in the basement where the gaming was carried on the defendant would come back to see about it. Another witness testified that on one occasion complaint was made to the defendant that the man who was conducting the game was doing so in a crooked manner, and the defendant discharged the employee complained of. Another witness testified that the defendant ran a gaming house at No. 424 Malvern avenue, in which he had installed new gaming devices, and that he had moved his old gaming devices from a place in Hot Springs, known as the Rollins place to the Pastime place, located at 422 Malvern avenue.

It is fairly inferable from this testimony that the defendant was interested in the Pastime place, and that it was being conducted and operated as a gaming house. The evidence for the state, if believed by the jury, was legally sufficient to show that the Pastime place was operated as a gaming house within three years before the finding of the indictment, and that the defendant was interested in conducting the gaming house.

[2] It is next insisted that the judgment should be reversed because, under one of the instructions given for the state, the jury might have found the defendant guilty of operating a gaming house at any place in Hot Springs, when the state had elected to prosecute the defendant for conducting a gaming house at the Pastime place, or being interested therein. The instruction in question, together with other instructions, had been given by the court before the state elected to prosecute the defendant for operating a gaming house at the Pastime place at No. 422 Malvern avenue. After the state had made its election, the court specifically told the jury that it could not convict the defendant for conducting a gaming house other than the one at the Pastime place on which the state had elected to rely, and that proof of similar offenses about the same time at other places in the city of Hot Springs could only be considered as evidence in determining whether or not the defendant was guilty of operating a gaming house at the Pastime place. Thus the jury was told that it could not consider evidence of running a gaming house at other places without restriction; but that such evidence could only be considered for the purpose for which it was admitted.

The instructions as a whole properly guarded the rights of the defendant, and if the defendant thought that the instruction complained of was misleading, he should have specifically objected to it on the ground that it was necessary to find that the defendant was interested in running a gaming

house at the Pastime place in order to convict him; for the jury must be credited with having common sense, and when the instructions are read as a whole, it is perfectly plain that the jury was restricted to the Pastime place and that evidence of running a gaming house at other places was only admitted for the purpose of showing that the defendant was guilty of being interested in operating a gaming house at the Pastime place.

[3] It is next insisted that the court erred in refusing to give instruction No. 3 asked by the defendant. This instruction told the jury, in effect, that unless the state had proved, beyond a reasonable doubt, that the defendant had some interest in the Pastime place, and that gaming was carried on therein with his consent and knowledge, it should not convict him. The matters embraced in the refused instruction were fully covered by the instructions given by the court. The jury was specifically told that in order to convict it was necessary to find that he operated the gaming house in question and had direction and supervision over it. The court was not required to multiply instructions on the same point.

[4, 5] It is next insisted that the court erred in admitting evidence tending to show that the defendant operated gaming houses at other places in Hot Springs than the Pastime place. There was no error in admitting this testimony to go to the jury. It is true the general rule is that evidence of the commission of other crimes is admissible only when such evidence tends directly or indirectly to establish the defendant's guilt of the crime charged in the indictment, or some essential ingredient thereof. The evidence of the commission of other crimes of a similar nature about the same time, however, tends to show the guilt of the defendant of the crime charged when it discloses a criminal intent, guilty knowledge, identifies the defendant, or is part of common scheme or plan embracing two or more crimes so related to each other that the proof of one tends to establish the other. *Larkin v. State*, 131 Ark. 445, 190 S. W. 382.

Here the evidence shows that the defendant on one occasion discharged an employee who was operating a crooked game in the basement of the Pastime place, and evidence that the defendant was interested in running gaming houses at other places in the city of Hot Springs about this time tended to show that he was operating a gaming house in the Pastime place and was not merely running a game on some particular occasion. Such evidence also tended to show that he had knowledge that a gaming house was being operated in the basement of the Pastime place, which other evidence tends to show that he was interested in conducting and operating.

We find no prejudicial errors in the record, and the judgment will be affirmed.



**BERRY v. AMERICAN RIO GRANDE LAND & IRRIGATION CO. (No. 6639.)**

(Court of Civil Appeals of Texas. San Antonio. Oct. 5, 1921.)

1. Jury  $\S$ 28(6)—Where parties voluntarily try case without jury during vacation, judgment stands, though no written agreement to do so.

In view of Rev. St. art. 1714, permitting a trial without a jury on consent of parties, where both parties voluntarily engaged in the trial of an action by the judge in vacation, and offered no objection, the judgment will not be reversed, though no written agreement to try the case was made, any act of the parties clearly evincing a willingness to try it being sufficient.

2. Appeal and error  $\S$ 782 — Appellate court without jurisdiction cannot reverse judgment, but can only dismiss appeal.

The Civil Court of Appeals, if it has no jurisdiction of a cause, cannot entertain a motion to reverse the judgment and remand the cause, but can only dismiss the appeal.

Appeal from District Court, Hidalgo County; Hood Boone, Judge.

Action between Mrs. Epsie Berry and the American Rio Grande Land & Irrigation Company. Judgment for the latter, and the former appeals. Motion by appellant to reverse judgment and remand cause for want of jurisdiction. Motion overruled.

Graham, Jones, Williams & Ransome, of Brownsville, for appellant.

John P. Gause, of Mercedes, for appellee.

FLY, C. J. [1] Appellant has filed a motion asking this court to reverse the judgment and remand this cause for want of jurisdiction, because the same was tried when the court could not be and was not in regular session. The cause was heard by the trial judge on exceptions on April 13, 1921, when the regular term had expired by law on April 9, 1921. No order of extension of the term appears in the record, but clearly the case was disposed of in vacation. There is no written agreement in the record that the case should be tried by the judge in vacation. Under the provisions of article 1714, Rev. St., however, any cause except a divorce case may be tried without a jury, before the judge, upon the consent of parties, and he is given authority to enter final judgment and make all necessary orders. No written agreement to try the case is indicated by the record, nor is it required by the statute; but any action of the parties clearly evincing a willingness to try the case would be sufficient under the statute. Nothing could more strongly show consent for the trial to take place than for both parties to voluntarily engage in the trial and offer no objection to the case being tried. This is the case made by

the record. Finney v. Walker, 144 S. W. 879.

[2] This court, on the face of the record, has jurisdiction to hear this cause, but if it did not have such jurisdiction it could not entertain a motion to reverse and remand, as in that situation it could only dismiss the appeal.

The motion is overruled.

**CAMERON COMPRESS CO. v. TEXAS BAG CORPORATION. (No. 6384.)**

(Court of Civil Appeals of Texas. Austin.

June 11, 1921. Rehearing Denied

Oct. 5, 1921.)

Sale  $\S$ 40—Purchaser of scrap iron falsely represented to be cast iron not liable on contract.

A corporation, purchasing scrap iron in reliance on the seller's representation that it was cast iron, which, on discovering the iron delivered was chilled iron and unsuited for the purposes for which it was purchased, stored it where it would be protected and notified the seller it was subject to its order, is not liable for the contract price.

Appeal from Milam County Court; W. G. Gillis, Judge.

Suit by the Cameron Compress Company against the Texas Bag Corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Chambers & Wallace, of Cameron, for appellant.

M. G. Cox, of Cameron, for appellee.

KEY, C. J. Appellant brought this suit against appellee in a justice of the peace court, and the case was appealed to the county court, where it was finally tried, and judgment rendered for the defendant; and the plaintiff has appealed.

The suit was founded upon a contract for the sale from the plaintiff to the defendant of certain scrap iron, the plaintiff alleging that it had complied with the contract, but that the defendant refused to pay the contract price for the iron.

Among other things, the defendant alleged in its answer that the plaintiff represented to the defendant that the iron in question was cast iron, and that the defendant relied upon that representation, and would not have agreed to purchase the iron but for such representation; and further alleged that when it was received by the defendant and examined, it was discovered that it was not cast iron, but was chilled iron, and unsuited for the purposes for which it was purchased; and that upon so discovering, the defendant stored the iron where it would be protected, and notified the plaintiff that it was subject to its order.

The court submitted the case to a jury upon special issues, and the verdict, when construed as a whole, was in favor of the defendant, and judgment was rendered accordingly.

The different questions presented in appellant's brief have been duly considered, and are decided against appellant.

No reversible error being shown, the judgment is affirmed.

Affirmed.

**KELLY et al. v. NATIONAL BANK OF DENISON et al. (No. 1838.)**

(Court of Civil Appeals of Texas. Amarillo. June 8, 1921. Rehearing Denied Oct. 5, 1921.)

**1. Venue §32(2)—Filing of cross-action held waiver of plea of privilege.**

Defendant, by filing a cross-action setting up a cause of action on which plaintiffs were entitled to be sued in the county in which the action had been brought, waived plea of privilege to have case transferred to other county.

**2. Dismissal and nonsuit §19(3)—Plaintiffs may take nonsuit at any time before filing of answer asking for affirmative relief.**

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1955, the court cannot deny to plaintiffs the right to take a nonsuit at any time before defendants have filed an answer asking for affirmative relief.

**3. Appeal and error §1176(6)—On appeal from order sustaining plea of privilege appellate court will direct dismissal of case where plaintiffs took nonsuit.**

Where plaintiffs took a nonsuit prior to filing of answer asking for affirmative relief, it was the duty of the Court of Civil Appeals under Vernon's Sayles' Ann. Civ. St. 1914, art. 1955, on appeal from order sustaining plea of privilege under article 1903, to direct a judgment of dismissal, though trial court's judgment did not definitely decree dismissal.

Appeal from District Court, Hall County; Davis Fitzgerald, Special Judge.

Action by M. L. Kelly, Jr., and others against the National Bank of Denison and others. From order sustaining pleas of privilege and transferring the case to other county, defendants appeal. Reversed, with instructions.

Thomas, Milam & Touchstone and J. W. Gormley, all of Dallas, for appellants.

Spence, Haven & Smithdeal, of Dallas, for appellees.

HALL, J. Appellee Harston, as sheriff of Dallas county, served notice upon appellants, a firm, composed of M. L. Kelly, Jr., and Edwin Kelly, that he had levied upon the interest of M. L. Kelly, Sr., in the firm of Kelly & Co., under a judgment rendered in the district court of Dallas coun-

ty, in favor of the National Bank of Denison, against M. L. Kelly, Sr., and Irene Kelly, and that he would proceed to sell said interest according to law. Appellants are the sons of M. L. and Irene Kelly, the defendants in said judgment. Appellants were not parties to the Dallas county suit, and are both residents of Hall county. They applied for and had issued out of the district court of Hall county a writ of injunction restraining the sale, making the said Harston and the bank parties defendant. When the case came on to be heard in the district court of Hall county on January 4, 1921, no answers had been filed by either Harston or the bank. Whereupon appellants in open court announced that they would take a nonsuit. Subsequent proceedings are better explained by the recitals of the judgment and the following additional findings filed by the trial judge:

"(1) Plaintiffs requested a nonsuit before defendants filed their pleas of privilege; (2) plaintiffs requested a nonsuit before defendants filed any answers in this cause; (3) defendants requested the court to withhold his order until defendants should file a cross-action; (4) the plaintiffs' request for nonsuit was granted immediately upon request, but the court did not enter the order until all issues raised by counsel had been presented to the court."

The judgment recites in part as follows:

"January 4, 1921. On this day the above-styled cause came regularly on in open court for trial. The plaintiff herein having moved for a nonsuit, said suit was ordered nonsuited as to the original suit, and the plea of privilege of the defendant Dan Harston, sheriff of Dallas county, Tex., and the plea of privilege of the defendant the National Bank of Denison, a corporation under the laws of the United States of America, with its principal place of business at Denison, Grayson county, Tex., was presented to the court, and after the reading of said plea and the controverting affidavits thereto, and the introduction of testimony and arguments of counsel, the court is of the opinion that each of said pleas of privilege is well taken, and that each of said pleas of privilege is in conformity to article 1903, Revised Civil Statutes, and that each of said pleas of privilege should be sustained, and that the venue of this cause should be transferred to the district court of Dallas county, Tex."

This is followed by a decree in proper form sustaining the pleas of privilege and transferring the case to Dallas county.

From the order making the transfer the appellants bring the case to this court, assigning as error such action of the trial court upon the ground that the defendants had filed a cross-action, thereby waiving their pleas of privilege and submitting themselves to the jurisdiction of the district court of Hall county. The appellee bank, subject to its plea of privilege and the special excep-

tions attacking the jurisdiction of the district court of Hall county, alleged as follows:

"Now comes the National Bank of Denison by cross-action, and says that the injunction issued herein was wrongfully issued in that no property was levied on only the interest of M. L. Kelly in said partnership, and since said injunction was issued the assets of said partnership have been sold and dissipated, and the interest of M. L. Kelly, of the value of \$50,000, has been placed beyond the reach of an execution. The National Bank of Denison has lost the opportunity of perfecting the collection of said judgment all by the wrongful acts of plaintiffs. It further alleges that said injunction was maliciously issued without cause, and the plaintiffs and sureties on their injunction bond are indebted to the National Bank of Denison in the amount of said judgment, interest, costs, and 10 per cent. damage, the plaintiffs being M. L. Kelly, Jr., E. T. Kelly, and their sureties being F. E. Chamberlain and S. S. Montgomery, a copy of said bond, petition for injunction, order of court thereon, and writ being attached hereto and made a part hereof."

The prayer is for judgment against the principal and sureties upon the bond. There is no prayer for citation.

[1] Appellees insist that upon the holding of the Supreme Court in *Hickman v. Swain et al.*, 106 Tex. 431, 167 S. W. 269, the filing of a cross-action by the bank was not a waiver of their pleas of privilege. It is true in that case Judge Brown said:

"If the plea of privilege was filed in due order of pleading, the filing thereafter of a plea over against plaintiff did not affect the right of the defendants to insist upon the transfer of the case to the county in which they resided."

No authorities are cited. The Court of Civil Appeals of the Ninth District, in *Griffith v. Gohlman-Lester & Co.*, 200 S. W. 233, has followed the holding in the *Hickman-Swain Case*. The Court of Civil Appeals of the Second District in *McClintic v. Brown*, 212 S. W. 540, held to the contrary. The decision in the last case is based upon previous decisions by the Supreme Court and cite Courts of Civil Appeals cases in which writs of error were refused by the Supreme Court which also follow the holding by the Supreme Court of Texas in *Douglas v. Baker*, 79 Tex. 499, 15 S. W. 801, and the Supreme Court of the United States in *Merchants' Heat & Light Co. v. Clow & Sons*, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488. There seems to be an irreconcilable conflict between the *Douglas v. Baker Case* and the *Hickman v. Swain Case*. In the *Douglas v. Baker Case* the defendant was sued out of the county of her residence in an effort by plaintiff to have a lost power of attorney alleged to have been given by her and her husband established. She pleaded in re-convention, setting up her ownership of the land, making a third party a defendant by her cross-action, praying for possession of

the land and judgment against the third party for the land and rents. Upon this issue Collard, Justice, said:

"But we think that the defendant, having invoked the jurisdiction of the court upon original and independent matter set up by her claiming the land, making Renolds a party, and asking judgment against him for the land, waived the question of jurisdiction raised by her exceptions. The entire form of the action was changed by her from a suit to establish a lost power of attorney to an action of trespass to try title, and in order to a recovery she made the person claiming the land a party defendant. \* \* \* Having brought into court a new party defendant, to try title to the land with him as a purchaser from plaintiff pending the suit, becoming the actor, and claiming affirmative relief upon an issue with him that could only be tried in the county where the land was situated, she was in no attitude to disclaim the jurisdiction of the court, or to insist upon her exceptions. She voluntarily submitted to the jurisdiction of the court, or, rather, invoked its jurisdiction as to a new party, and ought not to be allowed to repudiate it."

So it may be said in the instant case that, while the bank might have instituted an independent suit against the plaintiffs and the sureties, upon their injunction bond, to recover its damages, it elected to reconvene and sue for such damages in this action. It could only sue the plaintiffs and their sureties in Hall county, and, by asking affirmative relief against them and invoking the jurisdiction of that court as to the sureties, it fully submitted itself to the jurisdiction of the Hall county district court. Several Courts of Civil Appeals have followed the Supreme Court in *Douglas v. Baker*, and in the following cases so holding writs of error have been refused: *Gardner v. Planters' National Bank*, 54 Tex. Civ. App. 572, 118 S. W. 1146; *Kolp v. Shrader*, 131 S. W. 860; *Zavala Land & Water Co. v. Tolbert*, 165 S. W. 31; *Carver Bros. v. Merrett*, 155 S. W. 633. A number of other decisions by the various Courts of Civil Appeals to the same effect might be cited from which no writs of error were prosecuted. This, of course, presents an irreconcilable conflict which is not within our province to settle. Believing that the holding of the Supreme Court in the *Douglas-Baker Case* is in line, not only with the uniform rule announced in the decisions of the United States Supreme Court, but that it is also supported by the great weight of authority in other jurisdictions, we sustain appellants' assignments. This will require a reversal of the judgment.

[2] Appellees complain, but not by way of cross-assignment, of the court's action in permitting appellants to take a nonsuit, and incidentally insist that the judgment upon that phase of the case is not final. The right of appellants to take a nonsuit at any time before the appellees have filed an an-

asking for affirmative relief is statutory, and cannot be denied. Article 1955, V. S. C. S., provides:

"At any time before the jury have retired, the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief; when the case is tried by the judge such nonsuit may be taken at any time before the decision is announced."

This statute has been construed in a number of cases. In *W. B. Walker & Sons v. Hernandez*, 42 Tex. Civ. App. 543, 92 S. W. 1067, quoting from the case of *Hoodless v. Winter*, 80 Tex. 641, 16 S. W. 427, the Court of Civil Appeals said:

"The right of the plaintiff to take a nonsuit upon his own cause of action was considered of sufficient importance by the Legislature to be given express recognition. Owing to unexpected contingencies that may occur during a trial, it is a privilege which it may become necessary for the most careful and diligent litigant to exercise, and it is important that the substance and not the shadow alone of the right shall be preserved. \* \* \* It is only when the defendant by a counterclaim seeks some 'affirmative relief' that the right of the plaintiff to discontinue the entire cause is forbidden."

Following this quotation, Edison, Justice, proceeds:

"At the time the plaintiff asked the court to permit him to take the nonsuit there was no claim for affirmative relief by the defendants in the case; and therefore no right existed to be heard upon same or could be prejudiced by the taking of the nonsuit. Under these circumstances the statute gave the plaintiff the right to discontinue the entire cause. But does the fact that after the prayer for the nonsuit, but before it was granted, the defendants asked permission to amend their pleadings so as to set up a claim for affirmative relief, so change the situation as to deprive the plaintiff of his statutory right to take a nonsuit, so as to discontinue the entire case? In our opinion it does not. The case must be considered as consisting alone of the pleadings in existence at the time the plaintiff asks to take the nonsuit, and his right to the same is determined by the fact that at the time he asks to take the nonsuit there is no pleading of the defendant asking affirmative relief."

The Supreme Court, in *Kidd et ux. v. McCracken et al.*, 105 Tex. 383, 150 S. W. 885, which was a nonjury case, said:

"From the foregoing statement it is clear to our minds that at the time plaintiffs asked to take a nonsuit the court had not announced his decision. If this is true, then it was plaintiffs' right, secured by the statute above quoted, to have their case nonsuited. It seems to us to be immaterial to the exercise of the right to take a nonsuit that the plaintiff is made aware of the court's view of the case from the expression of the court's opinion, or from other source. Such knowledge may serve — the vital reason why the party desires to

get his case out of court. His information of how the court will decide cannot affect the plaintiff's right to a nonsuit, where the decision has not been announced. The statute is plain upon the subject, and, we think, does not mean that the plaintiff is denied the right to a nonsuit where he gathers from the opinion of the court in discussing the case what his decision will be. That is not the language nor is it the meaning of the law. \* \* \* We are clearly of the opinion that the trial court should have permitted plaintiffs to have taken their nonsuit in compliance with their request, and that in the denial of that right a substantial injury has resulted to them."

To the same effect are the following cases: *Pye v. Wyatt*, 151 S. W. 1086; *Adams v. Railway Company*, 137 S. W. 441; *Free v. Burgess & Son*, 104 Tex. 31, 133 S. W. 421; *Blunt v. Houston Oil Co.*, 146 S. W. 248; *Weil v. Abeel*, 206 S. W. 735. In the last-named case Judge Rice said:

"It is true that the court remarked at the time when he extended the time for counsel to present authorities that he would hear them, but would not permit him to take a nonsuit. This is shown to have been based on the idea that his right to permit or refuse the nonsuit was discretionary, rather than one based upon what the law might be in relation thereto. The right to take a nonsuit is liberally construed by the courts, and in cases above referred to it has been held that counsel had the right to discuss the matter with the court, and, if the court suggests or indicates that he is going to decide against plaintiff, plaintiff has the right to dismiss. The fact that the court makes such intimation is often the reason why a nonsuit is taken. As said by counsel for appellant, it is a statutory right given to plaintiff to dismiss his case at any time before a decision is announced."

[3] Appellee further insists that in the above-quoted excerpt from the judgment the court did not definitely decree a dismissal of the suit. We cannot assent to this contention, but, if it be admitted that the judgment does not "contain the declaration of the court pronouncing the legal consequences of the facts found," it would be the duty of this court, under the statute, to enter a judgment to that effect. Under article 1903, V. S. C. S. (supplement to volume 1), either party has the right to appeal from a trial court's judgment sustaining or overruling a plea of privilege and appellant has appealed from that part of the court's decree. The action of the court upon the request of appellants to be permitted to take a nonsuit, it would seem, is in a measure immaterial, since the provisions of article 1955, V. S. C. S. are mandatory. *Clevenger v. Cariker*, 50 Tex. Civ. App. 562, 110 S. W. 795, 111 S. W. 177.

The judgment is reversed, with instruction to the trial court to enter an order dismissing plaintiff's suit and overruling the pleas of privilege.

Reversed, with instructions.

**MAYER v. LOUISVILLE RY. CO.**

(Court of Appeals of Kentucky. May 6, 1921.  
Rehearing Denied Oct. 14, 1921.)

1. Appeal and error  $\S$ 688(2)—Error not shown in record not available on appeal.

Where an appellant assigned as error the use of a city ordinance in argument by counsel, and bill of exceptions does not show that there was any reference to the ordinance during argument, or objection to it, or any ruling of the court or request to rule on such question, it cannot be relied on, on appeal.

2. Street railroads  $\S$ 90(3)—Signal of approach of car seen is unnecessary.

Where a driver, whose wagon was struck when he attempted to cross ahead of a street car at a street intersection, saw the approach of the car when it was 80 feet away, the motorman was not required to give a signal of the approach of his car.

3. Trial  $\S$ 228(3)—Use of word "might" in part of instruction held not misleading.

In an action for injuries by street car, the use of the word "might" in a clause of an instruction, "If you believe from the evidence, after he discovered or by the exercise of ordinary care might have discovered, \* \* \*" instead of "could," or "would," or "should," was not misleading.

4. Trial  $\S$ 260(1)—Refusal of instructions, given in substance in another instruction, is not error.

Refusal to give instructions, every idea of which, except one, which was immaterial, was included in an instruction which the court gave, was not error.

5. Appeal and error  $\S$ 1066—Introduction of evidence concerning signals by motorman, when there was no issue as to signals, was immaterial.

When there was no issue concerning signals given by a motorman of a street car, which struck plaintiff, the introduction of evidence concerning the signals was immaterial.

6. Appeal and error  $\S$ 1003—Verdict on conflicting evidence not against weight of evidence.

In an action against a street car company for personal injuries, where there was a sharp conflict in evidence on some material points in issue, a verdict for defendant is not against weight of evidence.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by August C. Mayer against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

O'Doherty & Yonts and Lawrence J. Mackey, all of Louisville, for appellant.

Straus, Lee & Krieger and Alfred Selligman, all of Louisville, for appellee.

TURNER, C. Twentieth street, in the city of Louisville, runs north and south, and Bank street, therein, runs east and west. Appellee's car tracks are operated along Bank street. Appellant, on December 1, 1917, was driving a delivery wagon north on Twentieth street, and at the intersection of that street with Bank street one of appellee's cars going east collided with appellant's wagon, whereby he was knocked therefrom and injured.

This is an action for damages growing out of that collision, wherein the plaintiff alleged in general terms that his injuries grew out of the gross negligence of those in charge of the east-bound car. The answer was a traverse of the allegations of the petition, and in the second paragraph the contributory negligence of the plaintiff was relied upon, and this was controverted by reply. On a trial the jury returned a verdict for the defendant, and the plaintiff, having filed his motion and grounds for a new trial, which were overruled, prosecutes this appeal.

The plaintiff's own evidence, in substance, is that as he approached Bank street his horse was going along slowly at a jog trot, and that when he was a short distance from the car tracks he looked west and saw the east-bound car approaching at a distance, as he thought, of about 80 or 90 feet, and that the car was going at its ordinary speed; that he slackened the speed of his horse as he approached the car track, but that he thought he had time to cross ahead of the car and permitted his horse to proceed, and looked east to see if a car was approaching from that direction; but when he again looked west his horse was on the track and the east-bound car was only a short distance from him and going at a high rate of speed, and he then undertook to urge his horse across in a hurry, but the car struck his wagon.

The motorman's evidence, in substance, is that he saw the horse attached to the wagon approaching the intersection as soon as its head came in sight, and that then he was only about 30 feet from the intersection; that he sounded his gong, and the driver of the wagon looked up and saw the car approaching and then slackened the speed of his horse almost to a standstill, and he, the motorman, assuming from this that the driver was stopping his horse for the purpose of letting the car pass, thereupon increased the speed of the car, but immediately thereafter saw that the driver was undertaking to pass in front of him, and he then used every possible effort to avoid the collision, but was unable to do so.

It will be seen from this short recital of the evidence that the motorman saw the horse and wagon approaching the intersec-

tion, and the driver of the wagon saw the car approaching it, and the court below, in view of this situation, submitted the case to the jury upon the theory that there might be a recovery for the plaintiff only if the jury should believe that after the discovery of the plaintiff's peril the motorman failed to exercise ordinary care, or to use the means at his command to avert the collision; or, second, if the car was running at an excessive rate of speed and thereby brought about the collision.

[1] It is the first contention of appellant's counsel that the instructions given in this form, when taken in connection with the use on the trial by counsel for appellee during the argument of an ordinance of the city providing that street cars running east and west had the right of way, caused the jury to believe that the question of the right of way was the vital one in the case and thereby induced the verdict for the defendant. In the first place, there is no authority in the record for the statement that the ordinance was used or referred to in any way by counsel during the argument. The bill of exceptions shows that counsel for defendant did offer in evidence the ordinance, but that the court declined to permit it to be read in evidence, saying at the time that the court took judicial notice of the ordinances of the city; and so far as the bill of exceptions shows there is no reference whatsoever to any occurrence during the argument with reference to the use by counsel of this ordinance. There is nothing to show that any such use was made of it, or that there was any objection to such use, or that the court ruled upon, or was requested to rule upon, any such question. The only reference in the whole record to the use during the argument by counsel of this ordinance is found in the motion and grounds for a new trial.

[2] It is further complained that the court in its instructions failed to require of the motorman the duty to give the signal of his approach to the intersection. Manifestly in this case the signals were not necessary, for it is testified by the driver of the wagon that he saw the approach of the car when it was 80 or 90 feet away, and the purpose of the signal being to notify persons using the intersection of the approach of a car, no signal was necessary to give him notice of what he already knew.

[3] It is also complained that the court erred in its instruction when it said, "If you believe from the evidence that after he discovered, or by the exercise of ordinary care might have discovered, \* \* \*" and that the use of the word "might," instead of either the word "could" or "would" or "should," was misleading. The criticism is a mere play upon words. It is hardly probable that an ordinarily intelligent jury could

have failed to understand the language used by the court, or that it in fact went into the technical meaning of the language used by the court, or attempted to differentiate between the technical meaning of "might" and "could," "would," or "should."

[4] The contention that instructions 1 and 2, offered by the plaintiff, should have been given, is without merit; every idea embraced in them is embraced in the first instruction given by the court, except the requirement for signals, which we have seen was unnecessary.

[5] The complaint of the introduction of incompetent evidence in the form of the ordinance heretofore referred to is, as we have seen, without foundation in fact, for the simple reason that the ordinance was not permitted by the court to be introduced; and as to the introduction of the evidence concerning the signals, there being no issue involving the necessity for signals, it was immaterial in any event.

[6] The contention that the verdict was flagrantly against the evidence cannot be sustained. Upon some of the material points at issue there was a sharp conflict in the evidence, and the jury, being the triers of the issues of fact, were authorized under the evidence to find the verdict they did. In fact, they might very well have found from the evidence that the plaintiff, having seen the approach of the car, negligently undertook to cross in front of it.

Judgment affirmed.

### E. W. ROSS CO. v. AKERS.

(Court of Appeals of Kentucky. Sept. 30, 1921.)

1. Appeal and error  $\S$  837(2)—Action for new trial being wholly independent of original action, cannot be looked to on appeal from original judgment.

On appeal from judgment taken by default, court cannot consider matter appearing in an action under Civ. Code Prac.  $\S$  518, for a new trial, which was commenced after the appeal, as such action is wholly independent of the original action, and the judgment in one case or the other must stand or fall on the merits of the case in which rendered, regardless of the merits of the other.

2. Pleading  $\S$  234—Petition may be amended without leave before answer, but not after.

Plaintiff may amend the petition without leave of court at any time before the filing of an answer, but afterwards such leave is required.

3. Pleading  $\S$  238(2)—Filing amended petition before answer, with leave of court, and without one day's notice, is insufficient.

Civ. Code Prac.  $\S$  132, requires plaintiff to give defendant one day's notice of his inten-

tion to file amended complaint, and applies to filing before answer, which does not require leave of court, and filing by leave of court prior to answer without such notice is insufficient.

**4. Statutes  $\Leftrightarrow$  243—Statute prescribing rule of practice liberally construed to carry out legislative purpose.**

A statute prescribing a rule of practice should be liberally construed to carry out the legislative purpose, and this is especially enjoined by Civ. Code Prac. § 733, providing that the rule that statutes in derogation of the common law are not to be strictly construed shall not apply to the Code.

**5. Appearance  $\Leftrightarrow$  9(1)—Party objecting to service and appealing from default judgment is before the court for all purposes on remand.**

Where a defendant has objected to the service of summons, and appealed from a default judgment, which is reversed, such defendant will be before the court for all purposes upon return of the case to the trial court.

**Appeal from Circuit Court, Hardin County.**

Action by Lee Akers against the E. W. Ross Company. Verdict and judgment for plaintiff, and defendant appeals. Reversed, with directions to set aside judgment, and for proceedings consistent with the opinion.

Irwin & Irwin, of Elizabethtown, and Augustus E. Willson, of Louisville, for appellant.

Haynes Carter and G. K. Holbert, both of Elizabethtown, for appellee.

THOMAS, J. Appellee and plaintiff below, Lee Akers, purchased from appellant and defendant below, E. W. Ross Company (a corporation), whose place of business is Springfield, Ohio, the material for a steel silo which was to be shipped by defendant to Senora, Ky. f. o. b. car at Springfield, Ohio, and the silo was to be constructed by plaintiff out of the material purchased by him from defendant according to written directions furnished by it. There was a warranty that the silo, if constructed according to directions, would "not be affected by climatic conditions, that it is fireproof and stormproof, and will not buckle or twist," and when so constructed it would "be the most practicable, most permanent, and most efficient silo that can be erected." The order for the purchase of the material was given April 28, 1917, and on November 12, in the same year, this action was filed by plaintiff against defendant seeking to recover against it the sum of \$3,000, as damages proximately resulting from a breach of the warranty. It was alleged in the petition after averring the contract, including the warranty, that plaintiff had constructed the

silo according to the directions furnished to him by the defendant, and filled it with ensilage, but that, on account of the defective material and the weakness of the walls, it buckled and twisted, and fell against his barn, destroying the latter and some seed wheat and other articles therein, and that the value of the ensilage and the articles destroyed amounted to the sum sued for.

Summons was served on S. G. Garlow, who was stated in the return of the sheriff to be the "chief officer and agent of said defendant in this county." That return was dated more than 10 days before the convening of the next term of court, and, upon the convening of that term, plaintiff filed, as he claims "with leave of court," an amended petition in which he increased the amount of his damages, by enlarging some of the items stated in the original petition and incorporating others, from \$3,000 to \$5,124.46. The sheriff was permitted on plaintiff's motion to amend his return so as to conform to the rule of practice stated in the case of Youngstown Bridge Co. v. White's Admr., 105 Ky. 273, 49 S. W. 36, 20 Ky. Law Rep. 1175. In his amended return he negated the presence of any of the defendant's officers in the county preceding its managing agent, as set forth in subsection 33, § 732, of the Civil Code. Thereupon, without answer, demurrer, or any other defensive action on the part of the defendant, the petition and the amended petition, on motion of plaintiff, was taken for confessed, and a jury was impaneled to assess the damages. After hearing evidence and receiving the instructions of the court, it returned a verdict in favor of plaintiff for the sum of \$4,571.46, which was \$1,517.46, more than was claimed in the original petition. Judgment was rendered on that verdict, and defendant has appealed, and seeks a reversal upon the sole available ground that the court erred in taking for confessed any of the matters alleged in the amended petition, and in submitting any of them to the jury.

[1] Why the defendant did not appear and make defense we do not know from anything contained in this record, but there has been filed therewith since the appeal was taken a portion of a record in an action brought under the provisions of section 518 to obtain a new trial, and in that we learn that defendant contends that the person upon whom the summons was served was neither its managing agent nor did he hold any office with it. We, however, cannot consider on this appeal any of the facts developed in that case, because (a) it is yet pending and undecided, and because (b) it could not affect the merits of this case, however decided, since the action for a new trial is one wholly independent of the original one, and the judgment in the one or the other must stand

or fall upon the merits of the case in which it was rendered, regardless of the merits of the other one. *Mason, Evans & Keys v. Meloan*, 185 Ky. 582, 177 S. W. 435. We must therefore look alone to the record in the original case in disposing of the question raised.

[2, 3] In determining that question we have concluded to pass over the further one as to whether the amendment was such as to require the service of a summons upon it in the absence of an entry of an appearance thereto, since we have concluded that, under a proper construction of section 132 of the Civil Code, it was necessary for plaintiff to give defendant one day's notice of his intention to file the amended petition. That section says:

"The plaintiff may, at any time before answer, amend his petition without leave; but, unless the amendment be filed five days before the term at which the defendant is summoned to answer, he shall give to the defendant notice, of one day, of his intention to amend."

[4] The section prescribes a rule of practice, and it should be liberally construed so as to carry out the purpose of the Legislature in its enactment. This is not only the rule with reference to the interpretation of all statutes, but it is especially enjoined by the provisions of section 733 of the Civil Code. The evident purpose of requiring one day's notice to the defendant of the intended amendment was to prevent him from being taken unawares, and to give him time within which he might prepare his defense thereto, though the amendment might be strictly germane to the matters complained of in the petition, and be such as not to require the service of a summons thereon. And the period of time within which the one day's notice was required should begin "five days before the term at which the defendant is summoned to answer," provided the amendment was filed "without leave" of court. The only time that a pleading may be filed with leave of court is after answer is filed. *Champion v. Robertson*, 4 Bush, 17, and *Louisville & Nashville Railroad Co. v. Hall*, 115 Ky. 567, 74 S. W. 280, 24 Ky. Law Rep. 2487. The cases cited, as well as the section of the Code under consideration, sustain the right to file the amendment without leave of court at any time before the filing of an answer. On the other hand, after answer is filed no amendment of the petition may be made without leave of court. *Mount v. Louisville & Nashville R. Co.*, 2 Ky. Law Rep. 221, and *Petry v. Petry*, 142 Ky. 564, 134 S. W. 922. Evidently, therefore, the giving of leave to file an amendment when, under the practice, no such leave was required, and therefore given without authority, cannot change the rules of practice governing the filing of amendments.

It was no doubt the failure to observe

this distinction that led this court, in the case of *Bryant v. Cooney*, 40 S. W. 918, 19 Ky. Law Rep. 223, to hold that one day's notice of the filing of the amendment as required by section 132, supra, of the Code, was required to be given only where the amendment was filed within the five days immediately preceding the convening of court. A reading of that opinion will show that the amendment there involved was not only one to correct a formal defect, but it was filed "with leave of court," which was wholly unnecessary and therefore without any effect, since there had been no answer filed, and plaintiff was entitled to amend his petition without leave of court. It is expressly held in that opinion that "the provision of the Code cited (section 132) has no application to pleadings filed by leave of court during term time." But the fact seems to have been overlooked by the learned judge who wrote the opinion, that the leave of court there obtained (though given in term time) was entirely unnecessary, and without authority, and could not, therefore, alter the right of defendant to receive one day's notice of the intention to file the amendment, if it was filed at any time after the five days preceding the commencement of court, and was therefore one that could be filed under the condition of the record without leave of court. The opinion referred to is sound in so far as it holds that no notice is necessary when the amendment is filed with leave of court (which, as we have seen, is unnecessary till after answer is filed), but we think it is erroneous in confining the requirement of notice to only the five days immediately preceding the commencement of court, and in dispensing with notice if the amendment is filed during court, but before answer.

In the case of *Hunt v. Semonin*, 79 Ky. 270, the amendment, which was also one to correct a formal omission, was filed with leave of court, but no answer had been filed and it was not necessary that leave should be obtained to file the amendment, and the court seems to have fallen into the same error as was done in the *Bryant Case*, except that the record in that case affirmatively showed that the amendment was filed in the presence of defendants, and in holding that the notice was not necessary the court said:

"In a case like this, the amendment being made by leave of court, and in the presence of defendants, no notice is necessary."

To our minds, no better case can be found than the instant one by which to illustrate the erroneous construction of the section of the Code under consideration by the opinions referred to, in so far as they hold that leave of court, obtained when it was unnecessary, dispenses with the notice required by the section. The defendant in this case, knowing that the plaintiff could amend his petition without notice up to within five



days of the convening of the court, might have with the utmost diligence visited the clerk's office up to that time, and, finding no amendment filed, and being unable to make defense to the cause of action stated in the petition, concluded to save the expense of litigation by failing to appear and let judgment go by default. If the rule, as construed by the cases supra, should be adhered to, the plaintiff in such cases could amend his petition after the convening of court and without limit increase the relief sought and take the amendment for confessed when defendant might have one or more absolute defenses to the matters therein charged. It is our view that it was the intention of section 132 of the Code to prevent a plaintiff, under such circumstances, from taking advantage of a defendant so situated by filing an amendment affecting the substance of the cause of action, and materially increasing the relief sought where the defendant had not manifested his intention to defend the cause by filing an answer or taking some other defensive action, unless he give the required one day's notice prescribed in the section. No construction should be adopted, if avoidable, that would afford an opportunity for one litigant to ensnare or entrap his antagonist in any such fashion.

The language of the section is no doubt susceptible to this interpretation, and it requires a very strained construction to interpret it as was done in the opinions supra. If, however, it was equally susceptible to either construction, that one should be adopted, as we have shown, which would prevent the perpetration of fraud upon defendant by plaintiff, and render it impossible for the latter to obtain an undue advantage of him. Such fraud or undue advantage could easily be perpetrated or obtained if plaintiff could file an amendment materially changing the cause of action, though germane to the subject-matter of his petition, when defendant had not answered, and at a time when the amendment, under the settled practice, could be filed without leave of court. It was no doubt the purpose of the Legislature to prevent such consequences by providing that the one day's notice should be given if the amendment was filed after the beginning of five days immediately preceding the court, and at a time when it could be filed without leave, which, as we have seen, is any time before the filing of an answer, unless defendant waived the notice in some legal way. This purpose cannot be defeated by the court granting leave to file the amendment when none was required and when it was without authority to do so. As we read the opinions supra, they were based in the main upon the unauthorized action of the court in granting leave to file the amendments therein. Those cases, in so far as

they are in conflict with this opinion, are hereby overruled.

[5] The amended petition in this case having been filed after the beginning of the five days preceding the commencement of court, and before answer or other defensive action taken by the defendant, and consequently without legal leave of court, it was entitled to one day's notice of plaintiff's intention to file it, and the court erred in taking it for confessed, and in submitting to the jury any of the items of damage therein contained. Under numerous opinions of this court the defendant will be before the court for all purposes upon a return of the case.

Wherefore the judgment is reversed, with directions to set it aside, and for proceedings consistent with this opinion.

### CITY OF MAYFIELD v. CARTER HARDWARE CO.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

1. Appeal and error  $\S$  195(3)—Holding as to validity of ordinance is law of case on retrial in lower court.

In prosecution by a city of truck owner for failure to obtain license to operate truck, in which the truck owner claimed that the ordinance requiring such license was unreasonable, and therefore void, a holding of the Court of Appeals on appeal as to the validity of the ordinance became the law of the case, precluding the trial court on a retrial of the case from again passing on the question.

2. Licenses  $\S$  7(9)—License ordinance not invalid, though fee is in excess of cost of administration.

A license ordinance, enacted within the police power of a city, is not invalid, though a slight mistake is made in calculating the cost of administration, and the fee is fixed too high, if the surplus fund, after the payment of all reasonable charges, is not so great as to manifest a purpose on the part of the legislative body to make the ordinance a revenue-producing measure.

3. Licenses  $\S$  7(9)—Presumed reasonable.

A license ordinance, within general power of the municipality, is presumed to be reasonable, and will not be held void, unless its inherent character is shown to be unreasonable.

Appeal from Circuit Court, Graves County.

Proceeding by the City of Mayfield against the Carter Hardware Company for violation of an ordinance. Judgment for defendant, and the City appeals. Reversed, with directions.

See, also, 191 Ky. 364, 230 S. W. 298.

W. J. Webb, of Mayfield, for appellant.  
Robbins & Robbins, of Mayfield, for appellee.

**SAMPSON, J.** This is the second appeal of this case. It is a prosecution in the name of the city of Mayfield against the Carter Hardware Company, under a city ordinance, for failure to take out and pay for a license, as required by the ordinance, to operate its motor truck on the streets of said city. The questioned license ordinance reads in part as follows:

"For each automobile, owned and operated by any person, firm or corporation, residing in the city of Mayfield, Kentucky: For each machine of 25 horse power or under, \$6.00; for each machine of more than 25 horse power, \$7.00; for each motorcycle, \$6.00."

It was the contention of appellee upon the former appeal, as well as on this appeal, that the ordinance is invalid because unreasonable in the amount of the license fee. In the former opinion we held the ordinance valid as a proper exercise of the police power of the city. *City of Mayfield v. Carter Hardware Co.*, 191 Ky. 364, 230 S. W. 298. As the defendant, Carter Hardware Company, had been judged not guilty of a violation of the license ordinance, on the theory that the ordinance was invalid, the judgment was reversed for a new trial.

[1] The ordinance having been held valid, there was but one thing to be done on the return of the case to the lower court—fix the amount of the fine to be imposed for its violation, for it was conceded that the Carter Hardware Company owned and operated a motor vehicle on the streets of Mayfield at the time charged, without first having applied for and obtained a license so to do as required by the ordinance. That the opinion on the first appeal is the law of the case has been too often written to require repetition. The last trial in the circuit court proceeded *de novo*, and evidence as to the reasonableness of the license fee charged was heard and submitted to a jury. This was error, for the validity of the ordinance was fixed by the former opinion of this court.

The whole defense to the prosecution under the ordinance was based upon the unreasonableness of the fee charged for the license; it being argued that the cost of issuing the license and administering the act, as well as the ordinance regulating the parking of automobiles and the speed at which they may run in the different sections of the city, based upon the density of the population, would not approach the total sum derived from a tax of \$6 and \$7 for such machines in that city, where the evidence shows there are about 500 such cars.

[2] This tax was levied under the police power of the municipality for the purpose of regulating motor vehicle traffic upon the streets. It is general information that cit-

ies have more trouble regulating motor vehicles and their drivers than any other business or occupation. The road hog and speed maniac are everywhere, menacing the property, limb, and life of law-abiding people rightfully upon the highways. It requires careful supervision on the part of the police department to circumvent and apprehend these violators. At the time such a license ordinance is enacted, it is utterly impossible to tell the exact cost of administering it, and legislative bodies are justified in fixing the fee at a sum great enough to cover the entire cost of the enforcement of such laws, for such expense must necessarily be borne by those who receive the benefits, and if, in fixing the fee, a slight mistake is made in calculating the cost of administration, and the fee fixed too high, this alone will not invalidate the ordinance, if the surplus fund after the payment of all reasonable charges is not so great as to manifest a purpose on the part of the legislative body levying the same to make the ordinance a revenue-producing measure. The modern trend of judicial opinion in this country is to uphold license ordinances, even though they produce revenue in excess of the amount required for a judicious administration of the act, if such excess is small and plainly results from a miscalculation of the amount necessary to be raised or the amount that will result from such license.

[3] It has been held that, when plainly intended as a police regulation, such ordinance will be upheld, even where the amount realized from the license tax or fee is out of proportion to the cost of issuing the license. No unreasonableness will be presumed, and where the ordinance is clearly within the general power of a municipality, it is presumed to be reasonable, and the judicial power of the state will not be exercised to declare it void, unless by its inherent character or proof it is shown to be unreasonable. *Littlefield v. State*, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588, 47 Am. St. Rep. 697. Courts are not compelled to be too exact in determining what is a reasonable license fee. *Tiedeman's Limitation Police Power; City of Boston v. Schaffer*, 9 Pick. (Mass.) 415; *Welch v. Hotchkiss*, 39 Conn. 140, 12 Am. Rep. 383; *Johnson v. Philadelphia*, 60 Pa. 445; *Ash v. People*, 11 Mich. 347, 83 Am. Dec. 740; *Burlington v. Putnam Ins. Co.*, 31 Iowa, 102. A surplus resulting from the tax over cost of administration does not invalidate the law, if the amount of the fee is not disproportionate to the amount required for its enforcement. *Littlefield v. State*, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588, 47 Am. St. Rep. 697.

As the ordinance on the first appeal was declared a valid exercise of the police power of the city, the trial court should not have allowed the parties on the second trial to enter into a reconsideration of the same

question, but should have confined them to the one remaining issue, the amount of the fine to be assessed against the defendant company.

Judgment reversed, for proceedings not inconsistent herewith.

### COMMONWEALTH v. ROBINSON.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

#### 1. Statutes $\S$ 105(2)—Constitutional provisions concerning title and subject mandatory.

The requirement of Const.  $\S$  51, providing that no law shall relate to more than one subject, and that shall be expressed in the title, is mandatory, and any failure on the part of the Legislature to conform to that requirement is fatal to any legislation enacted.

#### 2. Statutes $\S$ 61—Compliance with requirements of Constitution presumed.

An enactment is presumed to accord with the requirements of the Constitution, and the validity of the act should be upheld unless found to clearly contravene a constitutional requirement after the act and the constitutional provisions have both been given a liberal construction with a view to sustaining the legislative action.

#### 3. Statutes $\S$ 114(6)—Subject of being drunk on road as an offense held expressed in title.

Making unlawful the act of being drunk on a road as declared in Sess. Acts 1920, c. 81,  $\S$  28, has a natural connection with the general subject of the act as expressed in the title, prohibiting the manufacture, sale, transportation or other disposition of intoxicating liquors, except for certain purposes, and is not invalid under Const.  $\S$  51.

#### Appeal from Circuit Court, Laurel County.

Eller Robinson was indicted for the offense of being drunk on a public road. From a judgment sustaining a demurrer, the Commonwealth appeals. Reversed and remanded.

C. I. Dawson, Atty. Gen., T. B. McGregor, Asst. Atty. Gen., and B. G. Reams, Co. Atty., of London, for the Commonwealth.

Finley Hamilton, of London, for appellee.

HURT, O. J. An indictment was returned against the appellee, Eller Robinson, accusing him of the offense of unlawfully being drunk and intoxicated upon the road. The indictment was based upon section 28 of chapter 81 of the Session Acts of 1920, which is commonly called the State Prohibition Enforcement Law. A general demurrer was sustained to the indictment, and the attorney for the commonwealth has appealed. The validity of the indictment is assailed upon the ground that the portion of section 28, c. 81, which makes the act of being drunk

upon a public road unlawful is void, because the enactment of the act with such provision in it was in contravention of the requirements of section 51 of the Constitution of Kentucky. The portion of section 51 of the Constitution which it is insisted was violated is as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

The title of the act embraced in chapter 81 of the Session Acts of 1920 is as follows:

"An act to prohibit and provide penalties for the manufacture, sale, transportation or other disposition of spirituous, vinous, malt or intoxicating liquors except for sacramental, medicinal, scientific or mechanical purposes in the commonwealth of Kentucky and to regulate manufacture, sale and transportation of alcohol for nonbeverage purposes thereunder."

[1] In section 28 of the act it is declared to be unlawful to drink intoxicating liquors in certain public places, or to drink them in excess so as to be intoxicated or drunk. It is the contention of the appellee that the subject of drunkenness is not germane to the subject expressed in the title to the act. In other words, it is a different subject-matter from the subject expressed in the title to the act, and for that reason so much of section 28 as makes it unlawful to drink liquors to intoxication and being in a drunken condition is void. It is not necessary to say that the requirement of the Constitution, as expressed in section 51, is mandatory, and any failure on the part of the Legislature to conform to that requirement is fatal to any legislation enacted.

[2] It is, however, a well-settled doctrine that an enactment of the Legislature is presumed to be and to have been done in accordance with the requirements of the Constitution, and the validity of an act should be upheld unless it is found to be clearly in contravention of a constitutional requirement, after the act and the constitutional provision have both been given a liberal construction with the view of sustaining the legislative action. *Collins v. Henderson*, 11 Bush, 74; *C. S. Co. v. Moreland*, 126 Ky. 656, 104 S. W. 762, 31 Ky. Law Rep. 1075, 16 L. R. A. (N. S.) 479; *Ragland v. Anderson*, 125 Ky. 141, 100 S. W. 865, 30 Ky. Law Rep. 1199, 128 Am. St. Rep. 242; *Aldridge v. Com.*, 192 Ky. 215, 232 S. W. 619.

It is clear that the general legislative subject of the act, and the purpose and object of the Legislature in enacting it, was the prohibition of the use of intoxicating liquors for beverage purposes. The statute enacted following the title may include every matter germane to and in furtherance of the general subject expressed in the title. If the

provision of the act attempted to be impeached for constitutional invalidity relates to the general subject expressed in the title, is naturally connected with it, and not foreign to it, it is not rendered invalid by section 51 of the Constitution. *Williams v. Wedding*, 165 Ky. 361, 176 S. W. 1176; *Diamond v. Com.*, 124 Ky. 413, 99 S. W. 232, 30 Ky. Law Rep. 655; *Burnside v. Lincoln Co. Ct.*, 86 Ky. 423, 6 S. W. 276, 9 Ky. Law Rep. 635; *Barksdale v. Laurens*, 58 S. C. 413, 36 S. E. 661; *Crookston v. Board*, etc., 79 Minn. 283, 82 N. W. 586, 79 Am. St. Rep. 453; 25 R. C. L. 846, and cases cited.

[3] The question is now presented as to whether the making unlawful of the act of being drunk upon a road, as declared in section 28 of the act, has a natural connection with the general subject of the act as expressed in the title, which is the prohibition of the use of intoxicating liquors as a beverage. Is it foreign to that general subject, and not germane to it? Is not the prohibition of drunkenness and a punishment therefor naturally germane to and in furtherance of the general subject of prohibiting the use of intoxicating liquors as a beverage? Would not a legislator naturally expect to find a declaration that the excessive use of intoxicating liquors was unlawful and a punishment fixed therefor under title of an act which expressed the general subject of the act to be the prohibition, and therefore to restrain the use of such liquors as a beverage? Under the principles which determine the validity of statutes and parts of statutes, as affected by section 51 of the Constitution, we are constrained to hold that the court was in error in sustaining the demurrer.

The judgment is therefore reversed, and cause remanded for further proper proceedings not inconsistent with this opinion.

#### MEREDITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

1. Criminal law § 565—Evidence held not to establish sale of liquor within year before indictment.

Where indictment charging a sale of intoxicating liquor in local option territory, under Ky. St. § 2557b2, was returned on November 17, 1920, a conviction could not rest on testimony that there was a sale of intoxicating liquors "in the fall of 1919," since such testimony would not show that the sale occurred within a year preceding the date of the finding of the indictment.

2. Criminal law § 561(1)—Guilty must be established beyond reasonable doubt.

To authorize conviction, defendant's guilt of the offense charged must be established beyond

a reasonable doubt, and every fact essential to conviction must be shown, and where commonwealth's evidence presents two states of fact under one of which the defendant is guilty and under the other he is not guilty, and the evidence fails to show which state of fact is true, he is entitled to an acquittal.

Appeal from Circuit Court, Edmonson County.

Charlie Meredith was convicted of an unlawful sale of intoxicating liquors, and appeals. Reversed and remanded.

Milton Clark, of Brownsville, for appellant. Charles I. Dawson, Atty. Gen., John Gilliam, Commonwealth's Atty., of Scottsville, and Thos. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. This is an appeal from a judgment of the Edmonson circuit court upon the verdict of a jury finding appellant guilty, under an indictment charging a sale by him of intoxicating liquor in territory where local option was in force, and fixing his punishment at a fine of \$60 and 10 days' confinement in jail; the offense charged being one defined and denounced by section 2557b2, Kentucky Statutes.

The principal ground relied on by the appellant for the new trial refused him in the court below, and now urged by him for the reversal of the judgment by this court, was and is that the evidence was insufficient to establish his guilt; indeed, that it wholly failed to do so, and therefore that the verdict and judgment are unsupported by and contrary to the evidence, which, it is claimed, entitled him to the peremptory instruction directing a verdict of acquittal asked by him, and refused by the trial court, at the conclusion of the commonwealth's evidence and again at the conclusion of all the evidence.

This contention must be sustained, as the evidence contained in the bill of exceptions found in the record fails to show that the offense charged was committed within a year previous to the finding of the indictment, which was returned by the grand jury November 17, 1920. The trial and conviction of appellant occurred June 21, and during the June term, 1921, of the Edmonson circuit court, more than 7 months after the return of the indictment. The Commonwealth introduced a single witness on the trial of appellant, one Joe Dugger, who testified that he bought one quart of whisky from appellant in Edmonson county, Ky., "in the fall of 1919," for which he paid him \$3. The only evidence introduced by the appellant was furnished by his own testimony, in giving which he declared he did not sell Joe Dugger whisky in the fall of 1919, or at any time. This was the entire evidence regarding the sale of the whisky.

[1] To make out its case it was necessary for the commonwealth to prove more than that the sale of whisky in question was made in the fall of 1919. It was indispensably necessary for it also to prove that the sale, if made, as stated by the prosecuting witness, in the fall of 1919, was made in some part of that fall included within the year preceding the date of the finding of the indictment. There are three fall or autumn months in each year, viz. September, October, and November, and as the indictment was returned on the 17th of November, 1920, there was left nearly half of that month of the fall of 1919 in which the sale of the whisky must have taken place in order for it to have occurred in the fall of 1919, and within a year of and before the finding of the indictment. On the other hand, if the sale occurred on or between September 1 and November 17, 1919, though made in the fall of 1919, as stated by the commonwealth's witness, it was made more than a year before the indictment was found; and, if so made, the offense, both at the time of his trial and when the indictment was returned, was, as insisted by appellant, barred by the statute of limitations requiring the prosecution of such a misdemeanor to be commenced within a year of the commission of the offense.

[2] In a criminal prosecution to authorize conviction, the defendant's guilt of the offense charged must be established by the evidence beyond a reasonable doubt. Every fact essential to his conviction must be shown by the evidence, and where, as in this case, the commonwealth's evidence presents two states of fact, under one of which the defendant is guilty, and under the other he is not guilty, and the evidence wholly fails to show which state of fact is true, he is entitled to an acquittal. In the absence of evidence nothing can be presumed against the defendant, but he is entitled to the benefit of every doubt arising out of the evidence or lack of evidence, and every presumption of innocence, until such presumption is destroyed by evidence. In the case at bar, if the commonwealth's witness, in addition to testifying as to his purchase of liquor of appellant in the fall of 1919, had also testified that the sale was made after November 17th of that fall, it would have been the province of the jury to determine the issue of fact made by such additional evidence, and the appellant's positive denial of same, as in such case there would have been cause for letting the case go to the jury. But, as there was no evidence tending to prove that the sale, though made in the fall of 1919, was made after November 17 of that fall, neither the trial court nor jury had a right to presume that it was made after that date. On the contrary, the presumption of innocence left by the absence of this necessary proof, to affirmatively prove

which the burden was on the commonwealth, entitled appellant to the directed verdict of acquittal requested by him.

As the conclusion expressed compels the reversal of the judgment appealed from, it is deemed unnecessary to pass upon the minor errors complained of, which doubtless will be avoided upon another trial. For the reasons indicated, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

SAMPSON, J., not sitting.

### MEREDITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 27, 1921.)

1. Indictment and information  $\S$  87(4), 166—Indictment must allege and proof show that misdemeanor was committed within 12 months.

Offense of selling intoxicating liquor in dry territory being a misdemeanor, it was necessary for indictment to allege, and for commonwealth to prove, that the offense was committed within 12 months before the finding of the indictment.

2. Criminal law  $\S$  565—Evidence held insufficient to show crime committed within one year preceding indictment.

Where indictment for selling intoxicating liquor in dry territory was returned on November 17, 1920, a conviction could not rest on testimony that defendant made a sale of whisky "in the fall of 1919," since the sale could have been made in the fall of 1919 without having been made within a year preceding the return of the indictment.

Appeal from Circuit Court, Edmonson County.

Fred Meredith was convicted of selling intoxicating liquor in dry territory, and appeals. Reversed and remanded.

Milton Clark, of Brownsville, for appellant.

Ohas. I. Dawson, Atty. Gen., Thomas B. McGregor, Asst. Atty. Gen., and John H. Gilliam, of Scottsville, for the Commonwealth.

CLAY, J. Appellant, Fred Meredith, was convicted of the offense of selling intoxicating liquor in dry territory.

[1, 2] One of the grounds urged for reversal is that the verdict is not sustained by the evidence. The point is well taken. The offense being a misdemeanor, it was necessary for the indictment to allege and for the commonwealth to prove that the offense was committed within 12 months before the finding of the indictment. *Williams v. Commonwealth*, 87 S. W. 839, 18 Ky. Law Rep.

667; *Commonwealth v. T. J. Megibben Co.*, 101 Ky. 193, 40 S. W. 694, 19 Ky. Law Rep. 291. The indictment which was returned on November 17, 1920, contained the necessary allegation, but the only evidence offered by the commonwealth was the statement of one witness that "in the fall of 1919" he bought one quart of whisky from the defendant in Edmonson county, and paid the defendant \$3 therefor. As the fall season includes the months of September, October, and November, it necessarily follows that evidence that a particular offense was committed in the fall does not prove beyond a reasonable doubt that it was committed after November 17th.

We refrain from discussing the other errors assigned, as probably they will not occur on another trial.

Judgment reversed, and cause remanded for new trial not inconsistent with this opinion.

#### CALHOUN, Mayor, et al. v. JETT.

(Court of Appeals of Kentucky. Sept. 30, 1921.)

**Municipal corporations §—48(2) — City attorney in city adopting commission form of government held entitled to compensation until end of term of office.**

On adoption by city of the commission form of government under Ky. St. § 3480b, subdivision 4 of which abolishes city officers except mayor, police judge, and prosecuting attorney, in view of subdivision 2, providing that all laws applicable to third-class cities not inconsistent with the act shall continue, and subdivision 19, empowering commissioners to appoint necessary employees, it was not the legislative purpose that the office of prosecuting attorney in third-class cities be abolished, and incumbents may serve until expiration of term for which elected, and are entitled to compensation to such time.

Appeal from Circuit Court, Daviess County.

Application by Tanner W. Jett against J. C. Calhoun, Mayor of the City of Owensboro, and others, for mandamus to compel the city commissioners to pay a portion of the fines and penalties claimed to be due to petitioner as city attorney. Relief granted as prayed for, and defendants appeal. Affirmed.

George S. Wilson, of Owensboro, for appellants.

Tanner W. Jett and Sandidge & Sandidge, all of Owensboro, for appellee.

QUIN, J. Whether the office of prosecuting attorney of the police court of the city of Owensboro was abolished by the adoption by that city of the commission form of govern-

ment is the only question raised on this appeal. At the regular November election in 1917, plaintiff was elected for a term of four years to the office of prosecuting attorney of the police court of Owensboro, a city of the third class. In the December following he entered upon the discharge of the duties of said office, and has continuously performed same since said date. As such prosecutor his compensation, consisting of 30 per cent. of the fines and forfeitures recovered in the police court, were paid to him until May 1, 1919. Defendants having failed and refused to pay the proportion of the fines and forfeitures recovered during the month of May, 1919, it was sought by mandamus to compel the city commissioners to pay the sum alleged to be due. The relief prayed for was granted.

Pursuant to the provisions of an act of 1914 (Ky. Stats. § 3480b), and prior to the 1917 election, the city of Owensboro adopted the commission form of government, and it is the contention of the defendants that in so doing the office of prosecuting attorney was abolished. This argument is based upon the provisions of section 4 of the act aforesaid (Ky. Stats. § 3480b, subd. 4) which reads:

"All the present city officers, save those of mayor and police judge and city prosecuting attorney, shall, at the expiration of that year which shall next follow the year in which said election is held, be ipso facto abolished, if the vote at said city election shall be in favor of the organization and government of the city under this act. It is understood that the mayor, police judge and city prosecuting attorney shall hold their respective offices until the expiration of the term of office to which such officer was elected."

In the succeeding sections of the act it is provided that in the year following the adoption of the commission plan there shall be elected two commissioners and a mayor or police judge, depending upon the expiration of the term of the two officers last mentioned, and in the event both terms expire in the same year the first term of the police judge shall be for two years only; the object being that every other year two commissioners and a mayor or police judge shall be elected. This section makes no mention of the prosecuting attorney.

Section 2 of the act provides that all laws applicable to cities of the third class, not inconsistent with the 1914 act, shall continue to apply to and govern each city organized under the act. Section 19 empowers the commissioners to appoint such employees as may be necessary for the proper conduct of the affairs of the city.

If the Legislature intended to abolish the office of prosecuting attorney, it has failed to express that intention in the language used

in the act; on the contrary, it expressly provided that all offices except those of mayor, police judge, and city prosecuting attorney should be abolished, nor should the terms of the incumbents of any of the three named offices be interfered with.

In construing a statute it is proper to look to its effect and consequences when its provisions are ambiguous, or the legislative intent is doubtful. But when the law is clear and explicit, and its provisions susceptible of but one interpretation, its consequences, if evil, inconvenient, unjust or arbitrary can only be avoided by a change in the law itself, to be effected by legislative, and not judicial, action. *Bosley v. Mattingly*, 14 B. Mon. 89; *Aldridge v. Commonwealth*, 192 Ky. 215, 232 S. W. 619. The courts should construe statutes in accordance with the legislative intention, and this intention is to be ascertained from the language of the act itself.

That the Legislature did not purpose to abolish the office of prosecuting attorney in cities of the third class is emphasized by corresponding sections in acts relating to cities of other classes; e. g., in cities of the second class only the offices of mayor and police judge were retained (Ky. Stats. § 3235c, subd. 4) in language identical to that found in the section pertaining to cities of the third class, with the proviso, however, that the offices (naming them) other than mayor and police judge should not be deemed abolished until the expiration of the terms of the incumbents; while the act relating to cities of the fourth class (Ky. Stats. § 3606b, subd. 4) abolishes all offices after the expiration of the term for which they were elected.

Thus we find that, when the Legislature wanted to abolish all the offices, it said so in express language; when it was desired to retain certain offices, language to that effect, equally as expressive, was used. If it was the legislative will that the office of prosecuting attorney in cities of the third class should be abolished, it was expressed antonymically, because the act expressly saves and excepts said office along with that of mayor and police judge from the abolition directed to all others.

The fact that in section 5 of the 1914 act provision is only made for the election of a mayor and police judge and commissioners does not militate against the conclusion we have reached. The Legislature was desirous of having the election for mayor and police judge take place at different times, and, when this had been provided for, it would have been useless to make any reference to the election of prosecuting attorney, since it was necessary, if his election was to take place when commissioners were to be elected, that he be elected on one date or the other. In so far as subsection 5 of the statute aforesaid

attempts to limit the term of the police judge to two years, we held in *Watkins v. Pinkston*, 190 Ky. 455, 227 S. W. 583, that same was unconstitutional.

Finding no error in the judgment, it is accordingly affirmed.

### BRUNER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 30, 1921.)

#### 1. Searches and seizures ¶7—Persons protected from unreasonable search and seizure.

Under the federal and state Constitutions persons will be protected from unreasonable search and seizure, though to do so in certain instances might retard or defeat the ends of justice.

#### 2. Criminal law ¶1036(8), 1064(5)—Sufficiency of search warrant not subject to attack on appeal, where question not raised in lower court.

In prosecution for breaking into a store-room, where there was no attack in lower court on the sufficiency of a liquor search warrant issued under Acts 1920, c. 81, § 31, pursuant to which officers had searched defendant's house and found the stolen goods therein, and no reference thereto in motion for new trial, the insufficiency of the warrant urged as ground for granting a peremptory instruction could not be raised for the first time on appeal.

#### 3. Searches and seizures ¶3—Owner's consent sufficient authority, notwithstanding improperly issued warrant.

That search warrant was not properly issued is immaterial, if owner of searched house consented to the search.

#### Appeal from Circuit Court, Boyd County.

Hugh Bruner was convicted of feloniously breaking into a storeroom and stealing goods therefrom, and he appeals. Affirmed.

J. S. Fullerton, of Ashland, for appellant.

Chas. I. Dawson, Atty. Gen., and Charles W. Logan, Asst. Atty. Gen., for the Commonwealth.

QUIN, J. Appellant was indicted and convicted of feloniously breaking into a store-room and stealing goods therefrom. He was sentenced to serve a four-year term in the penitentiary, complaining of which judgment he has appealed.

The chief of police of Ashland and other police officers, while secreted in a building close to appellant's house, saw two men, with several packages and a bundle of boxes tied together, enter the building occupied by appellant. This was about 4 o'clock a. m. Immediately thereafter the police officers went to appellant's abiding place, and there in the loft they found 38 pairs of new shoes. The shoes were later identified as the property of

Gray & Poor, whose store was broken into the same night. The police officers did not know appellant, and at the time they went to his house they had not heard of the robbery at the shoe store. The officers had in their possession a "John Doe" search warrant, issued by the police judge on the information of one Watkins that illicit liquor was concealed in the building at 113 East Winchester avenue, the premises occupied by appellant.

[1] Appellant's chief insistence is that his motion for a peremptory instruction should have prevailed. This is on the theory that the officers' only authority for making the search and seizure was the search warrant; that it was not for accused, nor for the property seized, and was not issued upon the oath of two reputable citizens as required by law. Both the federal and state Constitutions guarantee to the people security of their persons, houses, and possessions from unreasonable search and seizure—rights that will be protected, though to do so in certain instances might retard or defeat the ends of justice. The courts have ever protected the sanctity of the home, and will always guard with zealous care one's indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense. *Boyd v. United States*, 118 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. As aptly said in the case supra:

"Any compulsory discovery, by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

See, in this connection, *Youman v. Commonwealth*, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303, and *Turner v. Commonwealth*, 191 Ky. 825, 231 S. W. 519. To same effect, see *Gould v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 311.

In the *Youman Case* the search of the premises was made without a search warrant; in the instant case there was a search warrant, but its validity is attacked. Section 31 of chapter 81, Acts 1920, provides that:

"Any judge or justice of the peace, when affidavits of any state or federal officer and one other reputable citizen, or when the affidavits of two reputable citizens, are filed with him describing the premises as nearly as may be,

where intoxicating liquors are sold or suspected of being sold or disposed of, in violation of this act, may by his warrant cause any house or building or other place, to be searched by night or by day for the detection of any intoxicating liquors which are kept there for the purpose of sale or other disposition, in violation of this act. \* \* \*

[2] The record does not show that the necessary affidavits were not filed. No demurrer or other step attacking the sufficiency of the warrant was interposed in the lower court, and no reference made to it in the motion for a new trial, so that in any event it is too late now to raise the question. *Cheek v. Commonwealth*, 162 Ky. 56, 171 S. W. 998. As said in *Frogg v. Commonwealth*, 163 Ky. 175, 173 S. W. 383, L. R. A. 1915D, 330:

"For the purpose of this case, conceding that the judge acted unlawfully in issuing the warrant without the affidavits, yet if the party was, in fact, guilty of the offense charged, the absence of affidavits to support the warrant cannot serve as a defense in the prosecution."

Aside from the question of the validity of the warrant, the facts of this case are clearly distinguishable from those in the *Youman Case*. The chief of police says he told accused he had a search warrant to search his house for some liquor; he both showed and read the warrant to him; whereupon appellant said, "All right; go ahead and search." The *Youman* opinion recognizes the exception to the general rule that a search without a warrant is not unlawful, where the consent or permission of the one in possession is given for that purpose. This is illustrated by the case of *Banks v. Commonwealth*, 190 Ky. 330, 227 S. W. 455, wherein we held that the general rule does not apply to a search of one's premises, though without a warrant, if done with the permission, voluntary agreement, or consent of the person in rightful possession of the place searched, and further, that articles found as a result of such a search may be relied upon by the commonwealth as evidence against the offender.

[3] Appellant did not take the stand. The only two witnesses introduced by the commonwealth were the chief of police and a member of the firm of Gray & Poor. There is no showing that the warrant was not properly issued; but, had it been invalid, accused's consent was sufficient authority to the officer to enter and search the premises. The verdict of guilty is amply supported by the evidence.

Finding no ground justifying a reversal of the judgment, same is accordingly affirmed.



**KNIGHTS AND LADIES OF SECURITY v. LEWELLEN. (No. 139.)**

(Supreme Court of Arkansas. Oct. 3, 1921.)

**1. Insurance**  $\S$ 755(5)—Mere formal notice of delinquency would not reinstate suspended member of mutual benefit society.

The mere giving of formal notice of delinquency would not operate to reinstate a member of a mutual benefit association who had been automatically dropped by failure to pay his dues, where he was not thereby induced to take any action or to pay any money.

**2. Insurance**  $\S$ 791(1)—Amount of proceeds of certificate on death before six months stated.

Under a certificate of a mutual benefit association for the sum of \$2,000, containing a provision that, if member should die within six months, the society would be liable to the beneficiary for only 60 per cent., and also "that on the death of the said member the National Council shall retain \$50 of each \$1,000 of this certificate, less \$1 per thousand for each year this certificate shall have remained in force," *held* that, on death before expiration of six months, beneficiary would be entitled to only \$1,100.

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Action by Paris R. Lewellen against the Knights and Ladies of Security. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Calvin T. Cotham, of Hot Springs, and A. J. De Mers, of Little Rock, for appellant.

A. B. Belding, of Hot Springs, and W. D. Swaim and Jas. E. Hogue, both of Little Rock, for appellee.

SMITH, J. Appellee was the beneficiary in a certificate issued to T. J. Lewellen, her husband, by appellant, a fraternal insurance company. The certificate was issued on the 31st day of May, 1919, and the insured died on August 13, 1919. The premium was payable monthly on the 1st day of each month in advance, and there was a provision in the constitution and by-laws of the order that, if any member should fail to pay any monthly assessment by the last day of the month for which the assessment was due, the delinquent member should automatically stand suspended.

The controlling question of fact in the case is whether the insured had paid two premiums or only one. The parties practically agree that, if two premiums were paid, the company is liable; whereas if only one premium was paid appellant is not liable. In fact, appellee, in stating the case, says:

"The paramount issue, and really the only issue, in the case was as to whether the assured had paid his dues."

We do not set out the testimony bearing upon this issue, as it may be different upon the retrial of the cause.

In submitting the case to the jury the trial court, among other things, said:

"If he failed to pay his dues, then he would stand automatically as suspended unless the association would voluntarily carry him on its books. On that feature of it, even though he had not paid his dues for the month of July, if they still carried him on the books and charged that dues to him and notified him that he was in arrears and made a demand on him—I think there was some evidence here to that effect—why, that would be a waiver of that part of the constitution and by-laws which says that a member is suspended for the nonpayment of dues, but, unless they did carry him on that way, if he failed to pay the dues for July, he was suspended and dropped automatically and could not claim any right at all under the certificate."

The only testimony on this feature of the case was that on August 6, 1919, the home office of the appellant company addressed to Lewellen, the insured, a formal notice that he was in arrears for his July dues. Objection was made to the introduction of this testimony on the ground that it was irrelevant and incompetent, inasmuch as the original notice was not produced or its loss accounted for. We think, however, that the introduction of the original of the notice would not have warranted the giving of the instruction set out above.

[1] It does not appear how the insured would have been reinstated if, in fact, he was delinquent. It may be that payment of the delinquent dues would have been sufficient, but no contention is made that any dues were paid after the date of this notice. It is certain, however, that the mere giving of formal notice of delinquency did not operate to reinstate the suspended member, as he was not thereby induced to take any action or to pay any money. 2 Bacon's Life & Accident Ins.  $\S$  601.

[2] The certificate sued on was for the sum of \$2,000, but it contained the provision that, if the member should die within six months after the delivery of the certificate to the member, the company would be liable to the beneficiary for only 60 per cent. of the amount of the certificate; and, inasmuch as the assured died within six months of the date of his certificate, it is conceded that the appellant company is not liable for more than \$1,200. The judgment rendered was for this amount. It is claimed, however, that this sum is excessive under another section of the policy; and such appears to be the fact. Section 7 of the policy reads as follows:

"It is herein further provided that for the purpose of creating and maintaining a reserve fund that on the death of the said member the

National Council shall retain \$50 of each \$1,000 of this certificate, less \$1 per thousand for each year this certificate shall have remained in force."

This certificate is for \$2,000, and would have been enforceable for that amount if the assured had not died within six months of the date of his certificate. The beneficiary is not entitled to the credit of the \$1 per thousand, as the certificate had not been in force for one year. The necessary effect of this section of the policy is therefore to further reduce the amount of the recovery by \$100 (in the event liability is properly found upon the retrial of the cause).

Other assignments of error are argued, but, as they may not arise on the retrial of the cause, we do not discuss them.

For the error in giving the instruction set out above, the judgment is reversed, and the cause remanded for a new trial.

#### GLENN v. UNION BANK & TRUST CO. (No. 136.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

1. Principal and surety ⇨126(3)—Mere advisory notice to sue principal insufficient to release surety.

Under *Crawford & Moses' Dig. §§ 8287, 8288*, exonerating sureties on notes from liability if suit against the principal debtor be not commenced within 30 days after service of written notice "requiring" the holder to forthwith commence suit, a notice by a surety merely "advising" the holder to take legal steps to collect the debt and get judgment was not sufficient.

2. Pleading ⇨214(1)—Allegations of answer taken as true on demurrer.

The allegations of an answer must be taken as true on demurrer.

3. Principal and surety ⇨89 — Holder's acceptance of maker's assignment of claim held sufficient consideration for contract releasing surety.

The acceptance by the holder of a promissory note of an assignment of the principal debtor's claim against the United States in lieu of the surety is a sufficient consideration for a contract releasing the latter from liability; the rule that payment by one already legally bound to pay is not a valid consideration being inapplicable in the case of a new contract with essentially different terms and imposing additional obligations on the holder and principal debtor.

4. Pleading ⇨11—Answer alleging new contract releasing surety on note held sufficient, though not alleging authority of bank president to make same, which was matter of proof.

In an action against a surety on a note, an answer alleging a new contract whereby the

bank holding the note, in consideration of the principal debtor's assignment of a claim against the United States, released the surety from liability, was sufficient, though it did not allege that the president of the bank had authority to make the contract; such authority being a matter of evidence.

Appeal from Circuit Court, Independence County; Dene H. Coleman, Judge.

Action by the Union Bank & Trust Company against E. H. Glenn. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The Union Bank & Trust Company sued E. H. Glenn to recover the sum of \$1,390 alleged to be due plaintiff on a promissory note executed by the defendant and others. As a defense to the action the defendant stated that he had signed said note as surety for J. C. Sheperd and J. R. Wilson, who were the principals; that after the note became due he wrote and mailed to the bank the following letter or notice:

"Denver, Colo., June 10, 1920.

"C. D. Metcalf, Batesville, Ark.—Dear Charley: I am just in receipt of yours of the 7th relative to the Sheperd and Wilson note. My advice would be for you to take the legal steps to collect the debt, advertise and sell the truck, etc., applying that on the debt, and getting a judgment for the balance."

We quote from the answer of the defendant another paragraph, as follows:

"Further answering plaintiff's complaint, defendant says that on the 4th day of August, 1919, his codefendant, J. C. Sheperd, made an assignment of his 'War Minerals claim' against the government of the United States, under the 'War Minerals Relief Act,' which assignment was in writing, and that in consideration of said assignment being made, and to secure further loans from plaintiff bank it was agreed between the defendant Sheperd, the defendant E. H. Glenn, and D. D. Adams, as president of said bank, that this defendant should and would be released from all liability on said note aforesaid."

The plaintiff filed a demurrer to these two paragraphs of the answer, which was sustained by the court. The defendant refused to plead further, and, upon final judgment being entered against him on the demurrer, duly prosecuted an appeal to this court.

W. M. Thompson, of Batesville, for appellant.

Samuel M. Casey, of Batesville, for appellee.

HART, J. (after stating the facts as above). It is insisted by counsel for the defendant that the court erred in sustaining the demurrer to the first paragraph of his answer because he notified the plaintiff after the note became due to sue the principal on the note

forthwith, and that the bank not having brought the suit within 30 days after the notice was given, the defendant is exonerated from liability on the note under the statute.

[1] Section 8287 of Crawford & Moses' Digest requires that the surety on a note in order to exonerate himself from liability, shall, after the note becomes due, by a notice in writing, require the person having the right of action to forthwith commence suit against the principal debtor and other party liable. The following section provides that, if such suit be not commenced within 30 days after the service of the notice, the surety shall be exonerated from liability to the person notified. In *Wilson v. White*, 82 Ark. 407, 102 S. W. 201, 12 Ann. Cas. 378, the court held that the statute, being in derogation of the contractual rights of the parties, must be strictly complied with by the surety before he can claim exoneration from liability on the obligation sued on.

Under the language of the statute the requirement to sue must be unconditional. It contemplates a peremptory requirement of the surety to the creditor to commence suit forthwith. The notice in the present case is advisory merely. The language is:

"My advice would be for you to take legal steps to collect the debt \* \* \* and getting a judgment for the balance."

The surety only advises the creditor to bring suit. The notice does not contain a demand or requirement for the creditor forthwith to commence suit. Not having shown a clear requirement or demand to the creditor to institute suit forthwith upon the note, the notice is insufficient, because it is merely advisory, or at most a request to collect from the principal, and, if he fails to do so, to bring suit.

This view of the statute is taken in the early case of *Bates & Hughes v. State Bank*, 7 Ark. 394, 46 Am. Dec. 293. In that case the surety gave notice to and requested the bank "to put the obligation in a train of collection," and the court held that the notice was not sufficient under the statute. The court said that the statute gave the surety the right to require the plaintiff to commence suit forthwith, but that, if he wished to exonerate himself from liability, he must give such notice as to leave no option with the plaintiff. To the same effect, see 32 Cyc. 104; *Baker v. Kellogg*, 29 Ohio St. 663; *Rice v. Simpson*, 9 Heisk. (Tenn.) 809; *Parrish v. Gray*, 1 Humph. (Tenn.) 88; *Kennedy v. Falde*, 4 Dak. 819, 29 N. W. 667; *Benge v. Eversole*, 156 Ky. 131, 160 S. W. 911; *Edmonson v. Potts' Adm'r*, 111 Va. 79, 68 S. E. 254, 21 Ann. Cas. 1365.

[2, 3] It is also contended that the judgment should be reversed because the court erred in sustaining the demurrer to the second paragraph of the answer, and in this con-

tention we think counsel for the defendant is correct.

Counsel for the plaintiff seeks to uphold the judgment on the rule laid down in *Smith v. Spradlin*, 136 Ark. 204, 206 S. W. 327, and cases cited, to the effect that the payment of a sum of money by one who is already legally bound to pay the same is not a valid consideration for a contract. Counsel claims that, inasmuch as the defendant was already bound to pay the note, there was no consideration for the contract whereby he was released from the payment of it, and that the case calls for the application of the well-known rule just announced. We do not think, however, that the rule contended for has any application to the facts of the present case. According to the allegation of the answer, the parties entered into a new contract, with essentially different terms, and imposing additional obligations upon the bank and the principal debtor.

In *Weaver v. Emerson-Brantingham Implement Co.*, 146 Ark. 379, 225 S. W. 624, the court held that the parties to a written contract may, subsequent to its execution, rescind it in part, or in whole, and substitute a new oral agreement therefor. Hence the parties had a right to make the new agreement. According to the allegations of the answer, which must be taken as true on demurrer, J. C. Sheperd, the principal debtor, made an assignment in writing of his War Minerals claim against the United States to the bank, and it was agreed between Sheperd, the principal debtor, Glenn, the surety, and the cashier of the bank, that the surety should be released from liability on the note.

The assignment of Sheperd's claim against the United States to the bank constituted additional security to the bank. The bank had the right to accept this new security in lieu of the surety, and its action in doing so was sufficient consideration for making the new contract. The president of the bank doubtless thought that the assignment of Sheperd's claim against the United States was better security for the bank than the signature of Glenn to the note, and for that reason made the contract. In any event he had the right to make the agreement with Sheperd and Glenn that the latter should be released from liability on the note in consideration that Sheperd should assign his claim against the United States to the bank. See *Kilgore Lumber Co. v. Thomas*, 96 Ark. 219, 135 S. W. 858 and *Phoenix Cement Sidewalk Co. v. Russellville Water & Light Co.*, 101 Ark. 22, 140 S. W. 996.

[4] It is also insisted that the demurrer to the answer should have been sustained, because the answer does not allege that the president of the bank had authority to make the contract in question. The authority of the president to make the contract would

come up upon the proof in the case, and was not required to be alleged in the answer.

For the error in sustaining the demurrer to the second paragraph of the answer, the judgment must be reversed, and the cause remanded for a new trial.

### DICKSON et al. v. LOVE. (No. 140.)

(Supreme Court of Arkansas. Oct. 8, 1921.)

1. Husband and wife ⇨138(2)—Evidence held insufficient to show authority of husband to sell standing timber on wife's land.

Evidence held insufficient to support a finding that a husband, assuming to act for his wife in making a sale of the standing timber on her land, had authority to make a binding contract in her behalf.

2. Trespass ⇨52—Measure of damages for cutting timber by authority of presumed contract is value of timber.

In an action for damages for cutting standing timber, where purchaser is acting under claim of right of a presumed contract to purchase, the measure of damages is the market value of the timber cut by him.

3. Trespass ⇨61—Treble damages assessed for cutting timber after notice of repudiation of incomplete contract.

Where defendant, under authority of a presumed contract, enters on land of plaintiff and cuts standing timber, which presumed contract is repudiated by plaintiff and defendant ordered from the land, held, that defendant is responsible to plaintiff for treble damages, under Crawford & Moses' Dig. § 10320, for all timber cut after notice.

Appeal from Columbia Chancery Court; J. M. Barker, Chancellor.

Action in trespass by Mrs. W. E. Dickson and another against J. C. Love. Case transferred to equity, and defendant files a cross-bill. From a judgment for defendant, plaintiffs appeal. Reversed, with directions.

Henry Stevens, of Magnolia, for appellants.

McKay & Smith, of Magnolia, for appellee.

SMITH, J. Mrs. Dickson and her daughter, Miss Strong, sued at law to recover treble damages from J. C. Love for cutting and removing the timber on the S. ¼ S. E. ¼ section 24, township 16, range 22, situated in Columbia county, which is owned by them. Love answered, and admitted the plaintiffs' ownership of the land described in their complaint, and admitted that he had cut and was cutting the timber thereon, but alleged that he was doing so pursuant to his purchase thereof from W. E. Dickson, the agent of the plaintiffs, for the sum of \$400, and that upon the payment of a part of the

purchase price W. E. Dickson had placed him in possession of said timber, and, acting in good faith, he had cut a portion thereof. He tendered the balance of the purchase money, and prayed that the cause be transferred to equity, where the specific performance of his contract of purchase could be enforced. The prayer to transfer was granted, and the cause was transferred to equity.

In the decree rendered the court found the facts to be that in 1916 plaintiffs, through their agent, W. E. Dickson, contracted and agreed to sell and convey to defendant, Love, the merchantable pine timber on the land above described, and that Dickson at the same time sold the timber on 240 acres of land owned by himself to Love for the total consideration of \$400, of which \$300 was to be paid the plaintiffs, and the balance of \$100 to Dickson for the timber on his land; that the agreement between Love and Dickson was oral, but that Love had paid Dickson more than the part of the consideration due to Dickson for the timber on his land; and that Dickson had placed him in possession of all the timber. The court ordered Mrs. Dickson and Miss Strong, within 60 days after the payment to them of the sum of \$300, to execute and deliver to Love a deed conveying title to the merchantable timber being and standing on the land described in the complaint, which was dismissed as being without equity, and this appeal is from that decree.

[1] After a careful consideration of the testimony we have concluded that the finding of the court below is contrary to the preponderance of the testimony. The testimony does show that Dickson had previously assisted his wife in the control and management of her land, and that he had assumed to negotiate the sale of the timber in question, and that he and Love had apparently agreed on the terms of the sale. These negotiations progressed to the point that Mrs. Dickson had a timber deed prepared conveying the merchantable timber on all the lands, and this deed was signed by Dickson and by Miss Strong, but was not acknowledged by them. Mrs. Dickson and Love disagreed about the size of the trees which might be cut, and also disagreed over the terms of the payments, and Mrs. Dickson refused to execute the deed. Love admits that Mrs. Dickson at all times insisted that no timber should be cut until a deed had been prepared and delivered; but he says the terms of the sale had been fully agreed upon between himself and Dickson, and he anticipated no trouble about the preparation and execution of a satisfactory deed. Love's contention was that he had bought the timber from Dickson, and had made him a payment on it, and had been put in possession

thereof, and that under his contract, which called for the merchantable timber, he was entitled to cut all the trees over 8 inches up. Dickson denied that he had any authority to sell his wife's timber, but admitted that he had reported his negotiations to her, and that the terms of the sale appeared to have been agreed upon, except that he did not understand that the term "merchantable," which had been employed in his negotiations, included any timber under 12 inches at the stump.

Mrs. Dickson testified that, when Love admitted that he had cut timber under 12 inches, she then declared all negotiations at an end, and advised him that she would not sell the timber at all, and notified him to cease cutting it. A few days later she gave him a formal written notice to that effect. Miss Strong testified that she had signed the deed, but, when she learned that her mother had refused to sign it, she went the next day to the notary who had prepared the deed and took it from him, and that, when Love came to her about the deed, she refused to execute and deliver it to him, whereupon Love remarked that he was going to have the timber anyway.

Love testified that, while he was cutting the timber, he offered to pay Mrs. Dickson the sum of money he had agreed to pay Dickson; but the testimony clearly establishes the fact that Mrs. Dickson at all times insisted that none of her timber should be cut until a proper deed conveying it had been executed and recorded, and she never executed the deed. On one occasion Mrs. Dickson went into the woods where the timber was being cut and ordered the laborers out of the woods. The next day Love put the men back into the timber, when they resumed their work of cutting and removing the timber. There is no testimony that Dickson had any semblance of authority to represent Miss Strong.

[2] Upon a consideration of all the testimony we have concluded that Love did not acquire the right to have the title to plaintiff's timber conveyed to him, and the decree of the court below, ordering specific performance of the agreement between Dickson and Love, is reversed, for the reason that Dickson had no authority to make a sale thereof. It follows, therefore, that Love is liable for the market value of all the timber cut by him on the 80 acres described in the complaint.

[3] We have concluded that, while Love had no authority to cut this timber, yet he thought he had this right until the refusal of Mrs. Dickson and Miss Strong to execute the deed, and for the timber cut prior to that time he should be held liable only for the actual market value. But a different rule must be applied after the refusal of

Mrs. Dickson and Miss Strong to execute the deed. He had never paid either of them any money. Neither of them had ever agreed that he should cut the timber. When these women, the owners of the land, refused to consent to sell their timber, Love should have ceased cutting it, and for his refusal so to do he must thereafter be held for treble damages under the statute. Section 10320, C. & M. Digest.

The testimony does not make it clear what amount of timber was cut prior to the refusal of Mrs. Dickson and Miss Strong to execute the deed. The cause will therefore be reversed, and the court directed to enter a decree, setting aside the original decree ordering a specific performance of the contract of sale, and to ascertain the amount of timber cut before the refusal to execute the deed and the amount cut thereafter, and, in stating the account, to charge the appellant with the actual market value of the first lot of timber and with three times that value for the second lot.

### MORRIS v. STATE. (No. 129.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

#### 1. Criminal law §938(1)—Insufficient diligence on defendant's part to require granting of new trial for newly discovered evidence.

Where defendant's counsel knew before trial of a charge for assault to kill that a third person claimed to have done the shooting, and did not call such third person as a witness, *held*, that there was an entire lack of diligence essential to granting another trial on account of newly discovered evidence, and, where such evidence was also improbable, new trial was properly refused.

#### 2. Witnesses §297—Need not testify to facts incriminating them.

In a prosecution for assault with intent to kill, a third person could not be compelled to testify that he, and not the defendant, shot the prosecuting witness, since one cannot be compelled to testify to facts which would incriminate him.

Appeal from Circuit Court, Stone County; Dene H. Coleman, Judge.

Neal Morris was convicted of assault with intent to kill, and appeals. Affirmed.

S. W. Woods, of Marshall, for appellant.  
J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

McCULLOCH, C. J. Appellant was convicted of the crime of assault with intent to kill, alleged to have been committed by shooting one Taylor with a gun. It is undisputed

that Taylor was shot and seriously wounded as he was driving along a lonely part of the road late in the evening of March 28, 1921, returning to his home in Stone county from Mountain View, the county seat.

Taylor testified that appellant did the shooting. His statement was, in substance, that as he was driving along in a wagon he saw appellant come out into the road with a gun on his shoulder, and after walking a short distance in the direction of the witness he turned into the bushes, and as the witness drove by he fired the shot which took effect in the shoulder of witness. He testified that he saw appellant and recognized him as he fired the gun.

Appellant testified in his own behalf and denied that he fired the shot or was present when the prosecuting witness received the wound. Appellant testified that he was out in the woods hunting for strayed goats, and upon hearing the shooting he went to the scene and ascertained for the first time that the witness, Taylor, had been shot. There had been previous difficulties and ill will between the parties, and each one in his testimony placed the blame for their troubles on the other. There was other testimony in the case bearing with more or less force on the question as to who fired the shot, but all of the direct testimony on that issue came from the two parties to the encounter, the appellant and Taylor.

After the return of the verdict appellant filed a motion for new trial, setting up, in addition to other grounds, the discovery of new evidence. It was alleged in the motion that Taylor was shot by one Shanks, and there was filed with the motion certain affidavits tending to support the claim that Shanks did the shooting. One of the affidavits was made by Shanks himself, in which he swore that he shot Taylor himself; there was also filed the affidavit of one Ware, stating that he was in the woods near the scene of the shooting and saw Shanks shoot the witness Taylor. There were also affidavits of other parties to the effect that on the night of the shooting Shanks came to a dance in the neighborhood and told them that he had shot Taylor. On the trial of the motion Shanks and Ware were introduced as witnesses, and Shanks testified to the same effect as the statement in his affidavit, that he had shot Taylor and did so in self-defense, after having engaged Taylor in a conversation with reference to an alleged slanderous statement made by Taylor concerning the mother of witness. Ware testified that he was standing in the woods near a little branch or creek and after hearing a quarrel between the par-

ties he looked and saw Shanks shoot Taylor. The court overruled the motion for new trial and in doing so stated that he knew from his own personal knowledge that appellant and his counsel were advised before the trial that Shanks claimed to have done the shooting and also that the court did not believe that the statements of the witnesses were true.

[1, 2] It appears from the record that Shanks was summoned as a witness and was in attendance at the trial, and on the cross-examination of Taylor appellant's counsel asked him the question whether or not Shanks had done the shooting. It does not appear that appellant was apprised before the trial of the testimony of witness Ware, but it is clear that appellant and his counsel were advised before the trial all about the claim of Shanks that he had done the shooting and his statements to that effect to numerous parties on the night of the dance. There is an entire lack of diligence which is essential before an accused can claim the benefit of another trial on account of newly discovered evidence. Shanks could not have been compelled to testify to facts which would incriminate himself (Butt, Ex parte, 78 Ark. 262, 93 S. W. 992), but after appellant's conviction he volunteered his testimony and would perhaps have voluntarily testified to the facts if he had been called to the witness stand at the trial. At least, it was the duty of appellant, knowing that Shanks had openly avowed that he had done the shooting, to call the latter to the witness stand and give him an opportunity to testify. He had so freely and publicly made the statement to that effect that it was reasonable to assume that he would then as well as later have been willing to narrate the facts on the witness stand. While appellant was not apprised, so far as it appears from the record, what Ware would testify to, having seen Shanks do the shooting, it was his duty to make all possible inquiry into the testimony tending to substantiate Shanks' statement that he had done the shooting. Besides this, the story told by Shanks and Ware is so improbable that the court was justified in the conclusion that the whole thing was a "frame-up" after the trial to secure appellant's acquittal and then also to secure Shanks' acquittal on the ground of self-defense. The court was therefore correct in refusing to set aside the verdict.

This is the only ground urged here for reversal of the judgment, and, since we find there was no error in refusing to grant a new trial on account of newly discovered evidence, it follows that the judgment must be affirmed; and it is so ordered.

**BELCHER et al. v. WINTER et al. (No. 135.)**

(Supreme Court of Arkansas. Oct. 3, 1921.)

**Chattel mortgages ¶117—Held not to cover crops produced by tenants.**

A chattel mortgage on all his right, title, and interest in crops that mortgagor "agrees to cultivate and produce during this year" on certain land did not give mortgagee a lien on crops raised on such land by mortgagor's tenants, who paid their rent in money, and not by sharing their crops, notwithstanding Crawford & Moses' Dig. §§ 6889, 6890, giving the mortgagor a lien on the crops for rent and supplies furnished by him to the tenants.

Appeal from St. Francis Chancery Court; A. L. Hutchins, Chancellor.

Suit by Crutcher & Co. against W. A. Winter, W. L. Belcher and others. From an adverse decree, the last-named and certain other defendants appeal. Affirmed.

B. J. Semmes, of Memphis, Tenn., for appellants.

Mann & Mann, of Forrest City, for appellees.

WOOD, J. On April 1, 1920, W. A. Winter was indebted to Crutcher & Co. in the sum of \$4,500, evidenced by promissory note of that date due November 1, 1920, and secured by a mortgage executed on the 8th day of April, 1920, in which the property mortgaged is described as "all their right, title, claim, and interest in the entire crops of cotton, cotton seed, and corn which the party of the first part (Winter) will cultivate and agrees to cultivate and produce during this year on what is known as the Walter Gray Place farms, or elsewhere in the county and state aforesaid." Winter owned what is known as the Walter Gray Place farms in St. Francis county. Winter leased these farms to negro tenants for the year 1920 and took their notes for the rents amounting in the aggregate to \$2,800. Winter furnished to these tenants in the aggregate more than \$4,000 to enable them to make and gather crops. Winter was indebted to the First National Bank in a sum in excess of \$6,000, secured by a deed of trust on certain lands and by mortgage on chattels.

On the 30th of November, 1920, Winter deposited the rent notes mentioned above with the First National Bank as collateral security for his indebtedness to the bank. This was in addition to the other security which he had given the bank. At the time he deposited these notes as collateral he did not obtain from the bank any more money or additional consideration. On the 1st day of December, 1920, Winter delivered to the First National Bank 10 bales of cotton

which had been grown by his tenants on the Walter Gray Place farms.

This suit was begun by a complaint in equity filed by Crutcher & Co., and at their instance an attachment was issued and levied upon the 10 bales of cotton which had been delivered to the First National Bank. Crutcher & Co. alleged that they had a lien on the cotton by virtue of the chattel mortgage executed by Winter to them, and the First National Bank alleged that it had a right to the cotton because same had been delivered to them by Winter on the notes of his tenants which Winter had deposited with it as collateral. At the time the bank accepted these notes as collateral it knew of the existence of the chattel mortgage which Winter had executed to Crutcher & Co. Before the attachment issued, the First National Bank had sold the cotton and had received therefor the sum of \$641.62.

The above are the facts upon which the trial court rendered a judgment in favor of the appellees, from which the appellants prosecute this appeal.

The decree of the court was correct. The language of the mortgage is:

"The party of the first part (Winter) has bargained, granted, and sold, and does by these presents bargain, grant, and sell, to said party of the second part (Crutcher & Co.), their heirs, administrators and assigns, all their (his) right, title, and interest in the entire crops of cotton, cotton seed, and corn which the party of the first part (Winter) will cultivate and agrees to cultivate and produce during this year on what is known as the Walter Gray Place farms in the county and state aforesaid."

The above language is not sufficient to create in favor of the appellants any lien on the cotton in controversy. For this cotton was cultivated and produced by the tenants of Winter, and not by Winter himself. But the language of the mortgage only conveyed to Crutcher & Co. "all the right, title, claim, and interest in the crops of cotton" which Winter himself "will cultivate and agrees to cultivate and produce" on the farms mentioned. Winter had no right, title, claim, and interest in and to the crops of cotton grown on his farms by his tenants. These tenants were not share croppers. They paid their rent in money, and not by sharing their crops with Winter. True, Winter, as the landlord, had a lien on the cotton grown on the farms during the year 1920 for the rent and supplies furnished the tenants by him for that year. Sections 6889 and 6890, O. & M. Digest. But such lien did not give Winter any right, title, claim, and interest in the cotton itself grown on his farms by his tenants. The crops grown by Winter's tenants on Winter's farms belonged to the tenants and were only subject to his lien

for rents and supplies which he furnished them.

"A lien is neither property or a debt, but a right to have satisfaction for a debt out of property, and is not the subject of sale or assignment." *Roberts et al. v. Jacks*, 31 Ark. 597, 25 Am. Rep. 584.

See, also, *Buckner v. McIlroy*, 31 Ark. 631.

But, even if it could be said that the language "all right, title, claim, and interest" was broad enough to include future cotton afterwards grown on Winter's plantations and delivered to him by his tenants, nevertheless such cotton was not conveyed by the mortgage, for the reason that the language, as before stated, only purports to convey to appellants the entire crops of cotton which Winter himself would cultivate and produce. He did not cultivate and did not produce the cotton in controversy.

The case of *Delta Cotton Co. v. Ark. Cotton Oil Co.*, 80 Ark. 431, 97 S. W. 440, upon which appellants rely, does not sustain their contention. By the language of the mortgage in that case the mortgagor conveyed the "entire crop of cotton, cotton seed, and corn grown and to be grown during the year 1903 on certain described real estate in the county of Jefferson and state of Arkansas." No such language is contained in the clause of the mortgage under review.

In the case of *Blakemore v. Eagle*, 73 Ark. 477, 84 S. W. 637, the deed of trust described the property conveyed as follows:

"The entire crop of cotton and corn that I [the mortgagor, Blakemore] may raise or cause to be raised during the year 1898 on my plantation known as the Blakemore place in Lonoke county," etc.

In that case Mr. Justice Riddick, speaking for the court in construing the above language, expressed the opinion that the cotton delivered to Blakemore by his tenants in the settlement of accounts for supplies furnished by him was not covered by the trust deed. While this language, as the opinion further shows, was not necessary to the decision in that case, and was therefore obiter, nevertheless it is very persuasive as to the proper construction of such language.

And in the later case of *Delta Cotton Co. v. Ark. Cotton Oil Co.*, supra, Judge Battle, in the concluding part of his opinion, expressed the view that the court in *Blakemore v. Eagle*, supra, was of the opinion that the language of the deed of trust in that case was not sufficient to cover cotton raised and cultivated during the year by the tenants on the plantation of the mortgagor (*Blakemore*), and the court, in making the distinction between the cases of *Delta Cotton Co. v. Ark. Cotton Oil Co.* and *Blakemore v. Eagle*, recognized that the latter case decided that the language therein con-

tained was not sufficient to cover cotton raised by tenants on the plantation of the mortgagor. So we feel that our opinion and judgment in the case at bar is fortified by the opinions of two former very able judges of our court.

In 11 *Corpus Juris*, § 178(3), p. 505, the following language is used by the authors of the text:

"As a general rule, where the mortgage purports to cover crops to be grown by the mortgagor, it will not include crops grown by his tenants, or other persons, but will cover the crops grown by him on the land designated. \* \* \* But a mortgage on crops to be grown during a certain year on certain lands will include crops grown on the premises by tenants and share croppers of the mortgagor."

Several cases are cited to support the first part of the text, and, to support the latter part of the text, our own case of *Delta Cotton Co. v. Arkansas Cotton Oil Co.*, supra, is cited.

We conclude that there was no error in the decree of the court, and the same is therefore affirmed.

#### JEFFERSON v. SOUTER. (No. 138.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

1. Mortgages  $\S$  38(2)—Parol evidence, showing deed to be mortgage, must be clear.

While equity will permit parol evidence to be introduced to show that a deed absolute on its face was intended as a mortgage, the evidence must be clear, unequivocal, and convincing.

2. Mortgages  $\S$  32(6)—Evidence considered in determining whether deed was mortgage.

For the purpose of ascertaining whether parties intended a deed absolute on its face to be a mortgage, the court will consider all the surrounding circumstances, including the value of the land, the price paid, and the acts and declarations of the parties at the time the transaction was had.

3. Mortgages  $\S$  38(1)—Evidence held not to sufficiently establish that deed was mortgage.

In an action wherein it was sought to have a deed absolute on its face declared a mortgage, evidence held not to show by sufficiently clear, unequivocal, and convincing testimony that the parties intended that the deed be treated as a mortgage.

4. Evidence  $\S$  230(1)—Declarations of grantor admissible against successor in interest.

Declaration of grantor to the effect that he was a tenant of the grantee in a deed was against his interest, and was admissible against his successors in interest and all who claimed under him, in a proceeding wherein they sought to have the deed declared a mortgage.



**5. Evidence — Common knowledge that lands appreciated in value.**

It is a matter of common knowledge that lands appreciated greatly in value during the period beginning January, 1912, and ending January, 1917.

Appeal from Columbia Chancery Court; J. M. Barker, Chancellor.

Suit by J. T. Souter against Lillie Jefferson. Decree for plaintiff, and defendant appeals. Affirmed.

In January, 1917, J. T. Souter brought suit in the circuit court against Lillie Jefferson to recover possession of 81 acres of land in Columbia county, Ark. Lillie Jefferson filed an answer asserting title to the land in controversy and setting up facts tending to show that the transaction with the plaintiff was not an absolute sale of the land to him, but was only intended by the parties as a mortgage. She asked that the cause be transferred to the chancery court, which was done.

According to the testimony of Lillie Jefferson, on the 17th day of December, 1902, L. H. Pearce executed a deed to the land in controversy to Scott Jefferson for the consideration of \$240. Scott Jefferson was her husband. As soon as the land was purchased, they moved on it, and Scott Jefferson finished paying for it in January, 1904. They continued to occupy the land as their homestead until Scott Jefferson died, on the 18th day of April, 1914. After his death Lillie Jefferson claimed the land as her homestead and rented it out, but never collected any rent therefor. On the 24th day of December, 1908, Scott Jefferson and Lillie Jefferson, his wife, executed an absolute deed to L. H. Pearce to the land in controversy for the consideration of \$301.30. It was intended by the parties that the transaction should be a mortgage to secure Pearce the amount named as the consideration in the deed. On the 4th day of March, 1911, L. H. Pearce and wife executed a deed to George Pickler to the land in controversy for the consideration of \$331.42. On February 25, 1911, Scott Jefferson, by an instrument in writing, which was not recorded, notified L. H. Pearce that he had transferred all his interest in the contract concerning the land in controversy made by Pearce to Scott Jefferson, and directed Pearce to execute a deed to the land to G. T. Pickler. On the 20th of January, 1912, G. T. Pickler and his wife executed a deed to J. T. Souter to the land in controversy for the consideration of \$320. In the spring of 1914, a short time before he died, Scott Jefferson caused a suit to be filed in the chancery court against J. T. Souter for the specific performance of an alleged contract for the purchase of the land in controversy.

The attorney for Scott Jefferson testified that he went to see J. T. Souter about the

matter, and that Souter claimed that Jefferson owed him \$592; that he made a tender of this amount to Souter; that Souter refused to accept the tender and to make a deed to Scott Jefferson to the land in controversy. The attorney for Scott Jefferson also testified that he dismissed the suit for specific performance in 1916, before the present suit was instituted, and that the land in controversy was worth \$1,000 at the time the present suit was brought.

According to the testimony of J. T. Souter, he did not agree with Scott Jefferson to pay off the amount that Jefferson owed Pickler, which was secured by a lien on the land in controversy, and to receive a deed from Pickler to the land as security therefor. On the other hand, it was intended by the parties that J. T. Souter should receive an absolute deed from G. T. Pickler to the land in controversy, and that the transaction was in no sense to be considered as a mortgage to secure Souter for an indebtedness owed him by Scott Jefferson. At the time the transaction was had Souter did make a verbal agreement with Scott Jefferson for a resale of the land to him, if Jefferson would pay him the amount he had paid for the land, together with an account which Jefferson owed him. The whole amount was \$592, and Souter would have conveyed the land to Jefferson, if the latter had paid him this amount. Souter denied that Jefferson, or his attorney, had ever tendered him this amount. In the first part of 1914, Jefferson saw that he was not able to pay Souter the \$592, and agreed to pay Souter rent for the land thereafter. Jefferson began to trade with another firm that year, and Souter, at the instance of Jefferson, by an instrument in writing, waived his landlord's lien for supplies. After Jefferson agreed to pay rent on the land in 1914, Souter expended \$500 in making permanent improvements on the place, and thereafter paid the taxes on the land.

The merchant who agreed to furnish Scott Jefferson supplies for the year 1914 testified that, before he would furnish Jefferson, he required Souter to waive his landlord's lien for supplies. Scott Jefferson told the merchant who agreed to furnish him in 1914 that J. T. Souter would not claim anything but the rent, and the merchant had Jefferson to get a statement from Souter to that effect before he furnished him supplies.

The chancellor found the issues in favor of the plaintiff, Souter, and a decree was entered accordingly. To reverse that decree, the defendant, Lillie Jefferson, has duly prosecuted this appeal.

Joe Joiner and Henry Stevens, both of Magnolia, for appellant.

McKay & Smith, of Magnolia, for appellee.

HART, J. (after stating the facts as above). [1] The deed to J. T. Souter to the land in controversy is absolute on its face. While equity will permit parol evidence to be introduced to show that the transaction was intended as a mortgage, in order to overcome the presumption of law, and show from the absolute form of the deed that the transaction was intended by the parties as a mortgage, the evidence must be clear, unequivocal, and convincing. *Wimberly v. Scoggin, Receiver*, 128 Ark. 67, 193 S. W. 264, and *Snell v. White*, 132 Ark. 349, 200 S. W. 1023.

[2] According to these and other decisions of this court, for the purpose of ascertaining the true intention of the parties, the court will consider all the surrounding circumstances including the value of the land and the price paid, as well as the acts and declarations of the parties at the time the transaction was had.

[3] Tested by this rule, it cannot be said that Lillie Jefferson showed by clear, unequivocal, and convincing testimony that the deed to the land in controversy to J. T. Souter was intended to be treated by the parties as a mortgage. On the one hand, Lillie Jefferson testified that her husband induced J. T. Souter to pay off an indebtedness against the land and to take an absolute deed thereto as security. On the other hand, Souter denied that he made such an agreement with Scott Jefferson, and testified that it was intended that the deed should be an absolute one. He admitted, however, that he made a verbal agreement with Scott Jefferson for a resale of the land, if Jefferson would pay him back the purchase money and an account for supplies which he owed him. Souter received a deed to the land on the 20th day of January, 1912. He waited on Jefferson during the years 1912 and 1913 to carry out his contract to repurchase the land. Jefferson failed to carry out his part of the contract for the repurchase of the land, and it was then agreed that Jefferson should begin to pay rent for the land. Souter is corroborated by the testimony of the merchant who agreed to furnish Jefferson with supplies in 1914.

[4] The merchant testified that Jefferson told him that Souter only claimed a lien for rent and would waive his landlord's lien for supplies. The declaration of Jefferson to the merchant was against his interest, and is admissible against his successors in interest and all who claim under him. *Russell v. Webb*, 96 Ark. 190, 131 S. W. 456, and *Strickland v. Strickland*, 108 Ark. 183, 146 S. W. 501.

[5] It is claimed that the testimony of Lillie Jefferson is corroborated by the fact that the consideration agreed to be paid for the land was grossly inadequate. Counsel point to the fact that Souter only claimed

\$592, and that the land was worth \$1,000. Souter purchased the land in January, 1912, and the testimony showing the land to be worth \$1,000 referred to the time when the present suit was brought, which was in January, 1917. It is a matter of common knowledge that lands appreciated greatly in value during the period of time referred to, and the alleged inadequacy of price is not, under the circumstances, of any weight in determining whether the transaction was an absolute sale or not.

It is true that the testimony of Lillie Jefferson is corroborated by the attorney, who testified that he had made a tender of the amount claimed to be due by Souter, and that the latter had refused to accept the tender and execute a deed to Jefferson to the land. The testimony is in direct and irreconcilable conflict, and Lillie Jefferson failed to establish her claim by that clear, unequivocal, and convincing testimony which is required under the settled law in this state.

It follows that the decree must be affirmed.

#### WEBB v. STATE. (No. 142.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

#### 1. Homicide $\S$ 342—No prejudice from conviction of lower degree than warranted by evidence.

Defendant cannot complain of verdict of murder in the second degree, where the evidence is sufficient to support a verdict of murder in the first degree.

#### 2. Homicide $\S$ 254—Verdict of second degree murder warranted.

Verdict of second degree murder *held* warranted, if the jury disregarded the state evidence of assassination, and believed defendant's testimony as to his being in plain sight at time of shooting, but, from the fact of his immediately leaving deceased without assistance after shooting him, believed that he fired without sufficient provocation or justification.

#### 3. Homicide $\S$ 23(1)—Malice in second degree murder implied.

Malice, a necessary essential in second degree murder, may arise by implication from the manner and circumstances of the killing.

#### 4. Homicide $\S$ 13—Malice implied from purposely killing with deadly weapon without provocation.

The law implies malice, where one purposely kills another with a deadly weapon without provocation.

#### 5. Criminal law $\S$ 1120(3)—For review testimony excluded must be shown.

The exclusion of testimony cannot be considered on appeal, what the testimony would have been not being shown.

**6. Criminal law §—822(1)—Consistent instructions to be read together.**

Where there is no conflict between instructions, they are to be read together to ascertain whether the whole law in the case is correctly declared.

Appeal from Circuit Court, Jefferson County; W. B. Sorrells, Judge.

W. D. Webb was convicted of murder in the second degree, and appeals. Affirmed.

Caldwell, Triplett & Ross and Nixon, Levine & Nixon, all of Pine Bluff, and James B. Gray, of England, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

**HUMPHREYS, J.** Appellant was indicted and tried in the Jefferson circuit court for murder in the first degree for shooting and killing one King Waters, found guilty of murder in the second degree, and as a punishment therefor sentenced to serve a period of 21 years in the state penitentiary, from which judgment and sentence an appeal has been duly prosecuted to this court.

[1] Appellant's first insistence is that the evidence on behalf of the state tended to establish murder in the first degree and that adduced on behalf of appellant tended to establish a justifiable homicide, and, for that reason, the evidence is insufficient to support a verdict for murder in the second degree. This court is committed to the doctrine that no prejudice can result to a defendant if convicted of a lower degree of homicide than warranted by the evidence. *Allen v. State*, 37 Ark. 433; *Bruce v. State*, 68 Ark. 310, 57 S. W. 1103; *McGough v. State*, 113 Ark. 301, 167 S. W. 857; *Lasater v. State*, 133 Ark. 373, 198 S. W. 122. If, therefore, the evidence is sufficient to support a verdict for murder in the first degree against appellant, he cannot complain because a verdict of murder in the second degree was returned against him.

It is admitted by appellant and his brother that he and his brother, Nick Webb, shot King Waters, their tenant, in a field being cultivated by him; that they shot him in the legs; that he (appellant) fired only one shot with a pistol, 32 caliber, which at the time contained nine cartridges, and his brother one shot with a pop gun; that his brother had about a half box of shells with him, a part of which was loaded with buckshot; that, at the time they fired the shots, they were standing near a thicket, and the deceased, King Waters, had approached them to a point about 75 yards distant; that Waters grabbed his knees and began to stagger around; that neither waited to see the result, but passed through the thicket and to their car, which had been left at their father's, and then

went home and telephoned to the officers at Pine Bluff; that Nick Webb and King Waters had a difficulty the day before the tragedy occurred, of which appellant had been informed; that the difficulty was discussed just before starting to that part of their farm cultivated by Berry Webb, which adjoined that part cultivated by King Waters. The evidence on the part of the state tended to show that King Waters was shot down while examining a piece of wet land to ascertain whether it was dry enough to plow; that he stated several times during the short time he survived that he did not see or know who fired upon him; that three shots were heard, two being from a pistol and one from a shotgun; that eleven shots entered Waters' body between his knees and groins, the two highest being larger than the others, the highest entering the groin and supposed to be the fatal shot, as it severed an artery; that, after being shot, Waters staggered around considerably before falling; that his pistol, which he carried in a scabbard, was found on the ground near him with loads in every chamber; that, upon examination, a place in the thicket was observed where some one had apparently stood and whittled, and at or near which an empty 32 pistol shell was found.

The testimony adduced on behalf of appellant tended to show that they took the loaded weapons along with them on the visit to the farm on account of the difficulty the day before and for protection in case an attack was made by King Waters upon Nick Webb; that, in passing around the thicket on the side of the field cultivated by Waters, en route to that part of the land cultivated by Berry Webb, they were discovered by Waters, who immediately advanced upon them with drawn pistol, cursing and abusing them, and, when ordered to stop, instead of doing so, fired upon them, when a shot was fired by each in succession in necessary self-defense.

[2-4] If the evidence introduced by the state was believed by the jury, it was sufficient to sustain a verdict for murder in the first degree. If, however, the jury disregarded the state's evidence tending to establish an assassination, they were not necessarily driven, under the evidence in this case, to the conclusion that the homicide was justifiable. The jury may have believed that part of appellant's testimony to the effect that they were walking around the thicket and were in plain view at the time the fatal shot or shots were fired, and yet may have concluded that the killing was unnecessary. They might well have argued that on account of leaving the scene of the tragedy immediately, appellant and his brother had fired upon Waters, without sufficient provocation or justification, for, had they fired in necessary self-defense, in all probability they would have remained to assist the wounded

man or to have explained the details of the tragedy to the first who might appear on the scene. In this event, malice, a necessary essential in second degree murder, would arise by implication from the manner and circumstances of the killing. The law implies malice where one purposely kills another with a deadly weapon without provocation. *McAdams v. State*, 25 Ark. 405; *Vance v. State*, 70 Ark. 272, 68 S. W. 37.

[5] In the course of the trial, over the objection and exception of appellant, the court refused to permit Nick Webb to testify concerning the trouble which occurred between him and King Waters the day before the tragedy. He was permitted to state that they had a difficulty and that he communicated this fact to his brother, but was not permitted to go into details concerning it. Appellant insists that the court erred in excluding this evidence, because, under the theory of the state that he was present, aiding, and abetting, or present and ready and consenting to aid and abet Nick Webb, that he was entitled to have all facts go to the jury in mitigation or exculpation of Nick Webb. If this contention were true, the case could not be reversed in the state of this record on that account, for the reason that the record fails to show what his brother would have said concerning the details of the trouble if permitted to prove them. Unless the excluded testimony of a witness is offered and set out in the record, it is impossible to determine its materiality to the issue involved. This court said in the case of *National Life & Accident Ins. Co. v. Henderson*, 133 Ark. 599, 202 S. W. 689<sup>1</sup>, that—

"Objection to the exclusion of testimony would not be considered on appeal, in the absence of showing what the testimony would have been."

The same announcement was made in *St. L. S. W. Ry. Co. v. Myzell*, 87 Ark. 123, 112 S. W. 203, and *Boland v. Stanley*, 88 Ark. 562, 115 S. W. 163, 129 Am. St. Rep. 114.

[8] Appellant insists that instructions numbered 10 and 11, given by the court, as to the necessity of an accused to do all in his power to avoid a killing or to avert the necessity thereof before resorting to force in his own defense, are fatally defective, because they did not define the test by which an accused may determine the danger and necessity for acting. It is true this phase of the law of self-defense was not included in the instructions referred to, but was thoroughly covered in the instruction numbered 5, requested by appellant and given by the court. There was no conflict between instruction No. 5 and the two instructions given by the

court. Where there is no conflict between instructions, it is proper to read them together to ascertain whether the whole law in the case is correctly declared. *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624; *Burke v. Sharp*, 88 Ark. 433, 115 S. W. 145; *Yellow Rose Mining Co. v. Strait*, 133 Ark. 206, 202 S. W. 691.

No error appearing, the judgment is affirmed.

### THOMAS et al. v. THOMAS. (No. 137.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

1. Courts ⇨202(5)—Circuit court acquired jurisdiction though order granting appeal from probate court not entered of record where appellees did not move to dismiss.

A notation in term time, by the judge of the probate court of his examination and approval on a proper petition for appeal being sufficient to show the granting thereof, the circuit court acquired jurisdiction, though the order was not entered of record, where appellees did not move to dismiss on such ground, the record being merely the best evidence that the appeal was granted, the nonproduction of which may be waived.

2. Appeal and error ⇨1010(1)—Findings not disturbed unless evidence insufficient to support them.

Findings of fact by a circuit court are as conclusive as the verdict of the jury, and will not be disturbed on appeal unless the evidence is legally insufficient to support them.

3. Marriage ⇨50(1)—May be proved by reputation and declarations and conduct of parties.

Marriage may be proved in civil cases by reputation, the declarations and conduct of the parties, and other circumstances usually accompanying that relation.

4. Marriage ⇨50(2)—Evidence held sufficient to show marriage.

In a suit for dower, plaintiff's testimony, corroborated by other witnesses, held sufficient to show that she was decedent's widow, though it was shown that the preacher, who she testified performed the marriage ceremony on a certain date, had died before that time, and the marriage license was not returned by him as required by law.

5. Courts ⇨200½—Probate court may award to widow property belonging to her individually.

The probate court, though its jurisdiction is confined to the administration of decedent's estate, may, in the exercise of its jurisdiction to allot dower to his widow, award to her property belonging to her individually, the determination of title to such property being necessary in properly administering the estate.

Appeal from Circuit Court, Ashley County; Turner Butler, Judge.

<sup>1</sup> Reported in full in the Southwestern Reporter; reported as a memorandum decision without opinion in the Arkansas Reports.

Petition by Alsie Thomas to be appointed administratrix of the estate of James Thomas, deceased, and for dower in his estate, opposed by Robert Thomas and others. Judgment for petitioner, and opponents appeal. Affirmed.

This suit originated in the probate court of Ashley county, Ark. Alsie Thomas filed a petition in that court asking to be appointed administratrix of the estate of Jas. Thomas, deceased, and for dower in his estate. She alleged that Jas. Thomas died in Ashley county, Ark., on the 9th of January, 1920, owning a valuable farm of 160 acres, and considerable personal property; that she was the lawful widow of Jas. Thomas, and resided with him on his farm at the time of his death, and that they owned certain personal property in common.

Jas. Thomas had no children, and his brothers and sisters became parties to the proceeding, and they denied that Alsie Thomas had ever been legally married to Jas. Thomas, and that she had any interest in his estate, as widow, or otherwise. The probate court found the issues against Alsie Thomas, and rendered judgment dismissing her petition. The case was tried de novo in the circuit court, where the issues were found in favor of Alsie Thomas. The case was tried before the circuit court sitting as a jury, and the court found that Alsie Thomas had legally married Jas. Thomas, and was entitled to dower in his estate. Letters of administration were granted to her, and she was given a share in certain personal property in addition to her dower. Judgment was rendered in accordance with the findings of the court, and to reverse that judgment this appeal has been prosecuted.

John Baxter, of Dermott, Jos. F. Wallace, of McGehee, and Compere & Compere and G. P. George, all of Hamburg, for appellants.

U. J. Cone, of Pine Bluff, for appellee.

HART, J. (after stating the facts as above). It is first earnestly insisted by counsel for appellants that the circuit court was without jurisdiction to try the case, and for that reason the appeal should be dismissed. No motion was filed or presented in the circuit court to dismiss the appeal from the probate court for want of jurisdiction, and the question of jurisdiction in the circuit court to try the case is raised here for the first time.

The record of the proceedings in the cause in the probate court is contained in the transcript. It shows that the judgment of the probate court dismissing the petition of Alsie Thomas was entered of record on the 28th day of February, 1920, and that this was a day of the regular January, 1920, term of the Ashley probate court. The probate record also shows that C. D. Oslin was the judge of the probate court who rendered

the judgment. In addition we copy from the record the following:

**"Affidavit for Appeal.**

"In re Estate of James Thomas. Petition for Assignment of Dower.

"Alsie Thomas respectfully prays an appeal from the judgment of the probate court herein to the circuit court of Ashley county, and says that said appeal is taken because she verily believes she is aggrieved, and is not taken for the purpose of vexation or delay.

"Alsie Thomas.

"Subscribed and sworn to before me this 28th day of February, 1920.

"U. J. Cone, Notary Public.

"Filed Feb. 28, 1920.

"George T. Gardner, Clerk.

"Examined and approved this Feb. 28, 1920.

"C. D. Oslin, Judge."

It is claimed by counsel for appellants that the record of the probate court does not show that an appeal to the circuit court was granted and that the circuit court acquired no jurisdiction of the case. Counsel for appellants invoke the general rule announced in *Matthews v. Lane*, 65 Ark. 419, 46 S. W. 946; *Walker v. Noll*, 92 Ark. 148, 122 S. W. 488, and other decisions of this court to the effect that it is necessary in order to invest the circuit court with jurisdiction that it appear from the record that the affidavit and prayer for appeal were presented to the probate court, and that the appeal was granted. In certain cases the statute requires that the county court shall grant the appeal to the circuit court, and under such statutes it has also been held that the granting of the appeal by the county court is a prerequisite to the exercise of the jurisdiction by the circuit court. Hence counsel places particular reliance upon the decision in *Drainage District No. 1 v. Reife*, 110 Ark. 374, 161 S. W. 1034. In that case it was held that the circuit court was without jurisdiction, and that the judgment on appeal from the county court was void where the record did not disclose in the matter of a formation of the drainage district that any of the steps were taken perfecting an appeal from the county to the circuit court.

The court further held that, inasmuch as the record showed that the circuit court was without jurisdiction of the cause, the defect of jurisdiction was not waived by a failure to move the court to dismiss the appeal.

Every decision must be construed with reference to the facts of the particular case. In that case the record of the Supreme Court contained a transcript of the proceedings in the county court, and did not show anything about a remonstrance against the formation of the district being filed in the county court; nor did it show an appeal from the county court, if any was granted; nor any of the steps necessary in taking an appeal. The statute required the county court

to grant the appeal, and, having prescribed the method for taking an appeal, such method must be substantially followed in order to give the circuit court jurisdiction. In that case there was an entire absence in the record brought to the Supreme Court of any showing that the county court had granted the appeal, or that the parties interested had taken any of the necessary steps toward taking an appeal.

[1] Here the facts are essentially different. The record shows that an affidavit for appeal substantially in the language of the statute was filed and sworn to on the day that the judgment of the probate court was rendered. Attached to this affidavit is the following: "Examined and approved this Feb. 28, 1920. C. D. Oslin, Judge." The record of the probate court shows that February 28, 1920, was a day of the regular January, 1920, term of the Ashley probate court, and that it was the day upon which the judgment in question was rendered and entered of record. The probate record also shows that C. D. Oslin was the judge who rendered the judgment. The notation made by him on the petition is sufficient to show that the prayer for appeal was granted. Alsie Thomas had complied with the statute with regard to taking the appeal, and was entitled to have it granted as a matter of right. The record shows that the petition was filed while the court was in session, and the fact that the presiding judge marked on the petition the words, "Examined and approved," and signed the same as judge, is evidence that he intended to act upon the petition and to grant the appeal.

It is true that the order was not entered of record, but that was not necessary in order to invest the circuit court with jurisdiction. The granting of the appeal by the county court upon the filing of a proper petition by the losing party was sufficient to confer jurisdiction upon the circuit court. The entering of such an order upon the records of the probate court was merely evidence of the fact that the appeal had been granted. The judicial act of the presiding judge of the probate court in term time in granting the appeal upon proper affidavit filed invested the circuit court with jurisdiction, and the manner of proving that the order was made could be waived, and it was waived by the appellants here not appearing in the circuit court and moving to dismiss the case there for want of jurisdiction. If they had made a motion to dismiss in the circuit court, they might have insisted that the record of the probate court was the best proof of whether or not an appeal to the circuit court had been granted, or they might have waived the production of the record and have permitted other proof to have been introduced of the fact that an appeal had been duly granted. The essential thing that gives the circuit court jurisdiction is the granting

of the appeal by the probate court upon proper affidavit filed, and not the manner of proving the granting of the appeal. In short, under our decisions the parties could not waive the granting of the appeal by the probate court, but they could waive the manner of proving the same. This is shown by other decisions bearing on the question.

In *Stricklin v. Galloway*, 99 Ark. 56, 137 S. W. 804, there was an insufficiency of the affidavit of appeal from the probate court to the circuit court, and the court held that this was waived by the parties appearing in the circuit court and taking substantive steps in the case.

Again, in *Huffman v. Sudbury*, 117 Ark. 628, 174 S. W. 1149, the court held that it is not essential to the exercise of jurisdiction by the circuit court that the affidavit for appeal filed in the probate court should appear in the record, but that the fact that it was so filed might be established by other evidence. So, too, in *Spybuck Drainage Dist. No. 1 v. St. Francis County*, 115 Ark. 591, 172 S. W. 893, where the statute required the county court to grant the appeal upon an affidavit filed in the manner provided by the statute, the court held that it was not necessary that the record of the county court should show that the affidavit for appeal had been filed, but that this fact might be shown by other proof that the affidavit for appeal was filed with the proper officer, and that when such proof was made the jurisdiction of the circuit court attached.

In the application of this rule to the instant case, it may be said that the record contains affirmative testimony from which the circuit court might have legally inferred that the probate court granted an appeal to the circuit court, and appellants will be deemed to have waived the proof of that fact by the entry of the order granting the appeal on the records of the probate court, because they did not move to dismiss the appeal in the circuit court on the ground that the jurisdictional facts were not shown by the best evidence. Therefore it cannot be said that the appeal was not granted by the probate court, and that on this account the circuit court acquired no jurisdiction in the case.

[2] On the merits of the case it is earnestly insisted that the findings of fact made by the circuit court are not supported by the evidence. The court found that Alsie Thomas was the widow of Jas. Thomas, deceased, and as such was entitled to dower in his estate. Appellants introduced testimony tending to show that Jas. Thomas and Alsie Thomas had never been legally married, and that they lived together in a state of concubinage. We need not set out this evidence in detail, because the case was tried before the court sitting as a jury, and the circuit court made a general finding of fact in favor of appellee. It has been uniformly and repeat-

edly held that the findings of fact made by a circuit court are as conclusive as the verdict of a jury, and will not be disturbed on appeal unless the evidence is legally insufficient to support them. *Huffman v. Sudbury*, 117 Ark. 628, 174 S. W. 1149; *Gay Oil Co. v. Akins*, 100 Ark. 552, 140 S. W. 739; *Ft. Smith & Van Buren Bridge Dist. v. Scott*, 111 Ark. 449, 163 S. W. 1137; *Cady v. Pack*, 135 Ark. 445, 205 S. W. 819; *Matthews v. Clay County*, 125 Ark. 136, 188 S. W. 564.

[3, 4] This brings us to a consideration of whether the evidence adduced by appellee was legally sufficient to sustain the judgment. Appellee was a witness for herself. According to her testimony, Jas. Thomas died on January 9, 1920, at his home in Ashley county, Ark., and they had lived there as husband and wife for about 8 years before he died. Jas. Thomas and Alsie Thomas were married at Ft. Smith, Ark., on the 6th or 7th of April, 1910, and lived together as husband and wife until Jas. Thomas died. Appellee lived in the same house with Jas. Thomas about six years before 1910, and cooked for him. She did not stay in the same room with Jas. Thomas, but slept in another room with Causey Drew and his wife. Jas. Thomas asked her to marry him, but put off their marriage. Finally she told him she was going to leave and go to Ft. Smith to live because he had not married her as he had agreed to do. A few weeks after she went to Ft. Smith, Jas. Thomas wrote her and asked her if she would marry him if he would come to Ft. Smith for that purpose. She answered that she would. He then wrote her to meet him at the train at Ft. Smith on a certain day. On that day she did meet him, and he had a marriage license that was issued by the clerk of Ashley county, and as they walked along the street from the train they met an old negro preacher named Mooney, who used to live in Ashley county, and Jas. Thomas procured him to marry them. Jas. Thomas turned over the marriage license to the old preacher, and they never saw it afterwards. The marriage license was never returned to the clerk by the preacher, as provided by the statute.

Two physicians who practiced medicine in Ashley county near where Jas. Thomas lived after he brought Alsie back from Ft. Smith, testified that Jas. Thomas told them that Alsie was his wife, and always spoke to and of her as his wife. One of the physicians testified that he did their practice for four years, and during all of this time Jas. Thomas conducted himself towards Alsie as his wife, and treated her as such. A salesman in the store where they traded stated that Jas. Thomas always spoke of and treated Alsie as his wife. Several other witnesses testified that they lived near to Jas. Thomas several years before he died, and that he always spoke of Alsie as his wife, and treated her as such. According to com-

mon repute in the neighborhood they were regarded as husband and wife.

It was shown on the part of appellants that the old colored preacher whom Alsie testified as having performed the marriage ceremony between Jas. Thomas and herself in 1910 had died in Ashley county before that time. For this reason it is insisted that her testimony is not entitled to any probative force. We cannot agree with counsel in this contention. This was a matter which affected her credibility as a witness only. It diminished the weight of her testimony, but did not destroy it.

The law in this state is that marriage may be proved in civil cases by reputation, the declarations and conduct of the parties, and other circumstances usually accompanying that relation. Declarations of the parties are evidence tending to establish marriage. *Kelly's Heirs v. McGuire*, 15 Ark. 555; *Jones v. Jones*, 28 Ark. 19; *Greenleaf on Evidence* (16th Ed.) vol. 2, § 462; *Wigmore on Evidence*, vol. 1, par. 268, and volume 3, pars. 2082, 2083.

In the light of these authorities it may be said that the testimony of appellee to the effect that she and Jas. Thomas were married in Ft. Smith in 1910, under a license he had procured in Ashley county, is testimony of a fact which, if true, established a ceremonial or legal marriage between them. Her testimony is not overcome because the marriage license was not returned by the preacher, as required by the statute. Proof that they procured a license as required by the statute, and were married by a minister of the Gospel, showed a legal marriage, and the return of the minister of that fact on the marriage license was only evidence that the marriage had been performed by him, but did not of itself constitute the marriage. It may be that appellee was mistaken in the preacher who married them, but this did not overcome her testimony to the effect that they were married by a minister of the Gospel, after Jas. Thomas had procured a license therefor as provided by the statute. Her testimony is corroborated by that of several witnesses to the effect that Jas. Thomas ever afterwards referred to appellee as his wife, and treated and conducted himself towards her as such. The testimony of appellee and the other witnesses was testimony of a substantive character, and legally sufficient to support the findings of the circuit court to the effect that appellee was the widow of Jas. Thomas, deceased, and as such entitled to dower in his estate.

[5] It is also insisted that the judgment should be reversed because the circuit court found that certain of the personal property was the individual property of appellee, and rendered judgment in her favor for it. It is contended that the circuit court acquired only such jurisdiction on appeal as the probate court had in the original proceeding,

and that the probate court had no jurisdiction in a contest between the administrator and others over property rights.

It is true that the jurisdiction of the probate court is confined to the administration of the estate of the decedent. The probate court had jurisdiction to appoint appellee as administratrix of the estate of Jas. Thomas, deceased, and to allot her dower in his estate as his widow. According to the evidence adduced by her, she and her husband lived on a farm in Ashley county, Ark., and he had accumulated considerable personal property, which was kept on the farm. Certain articles of this property, however, belonged to her, and the court gave it to her. In order to properly administer the estate of Jas. Thomas, deceased, and to allot dower to his widow, it was necessary for the court to determine what property belonged to the estate, and the question of the title to certain articles arose as a necessary incident to the determination of the main matter before the court. In such case the probate court can determine the question of title to the property, for this is necessary in properly administering the estate and allotting the property to those entitled to it as distributees under the statute. *King v. Stevens*, 146 Ark. 443, 225 S. W. 656.

It follows that the judgment must be affirmed.

#### DUPREE v. SMITH. (No. 143.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

##### 1. Ejectment $\S$ 30—Must be revived against heirs.

Ejectment must, on death of defendant, be revived, if at all, against her heirs and persons claiming under them, and cannot be revived, even as to recovery of damages for detention, against deceased's administrator alone; such right of recovery being dependent on title to the land being adjudged to plaintiff, which cannot be done without the heirs before the court, there being no severable cause of action as to such recovery.

##### 2. Ejectment $\S$ 30 — Limitation for revival without consent mandatory.

Crawford & Moses' Dig. § 1065, providing that an order to revive against the representatives or successor of defendant shall not be made without their consent, unless in a year from the time it could have been first made, is mandatory, so that, the time having elapsed, and the heirs of the deceased defendant in ejectment not consenting, there can be no revival, even against the consenting administrator, there being no severable cause of action against him.

Appeal from Chicot Chancery Court; Joe Harris, Special Chancellor.

Action by James Smith against B. F. Dupree and another. On the death of defendant, M. M. H. Dupree, there was revival in the name of her administrator, B. F. Dupree, and from a judgment against him he appeals. Reversed and remanded, with directions.

John Baxter and D. Dudley Crenshaw, both of Dermott, for appellant.

Buckner & Golden, of Dermott, for appellee.

HUMPHREYS, J. Suit in ejectment was brought, on the 8th day of January, 1918, by appellee against M. M. H. Dupree and B. F. Dupree, her husband, in the Chicot circuit court, to recover the possession of lot 15, in block 4, Holland's addition to the town of Dermott, Ark., and for \$300 damages for the detention of same, alleging ownership thereof under deed from them of date March 16, 1912.

The Duprees filed answer, admitting the execution of the deed and denying damages for the use of same, but alleging in a cross-complaint that the said M. M. H. Dupree, being the owner of both lots 14 and 15, in block 4, of said addition, sold appellee lot 14, and intended to convey him said lot, but, through a mutual mistake, lot 15, instead of 14, was described in said deed; that a short time thereafter they erected a residence and other improvements upon said lot 15, of the value of \$650, and have retained the continuous possession of said lot. The prayer of the cross-complaint was for a reformation of the deed, so as to describe lot 14, instead of lot 15, and for a transfer of the cause to the chancery court of said county. The motion embodied in the complaint to transfer the cause to equity was sustained, and the cause was transferred to the chancery court, pursuant to an order of the circuit court. During the pendency of the suit in the chancery court, M. M. H. Dupree died, on the 20th day of April, 1919, leaving as her only heirs her two sons, J. M. Holland and S. L. Holland, and two grandchildren, Lucile Dupree and Dorris Freeman. John Baxter afterwards purchased the interest of S. L. Holland in said lots.

The suit remained upon the chancery docket after the death of M. M. H. Dupree, without any steps being taken, until April 4, 1921. On that date the surviving heirs and John Baxter appeared for the sole purpose of filing a motion to dismiss the cause of action, because barred by the statute of limitations, which was pleaded, requiring that causes be revived after the death of a plaintiff or defendant in a real property action within one year from the time the order of revivor might have first been made. On the same date appellee suggested the death of M. M.



H. Dupree, and prayed for a revivor of the cause in the name of B. F. Dupree, her administrator, who had been appointed as administrator of her estate on May 8, 1919. Thereupon B. F. Dupree, as administrator, entered his appearance and consented that the case be revived in his name as such administrator.

Upon hearing of the motions, the court revived the cause against B. F. Dupree, as administrator of the estate of M. M. H. Dupree, but dismissed the motion of the heirs of M. M. H. Dupree and John Baxter for the want of equity, from the dismissal of which motion the heirs and John Baxter prosecuted an appeal to this court. Immediately thereafter the court proceeded to hear the cause upon the original pleadings and exhibits, and the depositions of James Smith and B. F. Dupree, which resulted in a decree establishing the ownership of said lot 15 in appellee, and a judgment of \$185 for damages by way of rental against B. F. Dupree, as administrator of the estate of M. M. H. Dupree, from which decree B. F. Dupree, as administrator, has prosecuted an appeal to this court.

[1, 2] The effect of dismissing the motion of the heirs of M. M. H. Dupree and John Baxter, and of reviving the cause in the name of B. F. Dupree, as administrator of the estate of M. M. H. Dupree, only, was to exclude the heirs and John Baxter from participation in the cause of action. In other words, it was a ruling on the part of the court that the heirs of M. M. H. Dupree, deceased, were not necessary parties to the adjudication of the title to the land of which she died possessed and to which she claimed title. The heirs and the parties claiming through them were necessary parties to the controversy, because the relief sought affected the title to said real estate. *Chowning v. Stanfield*, 49 Ark. 87, 4 S. W. 276; *Ex parte Gilbert*, 93 Ark. 307, 124 S. W. 762; *Mayers v. Lark*, 113 Ark. 207, 168 S. W. 1093, Ann. Cas. 1915C, 1094. It was said by this court in *Mayers v. Lark*, supra, that (quoting syllabus 1):

"In an action involving the title to land, the cause should be revived, after the death of one of the litigants, in the name of his heirs."

The court proceeded to a hearing of this cause without reviving it against the heirs of M. M. H. Dupree, or treating them as proper or necessary parties. The cause could have been revived against the heirs, upon proper notice, the first day court was in session after the death of M. M. H. Dupree, and the cause could not have been revived against them without their consent after the expiration of one year from the time the order of the revivor might have first been made. Section 1063, *Crawford & Moses' Digest*. This section of the statute is mandatory in nature. *Anglin v. Cravens*, 76 Ark.

122, 88 S. W. 833. Almost two years had expired after the death of M. M. H. Dupree, and after the appointment of an administrator for her estate, before an attempt to revive the cause was made, and at that time a revivor against the administrator only was sought; no revivor having at any time been sought against the heirs. The right to revive against the administrator was contingent upon the right to revive against the heirs, for the reason that the cause of action involved the title to real estate and the right to recover rents against the estate of M. M. H. Dupree, deceased, was dependent upon the title of the real estate being adjudged to appellee, which could not be done without the necessary parties before the court. The causes of action were not severable, so that appellee might revive and prosecute his suit for rents against the administrator of the estate of M. M. H. Dupree. The consent, therefore, of the administrator to a revivor, availed appellee nothing. The court erred in overruling the motion of the heirs of M. M. H. Dupree and John Baxter to dismiss the proceedings. The court should have stricken the cause from the docket upon the motion. Section 1067, *Crawford & Moses' Digest*.

For the error indicated, the judgment is reversed, and the cause remanded, with directions to strike the cause from the docket.

#### PAYNE, Agent, v. McDONALD. (No. 132.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

1. Carriers  $\S$  320(6)—Evidence of negligence in permitting passenger to use violent language held sufficient to go to jury.

Evidence that defendant carrier's agents negligently permitted and participated in a dispute in which a passenger used violent, profane, and threatening language in presence of plaintiff, another passenger, causing fright, resulting in a miscarriage, held sufficient to go to the jury.

2. Appeal and error  $\S$  1047(3)—Refusal to strike evidence held harmless.

Where defendant's counsel did not demur to the complaint, but after cross-examining plaintiff moved to strike out her evidence showing that defendant's agents permitted a passenger to use violent language in her presence, causing fright and a miscarriage, because not alleged to have been negligently permitted, a refusal to strike out the testimony held not prejudicial where defendant was not surprised.

3. Pleading  $\S$  428(3)—Want of formal averment of negligence should be questioned by motion to make more definite, and not by motion to strike testimony.

In an action against a railroad company for permitting a passenger to use violent and threatening language in the presence of plaintiff, causing fright, resulting in a miscarriage,

the failure of the complaint to formally allege negligence amounted only to imperfectly stating the cause of action, and should have been attacked by a motion to make more definite and certain, instead of by motion to strike testimony.

**4. Appeal and error  $\Rightarrow$  232(3)—Objection to instruction must have been specifically made in lower court.**

In an action against a carrier for permitting violent language, causing a passenger to become frightened and to suffer a miscarriage, where an instruction was objected to because the evidence was insufficient to justify submission of the issue, and that there was no allegation of failure to properly protect plaintiff, the objection that it did not properly submit negligence of defendant's agents in their conduct towards the disorderly passenger, not specifically made at the trial, cannot be heard on appeal.

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

Action by Lena McDonald against John Barton Payne, as Agent for Railroads. From judgment for plaintiff, defendant appeals. Affirmed.

Jas. B. McDonough, of Ft. Smith, for appellant.

Norwood & Alley, of Mena, for appellee.

**MCCULLOCH, C. J.** Appellee sued the appellant, John Barton Payne, as designated agent of the Kansas City Southern Railway Company, in the circuit court of Polk county, to recover for injuries alleged to have been received while she was a passenger on a train operated on said railroad. The basis of appellee's claim is that there was a quarrel or controversy in her presence between the train auditors and a passenger, which became so violent that it excited and frightened her, and that she became seriously ill, and, being pregnant, a miscarriage subsequently resulted, as well as ill health in other respects. The answer of appellant contained appropriate denials of all the charges contained in the complaint. On a trial of the issues before a jury there was a verdict in appellee's favor, assessing damages in the sum of \$500.

One of the contentions made for reversal of the judgment is that the evidence is not sufficient to sustain the verdict. Appellee took passage on a train at Texarkana en route to Grannis, a station in Polk county. She had her four children with her, ranging in age from 5 to 11 years, and two of her children were placed in a seat across the aisle from her, and the other two occupied the seat with her. There were two train auditors, Patterson and Whitehead, the latter being a new and inexperienced man and the former being on duty merely for the purpose of "breaking in" the new man.

There was a stop in the yards at De

Queen for the purpose of setting in a new car or setting one out, and during this stop a man named Wright, who was an employee of the railroad in some capacity not shown in the record, boarded the train and entered the coach occupied by appellee. Wright met the two auditors in the aisle immediately in front of the seat occupied by appellee, and presented a pass which was found to have expired, and on the refusal of the auditors to honor the pass Wright drew out his union card and presented that to the auditors, claiming the right to free transportation on the faith of his union card. The auditors refused to permit Wright to ride, and the latter became angry and used boisterous language, the extent of which is controverted in the testimony. Appellee in her testimony relates the substance of the occurrence, as follows:

"A. Well, Wright got on the train and wanted Patterson to recognize his pass, and he told him it was out of date, and he couldn't ride on that, and Wright cursed him, and he stood there and let him keep on cursing him and abusing him, and used very foul language, and he stood there, I suppose, 15 or 20 minutes, maybe longer than that, just using that talk over and over until the train started out and he taken the cash fare from Wright and let him ride on the train, and he got so abusive until Patterson made an attempt to use a gun right between me and my little children."

Other parts of appellee's examination are as follows:

"Q. Did they pass any licks? A. No, sir. \* \* \* Q. Just state what they did. A. Well, they cursed, and just kept cursing and cursing. Q. Who did? A. Wright. Q. What did Patterson do? A. He just stood there and listened at it. Q. Did he use any abusive language? A. No; I don't reckon he did. Q. What made him start to draw his pistol? A. He just told him to hush, and he didn't hush, and he put his hand back in his pocket. Q. What did you do then? A. I don't know what I did do. Q. Was he close to you when he started to shoot? A. Yes, sir; right at my arm. Q. Did he make any effort to get Wright to leave the train? A. He just told him to get off, and he didn't do it, and he just kept standing there listening at him."

On cross-examination of appellee, the following occurred:

"Q. Wright was the man that did the swearing and cursing? A. Yes, sir. Q. You didn't hear either of the other two men swear or curse? A. No, sir. Q. They didn't swear any at all? A. No, sir; they didn't swear. Q. They didn't use any language of any kind in the way of insulting language? A. Not any profanity of any kind; just told him to get off, that he didn't want to fight dogs."

Appellee testified further concerning her fright and excitement and illness, which immediately ensued and resulted in a miscar-

riage. The two auditors were introduced as witnesses, and each testified that they used no improper language nor made any attempt to draw a pistol, and that they were not negligent in any respect. The substance of their testimony is that when Wright presented his pass and union card, which were refused, he became obstreperous and they called the conductor, who required him to pay his fare in money, and that this ended the controversy.

[1] We are of the opinion that the evidence was legally sufficient to warrant a submission of the issues to the jury. *Hines v. Rice*, 142 Ark. 159, 218 S. W. 851. The evidence justified a finding that Wright became obstreperous and used violent, insulting, and profane language, and that the auditors, instead of quelling the disturbance and taking steps to have him ejected, negligently permitted the passenger to continue his conduct for an unreasonable length of time and even participated in it by making a move as if to draw a pistol and in replying to the invitation to fight by saying "they did not want to fight dogs." There is also sufficient evidence that appellee's injuries, both physical and mental, resulted from the fright, which was caused by her critical condition of pregnancy.

[2] It is next contended very earnestly that the court erred in refusing to exclude all of the testimony of appellee which related to the conduct of Wright, the contention being that the allegations of the complaint are not sufficient to charge negligence of the train auditors in failing to repress the obstreperous conduct of Wright or cause his ejection from the train. The second paragraph of the complaint, which is the one setting forth the acts upon which recovery is sought, reads in part, as follows:

"Plaintiff alleges that on the said 6th day of December, 1919, she was a passenger on one of the passenger trains of defendant, the same being known as passenger train No. 2, north-bound, and had with her two little children of her own, and that as the train was leaving De Queen the auditor, whose name is Patterson, began taking up tickets, and approached a man named Wright for his ticket, and the said auditor and this man Wright became engaged in a dispute and almost a fight; that they cursed and abused each other in the presence of this plaintiff and in the aisle in the coach immediately between where this plaintiff was sitting and her two little children, who were seated across the aisle from her, and in this difficulty the auditor attempted to draw a pistol from his pocket, as if to shoot the man Wright, and the act of the auditor, together with the insulting and abusive language used by the participants engaged in this dispute, so unnerved and excited plaintiff that she became ill as a result thereof. \* \* \*"

There was no demurrer to the complaint, and the question of the effect and sufficiency of the complaint was raised for the first

time after the examination of appellee as a witness had been about completed and a motion was made to strike out all the testimony which related to the conduct of Wright.

[3] The complaint only sets forth the facts upon which recovery is sought, without incorporating a formal charge of negligence. If it was thought that the complaint was insufficient an objection ought to have been made before the trial commenced. The complaint stated a cause of action, even if imperfectly so, and if objection was raised it should have been to make more definite and certain. Appellant's counsel cross-examined the appellee at length before making the motion to strike out the testimony, and when the motion was overruled there was no claim of surprise on account of the omission from the complaint of any specific charge of negligence with respect to the failure of the auditors to stop Wright's improper conduct. The ruling of the court was tantamount to treating the complaint as amended to conform to the proof, and, since appellant was not placed at a disadvantage by surprise, no prejudice resulted from the ruling.

[4] The court gave the following instruction, the giving of which is assigned as error:

"In this case, if you find from the evidence that plaintiff was a passenger on the train of defendant at the time and place alleged, with her children seated across the aisle of the train from her, and that a dispute arose between the auditor of defendant and another party in the aisle, and near plaintiff and her children, and that abusive or profane language was used in the dispute or difficulty, and that the auditor acted as though he was going to draw a pistol and fire on the opposing party, and you find that plaintiff became excited and scared because of this trouble, and the acts and dispute of the participants and as a result of her becoming excited and scared, if you so find from the evidence she suffered a miscarriage and experienced pain and suffering and injury to her health, and you so find from the evidence, you will find for plaintiff, and assess her damages at such sum as you believe from the evidence she has been damaged, not to exceed the amount sued for, provided you find the same was caused by the negligent acts of defendant or its employees."

The grounds of objection stated to the court at the time were that the evidence was insufficient to justify a submission of the issues to the jury, and that there was no allegation in the complaint concerning the negligence of the auditors in failing to protect the appellee, as a passenger, from the conduct of Wright. There were these specific objections to the instruction, but there was no objection made on the ground that the instruction did not properly submit to the jury the question of negligence of the train auditors in their conduct towards the obstreperous passenger. The instruction, it must be conceded, is not very aptly phrased, but the concluding portion of it does sub-

mit to the jury the question whether or not the conduct of the train auditors constituted negligence. If the instruction was ambiguous in its terms there ought to have been a specific objection to it. It is too late now to criticize the instruction on account of ambiguity in its language. A specific objection, therefore, was essential in order to raise the objections now urged against it.

The same may be said with reference to the objections now made that the use of the words "dispute or difficulty" was improper. If those words were inappropriate in view of the testimony, a specific objection ought to have been made to their use.

There are other assignments of error to the rulings of the court in giving and refusing instructions, but we are of the opinion that the issues were properly submitted, and that there was no error in that respect. Nor is there any error in any other respect. Judgment affirmed.

#### INTERURBAN RY. CO. et al. v. TRAINER et al. (No. 133.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

##### 1. Death ⚡77—Testimony of value of child's services unnecessary.

In an action for death of a child too young to earn anything, the value of its probable future services to the parent during minority may be determined by the jury without the testimony of witnesses.

##### 2. Death ⚡58(2)—Loss to parent from child's death presumed.

The law presumes pecuniary loss to a parent from the death of an infant of sound body and mind, even before it has arrived at an age to actually render services of a pecuniary value, or when it is still so young that the value of such services cannot be estimated in money.

##### 3. Death ⚡87—Elements of damages for child's death stated.

In determining pecuniary value of the services of a child of tender age to its parents between the time of its death and maturity, the jury should consider the position in life of both parents and child, the occupation of parents, their physical condition, their circumstances, and also the sex, age, physical and mental condition of the child, and the verdict must accord with what reasonable men, in viewing such facts and circumstances, would decide.

##### 4. Death ⚡87—\$5,000 for child's death held excessive.

Under Crawford & Moses' Dig. §§ 1074 and 1075, providing that an action for wrongful injury resulting in death survives to personal representatives, and that jury may give such damages as they shall deem just compensation. An award of \$5,000 for the death of an 11 year old daughter is excessive, and will be reduced to \$2,500.

##### 5. Death ⚡87—Pecuniary contributions by child held not element of damages.

Where a child was too young to earn anything, a recovery in an action for its death for probable future pecuniary contributions to the parents beyond the child's minority cannot be considered.

##### 6. Death ⚡89—Mental anguish not element of damages.

Under the statute there can be no recovery for death as a solatium, and mental anguish cannot be considered.

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by Joe Trainer and another against the Interurban Railway Company and others. From a judgment for plaintiffs, the named defendant appeals. Judgment modified and affirmed.

P. R. Andrews, of Helena, for appellant. Fink & Dinning and J. G. Burke, all of Helena, for appellees.

WOOD, J. On the 22d of May, 1920, Aline Trainer, a girl 11 years of age, was killed by one of appellant's cars. The jury returned a verdict in favor of the appellee in the sum of \$2,000 for the benefit of the estate and in the sum of \$5,000 for the benefit of the appellee, the father of the child.

The liability of the appellant for damages on account of the death of the child is conceded, and the only question for our decision is whether or not the verdict and judgment for \$5,000 in favor of the appellee, and for his benefit as father, were excessive. The little girl was a healthy, vigorous child. At the time she was injured she was on an errand for her mother. Her father testified that she was "very helpful, kind, and obedient about the house." He was asked to tell the jury how she would help about the house, and said:

"Well, naturally a child of that age couldn't do only such as kitchen work—such as sweeping, or odd things about the house, but she was always ready to aid her mother; in fact, she was that way in the whole neighborhood. She was exceptional, I think, in manners and behavior at home and to the teachers."

The case of L. R. & Ft. Smith Ry. Co. v. Barker and Wife, 33 Ark. 350, 34 Am. Rep. 44, is the leading case in this state upon the question under consideration. In that case the mother, who was a poor widow, and kept a boarding house for a living, sought to recover damages against the railway company for the killing of her only child, who was five years old at the time he was killed. He was an intelligent, healthy, and promising lad. Judgment was rendered in her favor in the sum of \$4,500. In that case, Chief Justice English, speaking for the court, among other things, said:

"The damages are not to be given as a solatium, but must be founded on pecuniary loss, actual, or expected; and mere injury to feelings cannot be considered. \* \* \* Nor does our statute limit the amount of the recovery, as the statutes of some of the states do; but juries are not warranted in finding verdicts for sums disproportionate to, or in excess of, the probable pecuniary loss of the parent, occasioned by the death of a child. Reasonable damages only, in view of all of the circumstances in evidence, should be awarded."

In concluding the discussion on the issue as to whether the judgment was excessive, the court said:

"We are satisfied that if the facts of the case were submitted to 100 impartial men, of sound, discriminating judgment, of experience and observation in the raising of children, properly instructed in the law as to the measure of damages, 99, if not all of them, would say that the damages awarded in this case for loss of probable service were excessive, and such is our judgment."

The judgment in that case was reversed, because it was excessive, and the cause was remanded for a new trial. On the second trial the jury awarded damages in the sum of \$3,500. From this sum the plaintiffs (appellees) voluntarily remitted the sum of \$1,235, and the trial court allowed the verdict to stand for \$2,265, and entered judgment for that sum, and this court affirmed the judgment, stating:

"It is not probable that another jury would give a less amount. There must be an end to litigation in the case."

In the course of the opinion on the last appeal, Judge English said:

"So where the death of a person earning or capable of earning wages or doing service is the subject of the action, what he was earning or capable of earning at the time of his death may be proved by witnesses, as the basis of forming a judgment of probable future earnings. But where the death of a child, incapable of earning anything, or rendering service of any value, at the time of its death, as in this case, is the subject of the action, the value of the probable future services to its parent, during its minority, must in the nature of things be matter of conjecture. \* \* \* The amount of damages to be recovered is not limited by the statute, and could not be under the constitutional provision above cited. But a jury is not left without restraint in the matter of assessing damages for the death of a minor, or in any other case. If the damages assessed are so enormous as to shock the sense of justice, and to indicate that the verdict is the result of passion or prejudice, the trial judge may set it aside, and if he refuse, this court, on appeal or writ of error, may do so." *Little Rock & Fort Smith Ry. Co. v. Barker and Wife*, 39 Ark. 491.

In the case of *Railway v. Freeman*, 36 Ark. 41, we held (quoting syllabus) that—

"The measure of damages to a parent for killing his child is the pecuniary value of his

services during minority, and the cost and expense incurred by the parent on account of the injury, less the reasonable and necessary expense of raising it; the value to be such as is ordinary with children in like condition and station in life, without regard to the relationship between them, or to the parent's feelings or the child's suffering."

[1] In this case it was not essential to recovery that the value of the services of the child to its parents be shown by any affirmative evidence, for, as was said by this court in *Railway v. Barker*, supra:

"Where damages are claimed for the death of a child incapable of earning anything, or rendering service of any value, the value of its probable future services to the parent during its minority is a matter of conjecture, and may be determined by the jury without the testimony of witnesses."

See, also, *Hines v. Johnson*, 145 Ark. 592, at page 602, 224 S. W. 989.

[2] Since parents are entitled to the services of their minor children during their minority, the law presumes that a parent has incurred or suffered pecuniary loss and damage in the death of an infant of sound body and mind even before it has arrived at the age to actually render services of a pecuniary value, or when it is still of such tender age that the value of such services cannot be estimated in money, because it accords with the general observation and experience of mankind in civilized society that such children, before they reach their majority, are capable of rendering, and do generally render, to their parents services that have a pecuniary value.

[3] In determining what the pecuniary value of the services of a child of tender age would be to its parents between the time of its death and the age of maturity, the jury should take into consideration the position in life of both parents and child, the occupation of the parents, their physical condition, their circumstances, and also the sex, age, physical and mental condition of the child. While the law is liberal in allowing the jurors to voice their own opinions and conclusions as to the pecuniary value of the services, without any specific proof or opinion of such value by affirmative evidence, yet such conclusion, as reflected by their verdict, must be predicated upon the facts and circumstances as above detailed, and accord with what reasonable men in viewing such facts and circumstances, would decide. *City of Chicago v. Scholten*, 75 Ill. 468.

[4] Learned counsel for appellants have cited cases where verdicts in sums greater than in the present case have been upheld. We have examined these cases and find that several of them are differentiated by the facts from the case at bar, while in some of them the facts are similar. But, whatever may be the rule in other jurisdictions, it occurs to us that, under the interpretation giv-

on the statute (sections 1074, 1075, O. & M. Digest) by our own court in *Ry. v. Barker*, and *Ry. v. Freeman*, supra, and *Ry. v. Davis*, 55 Ark 462, 18 S. W. 628, and the rule declared in those cases for measuring damages, the verdict and judgment based thereon in this case must be pronounced excessive. The jury awarded a sum equivalent to \$714.28 per year, \$59.52 per month, or \$1.98 per day, during the entire seven years of her minority, making no deduction for the expenses that her parents would have to incur for boarding, clothing, education, loss of time, and expense of probable illness. In other words, the jury assumed that the child would be of this pecuniary value to her father every day, every month, and every year.

[5] In the meager testimony in this record it appears that the little girl could do only such as "kitchen work, sweeping, or odd things about the house." She had not reached the age where she had shown herself "able and willing to make her own living, and to contribute out of her earnings to the support of her parents." Therefore a recovery for probable future pecuniary contributions to them beyond her minority could not be taken into consideration. In the cases of *Ry. Co. v. Davis*, supra, *Memphis, D. & G. R. Co. v. Buckley*, 99 Ark. 422, 138 S. W. 965, and *St. L., I. M. & S. Ry. Co. v. Jacks*, 105 Ark. 347, 151 S. W. 706, we held that the jury, in assessing damages to the father for the death of his minor son, may take into consideration the parent's expectation of pecuniary benefit from the life of the child beyond minority. The reason for this holding is bottomed expressly upon testimony in each of the cases showing that the minor was able and willing to make his own living, and "to contribute out of his earnings to the support of his parents." In the last two cases the minors were contributing all their earnings—quite substantial sums—to their parents, and expected to continue to support them as long as they lived. But there is no testimony in this record to warrant an inference that there would be any pecuniary benefit to the parents of this child beyond her minority, and the rule as announced in *Ry. v. Barker* and *Wife* and *Ry. v. Freeman*, supra, must govern. The little girl was bright, and "exceptional in manners and behavior," and her injuries were horrible. The resultant conscious suffering for the few hours she lived was terrible in the extreme. For this, as stated, her estate recovered the sum of \$2,000.

[6] We realize that it is most difficult for jurors and judges, in rendering verdicts and judgments in such cases, to shut out all considerations of sympathy for the natural affection and consequent mental anguish of parents. But it must be remembered that at the common law the death of a human being was not the subject of civil action, and

that under our statute, as it has been construed by this court, there can be no recovery as a "solatium," and that mental anguish cannot be considered. Therefore, jurors and judges must abjure these but natural and laudable impulses, and set their faces like flint toward the Constitution and laws which they are sworn to administer, that they may resist and overcome the natural feelings of sympathy and humanity in every normal breast towards the distressed and sorrowing. Otherwise, they cannot give to every litigant defendant in such cases that which is due him under the law—justice.

Now we can find no basis in reason to sustain the judgment of \$5,000 as a compensation to the appellee for the strictly pecuniary loss to him in the death of his child. In the ordinary course of the domestic relation between father and daughter, it occurs to us that the sum of \$2,500 would be the very highest amount that could be recovered for his pecuniary loss under any reasonable view of the evidence most favorable to him. This sum would meet every probable or possible contingency that could arise in the usual course of family affairs by which the services of this child would have been enhanced to her parents during the period of her minority. Of course, the jury cannot be allowed to speculate on the value of services that, in the ordinary course of the family relation and environment would be improbable or impossible for the minor to ever render.

The judgment, therefore, will be modified by deducting therefrom the sum of \$2,500. As thus modified, it is affirmed.

#### ARNOLD v. STATE. (No. 134.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

##### 1. Jury $\S$ 90—Relationship of juror to witness in trial does not per se disqualify him.

A juror who stated on voir dire that he was related to one of the witnesses, but would give no more credence to a relative's testimony than to any other credible witness, but from his personal knowledge of such relative he might determine him to be a credible witness as compared with other witnesses, will not be held disqualified, especially where the relative's testimony does not connect defendant with the crime.

##### 2. Criminal law $\S$ 931—New trial not granted where defendant failed to have jury polled.

Though some of the jurors testified that a verdict of guilty would not have been reached but for an agreement by all to petition the court for a stay of sentence, a new trial will not be granted where defendant failed to have the jury polled under *Crawford & Moses' Dig.*  $\S$  3216.

3. Criminal law § 857(3)—Verdict held not one by "lot" so as to be subject to impeachment by the testimony of the jurors.

Where a verdict of guilty was reached only by an agreement among the jurors that they would request the court to grant a suspended sentence, there was not a verdict by "lot" within Crawford & Moses' Dig. § 3220, providing that jurors may be examined on motion for new trial only to establish that the verdict was made by lot; "lot" being a contrivance to determine a question by chance or without the action of man's choice or will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lot.]

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Clifford Arnold was convicted of carnal abuse, and he appeals. Affirmed.

Geo. P. Whittington, of Hot Springs, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

WOOD, J. The appellant appeals from a judgment of conviction for carnal abuse. He presents two questions for our consideration.

[1] 1. Gibbons King, while being examined as to his qualifications to sit as a juror, in response to questions asked him by counsel for appellant, stated: That he was related to Dr. King, one of the witnesses in the case, and that his relationship might affect him in reaching a verdict. He further stated, in response to questions by court and counsel, that he would not give any more credence to the testimony of Dr. King than he would give to any other credible witness. He stated that his personal knowledge of Dr. King and relationship to him might determine him to be a credible witness as compared with any other witnesses, and cause him to give greater credibility to his testimony.

The court held that the juror was qualified to which counsel for appellant objected, and appellant excused the juror. The appellant afterward exhausted all his peremptory challenges. The appellant duly excepted to the ruling of the court in holding the juror King qualified. The court did not err in its ruling. The testimony of Dr. King only tended to prove that he made a vaginal examination of the prosecuting witness and found that her hymen had been ruptured, but there was nothing to indicate whether she had had sexual intercourse three or four days before. His testimony did not tend to prove any fact connecting the appellant with the commission of the offense charged against him, and the appellant did not attempt in any manner to controvert his testimony. Besides, the answers of the juror to the questions propounded

ed by the court and counsel showed that he was an impartial juror, and would not on account of his relationship to Dr. King be biased against the appellant in the consideration of his case; that he would not give any greater credence to the testimony of Dr. King on account of his relationship to him than he would that of any other credible witness.

[2] 2. The record shows that after deliberating for some time, the jury returned to the courtroom, and, upon being asked if they had reached a verdict, the foreman responded:

"We could arrive at a verdict, but on account of this defendant having a wife and child we do not feel like under the circumstances inflicting the penalty, but we could arrive at a verdict if what we recommend to the court would be given any consideration as to suspending sentence, or making it so that his wife and child would not suffer while he was taken away from them."

To this the court responded:

"Well, the court would not feel like making any agreement about it, gentlemen; you will just have to do your duty regardless of that. You haven't a right really to consider those things; the question is just one of guilt or innocence."

To this the foreman responded:

"Of course we understand that, but we did not know whether you could enter into that kind of an agreement with us or not."

The court replied:

"I do not feel like the court ought to enter into an agreement of that kind. On a question as to the amount of punishment, you could consider that, of course, but the law fixes the minimum punishment; you have a right to fix that at anything within the range which the law prescribes. If you find the defendant guilty, then, as a matter of course, a punishment ranging in between 1 and 21 years follows. You can now retire. It is your duty to come to a verdict if the evidence convinces you beyond a reasonable doubt of his guilt."

The appellant objected and excepted to the rulings of the court. The jury retired to further consider their verdict, and later returned into court and rendered the following verdict:

"We, the jury, find the defendant guilty as charged, and fix the punishment at one year in the penitentiary."

Afterwards the appellant filed his motion for a new trial, and assigned as one of the grounds of his motion:

"That the court erred in giving its instruction to the jury when they returned to the courtroom after having deliberated for a considerable length of time, and which proceeding was had in the following manner: [Setting forth the proceedings as above.]"

To sustain this ground of his motion, the appellant introduced as witnesses before the court several of the trial jurors, who testified substantially to the effect that the jury had not agreed upon the verdict of guilty at the time they sought information from the court as to whether or not the court could suspend sentence before the jury returned a verdict of guilty. One juror said:

"We took the points of the case into consideration, and decided that we could come to a verdict and petition or ask the judge to stay the sentence."

Before that they had not come to a verdict. Some of the jurors in the consideration of their verdict offered that as an inducement to finally agree on a verdict of conviction. One of the jurors further stated that, after taking the evidence of the case into consideration, they agreed to come to a verdict and then petition for a stay of the sentence. The agreement to petition the court for a stay of the sentence and to return a verdict of guilty "all came in together, and was discussed at the same time." The purpose of the agreement to petition the judge for a stay of the sentence was "to bring about an agreement on the verdict of conviction." This juror further testified that the court informed the jury when they sought the information that "the verdict would have to be reached before anything could be done." They went back to the jury room, and afterwards returned their verdict.

The juror further stated:

"My understanding of it was that, by reaching a verdict and coming to a verdict, the judge should be petitioned afterwards to stay the sentence."

He further stated in response to a question by the court:

"The jurors were all agreed on the facts of the case, and thought from the evidence that the defendant had carnal knowledge of this prosecuting witness according to the testimony. Up to the time the agreement was entered into to seek information from the court, some of the jurors had voted on all votes taken on the question of guilt or innocence, 'Not guilty.'"

Another one of the jurors stated that, after the jurors could not get together, they went into an agreement to petition the judge.

"They thought the punishment was too severe, and the fellows that were not for 'Guilty' would not agree to anything, and that agreement to petition the judge brought the jurors who prior to that time were voting for 'Not guilty' to vote for a verdict of 'Guilty.'"

It was the information of this juror that the verdict of "Guilty" would not have been agreed to by all of the jurors but for the agreement by all of them to petition for a stay of sentence. The ruling of the court was correct. At the time the verdict was rendered the appellant did not ask to have the jury polled, which he had the right to do. If he had done so, and any of the jurors had answered that the verdict returned was not their verdict, then the verdict could not have been received. Section 3216, C. & M. Digest.

[3] The proceedings, to which the appellant objects, were brought to the attention of the court after the verdict had been received and the jury discharged. The only testimony by which appellant sought to impeach the verdict was by the jurors themselves.

"A juror cannot be examined to establish a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot." Section 3220, C. & M. Digest; *Pleasants v. Heard*, 15 Ark. 403; *Fain v. Goodwin*, 35 Ark. 109; *Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; *Griffith v. Mosley*, 70 Ark. 244, 67 S. W. 309; *Wilder v. State*, 29 Ark. 293; *Williams v. State*, 68 Ark. 264, 50 S. W. 517; *Hampton v. State*, 67 Ark. 266, 54 S. W. 746; *Osborne v. State*, 96 Ark. 400, 132 S. W. 210.

See, also, *Capps v. State*, 109 Ark. 193, 159 S. W. 193, 46 L. R. A. (N. S.) 741, Ann. Cas. 1915C, 957; *Jenkins v. State*, 131 Ark. 312, 198 S. W. 877; *Kindrix v. State*, 138 Ark. 594, 212 S. W. 84; *Speer v. State*, 130 Ark. 457-464, 198 S. W. 113.

The appellant does not contend, and indeed it could not be contended, that the testimony of any of the jurors proved that the verdict was arrived at by lot. There was no element of chance, hazard, or fortune in the method by which the verdict was decided, as shown by the testimony of the jurors. "Lot" is defined to be "a contrivance to determine a question by chance or without the action of man's choice or will." Webster's Dict.; *Chavannah v. State*, 49 Ala. 396; *Loiseau v. State*, 114 Ala. 34, 22 South. 138, 62 Am. St. Rep. 84; *Johnson v. State*, 117 Ala. 101, 34 South. 1019. See, also, *Lynch v. Rosenthal*, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168.

In *Speer v. State*, supra, 130 Ark. at page 464, 198 S. W. 115, we said: "Lot involves an element of chance." To allow a verdict to be impeached in the manner herein attempted would contravene the statute, and be subversive of a sound public policy which the statute was intended to conserve.

The judgment is correct, and it is therefore affirmed.



**HALL et al. v. WEBB. (No. 141.)**

(Supreme Court of Arkansas. Oct. 3, 1921.)

**1. Trusts ⇨359(2)—Action to enforce trust held within jurisdiction of equity.**

Action by administrator to recover property left by intestate with defendants for distribution after his death, on the theory that defendants were trustees of the fund and that defendants were insolvent, *held* properly brought in equity.

**2. Trusts ⇨44(1)—Finding that property of decedent was held in trust held not against preponderance of evidence.**

In an action by an administrator to recover property from defendants which they had received from decedent, a finding of the chancellor that defendants were holding the property in trust for heirs, and that a gift of the property to the defendants had never been consummated, *held* not against the preponderance of the evidence.

**3. Trusts ⇨375(1)—No error in declaring lien on stock purchased by trustee with trust funds.**

Where decedent permitted defendants to care for his money, and it was placed in a bank in the name of one defendant, and such defendant purchased corporate stock, which he paid for by check drawn on the bank where the money was deposited, the chancellor did not err in declaring a lien on the stock for the amount of the trust fund.

**4. Equity ⇨44—Court of equity had jurisdiction to order sale of corporate stock on which plaintiffs had lien.**

In an action by an administrator to recover property left by decedent in defendants' care, where it appeared that the property was money which had been used by one of the defendants in purchasing corporate stock, court of equity had jurisdiction to declare a lien on the stock for the trust fund, and to make an order to sell the stock to satisfy the lien, and also to render judgment against defendants for the money left with them; the declaration of a lien and order to sell being in effect a foreclosure, cognizable in a court of equity, and not within the exclusive jurisdiction of a probate court.

**5. Judgment ⇨240 — Joint judgment proper against conspirators.**

In an action by an administrator against persons who had conspired to divert funds of decedent, it was proper to render a joint judgment against the defendants.

Appeal from Van Buren Chancery Court; Ben F. McMahan, Chancellor.

Suit by Cleve Webb, administrator, against T. S. Hall and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Appellants, pro sese.

J. Allen Eades, of Morrilton, W. E. Hall, of Garfield, and Garner Fraser, of Clinton, for appellee.

**HUMPHREYS, J.** Appellee instituted suit against appellants and Cinda Hall, the wife of John Hall, in the Van Buren chancery court, to recover \$3,300 alleged to have been received from Jasper Webb a short time before his death, for the purpose of distribution among his heirs after his death. In addition to alleging that the defendants, under a false claim of ownership, converted the money thus received to their own use, and that \$1,000 of same was invested in bank stock, which they were about to sell to innocent purchasers, and that they were insolvent, and that appellee was without any adequate remedy at law, the bill contained the following allegation:

"That the deceased was so weak in mind and body that he was incapacitated and unable to look after his business or financial interests and affairs; that he reposed absolute and explicit faith and confidence in the defendants. That the defendants, taking advantage of said faith and trust so reposed in them, and taking advantage of their relationship to the deceased, with the fraudulent intent, purpose, and design to obtain possession of his property, overreached him, and misled and deceived him, and falsely and fraudulently represented to him that, if he would turn over and deliver to them his money and other personal effects, they would care for same, and would correctly distribute same in the event of his death. That, relying upon said promises and representations so made to deceased by defendants, he delivered to them as trustees and fiduciaries for safe-keeping the sum of \$3,300 to be by them taken care of for him."

The prayer of the bill sought in substance to hold the defendants as trustees of the funds received and to enjoin a transfer of the stock and the expenditure of the fund.

To this bill appellants and Cinda Hall filed a motion to transfer the cause to the circuit court, and a demurrer challenging the jurisdiction of the chancery court, and, without waiving their rights under the demurrer, answered, denying the material allegations of the bill, and alleging that the moneys received were gifts to the appellants.

The cause was heard upon the pleadings and evidence adduced, which resulted in a decree overruling the demurrer and the motion to transfer to the circuit court, and the dismissal of the bill against Cinda Hall for the want of equity, and in a finding that appellants received \$1,450 belonging to the estate of Jasper Webb, deceased, out of which sum \$874.41 had been invested in 15 shares of bank stock in the Bank of Scotland, Ark., owned at the time of the rendition of the judgment by T. S. Hall, and that appellee should have a lien declared thereon for said amount. Judgment was rendered in accordance with the findings, from which an appeal has been duly prosecuted to this court, and the cause is here for trial de novo.

Jasper Webb, who had resided in Califor-

nia from young manhood until a few weeks before his death, informed John Hall, a nephew by marriage, by letter, that he had sold his farm, was in poor health, and would like to spend his remaining days in Arkansas, if he could come or send for him. He inclosed in the letter \$500 for the Jeff Webb family, consisting of five persons, with directions that John Hall see that each received his respective share. This money was divided as directed. In response to John Hall's next letter, the following letter was written by Jasper Webb to him:

"Springville, Cal., Aug. 24, 1919.

"Mr. John Hall, Scotland, Arkansas—Dear Nephew: Your letter to hand, found me still improving some in health, but slowly. I guess I shouldn't complain for a man 84 years old. I hope these few lines will find you well. You said you was not able to make the trip, but would send after me if I wanted to come and live with you the rest of my days. I written you before that I have sold my little farm and reserved a right to live on it as long as I wanted to, but now, if you will be kind enough to come or send after me, and take care of me the rest of my days, which I am sure are but few, you shall have what little I have got; it is not much, but enough to do us a while, so let me hear from you soon.

"Your uncle,

Jasper Webb."

T. S. Hall, a son of John Hall, went to California soon after the receipt of the last letter to bring his great-uncle to Scotland, Ark., where John Hall resided and conducted a hotel. One witness testified that T. S. Hall told him that Jasper Webb sent him \$100 to pay his way to California. T. S. Hall denied that he made the statement. John and T. S. Hall testified that T. S. Hall took \$400 of John Hall's money to California for the purpose of paying the return expenses of Hall and Webb, if needed, and, if not needed, to convert it into gold and bring it back.

T. S. Hall testified that, after reaching California, Jasper Webb made him a present in all of about \$450; that, when he started back, Jasper Webb purchased a draft payable to himself for \$1,000, being all the money he had, except expense money for the return trip; that he (Hall) purchased a draft for \$800, payable to himself; that, in the purchase of the draft, he used his own money and \$400 that his father had given him before he left for California; that the expense of the return trip was borne largely by his uncle, and partly by himself; that after his return his uncle indorsed the \$1,000 draft, and he placed it, together with the \$800 draft, to his personal credit in the Scotland bank, and gave his uncle \$1,000 in cash, which he gave to his father, John Hall, for taking care of him the rest of his life.

John Hall testified he gave him \$40 at one time, \$80 at another, and the balance of the \$1,000 at another, for agreeing to take care

of him for the rest of his life; that he had expended practically all the money at the time he testified, and was unable to give any itemized account of the expenditures. Webb and Hall reached Scotland about September 19; Webb went at once to the hotel conducted by John and Cinda Hall, and, after a short illness, died on October 14, 1919; on October 27th thereafter, Dr. Hatchett transferred 10 shares of the bank stock to T. S. Hall, and 5 shares to John and Cinda Hall jointly; that the stock was paid for by a check in the sum of \$1,175, drawn by T. S. Hall on his account; that in the latter part of the year 1919 John and Cinda Hall transferred the 5 shares of stock, which had been transferred to them jointly, to T. S. Hall.

J. H. Lindsey testified that on September 26, 1919, T. S. Hall deposited \$1,970, of which the two California drafts represented \$1,800; that on October 27, 1919, the account had been reduced down to \$874.40; that on that day Hall deposited \$379, and the bank paid his check to Dr. Hatchett of \$1,175 for the 15 shares of stock; also that T. S. Hall asked him whether he could deposit \$1,500 in gold in the bank and receive it back in gold a short time after he returned from California. He was informed that he could.

R. W. Hall, an uncle of T. S. Hall, testified that, soon after returning from California, he told him his Uncle Jasper was feeble, and that when starting he forgot \$750 in gold that was hidden in the stovewood box, and went back and got it.

Dr. Hatchett testified that John Hall came to him the evening he agreed to sell 15 shares of stock in the bank to T. S. Hall for \$1,175, and wanted to know what one-third of \$1,175 was, without explaining why he wanted to know.

John Hall, Cinda Hall, and T. S. Hall all testified that one-third, or 5 shares, of the stock was sold by T. S. Hall to his mother for cash; but none of them could explain why the 5 shares were transferred to John and Cinda Hall jointly, or why later in the year it was transferred to T. S. Hall, except that Cinda Hall got tired of owning the stock.

T. S. Hall testified that he had paid a portion of the \$1,800 out, and borrowed \$750 from Cleve Hall to aid in the purchase of the 15 shares of bank stock, and also got \$500 from his mother for the same purpose; that he did not put a cent of the old man's money in the stock.

Cleve Hall testified that he loaned his brother, T. S. Hall, \$750 about that time, and produced the note which was given to him.

W. O. Rutherford, a neighbor of Jasper Webb, Sr., for years in California, testified that he purchased his farm in 1919 for \$1,750; that \$500 of the money was sent to John Hall for the Webb heirs, and \$1,000 was used to purchase the \$1,000 draft, which he took to Arkansas with him; that he be-

Heved Webb had about \$900 at home, in addition to that amount.

Jasper Webb, Jr., a nephew of Jasper Webb, Sr., and brother to Cinda Hall, testified that his uncle told him he had given his money to no one about a week before his death; that, while they were talking, Cinda Hall came to the door and said, "I wish you would not bother our old uncle." Cinda Hall denied making the statement.

N. A. Simpson, brother-in-law of T. S. Hall, testified that he sent a car to Morrilton for Hall and Webb when they returned to Scotland; that, when they reached Scotland, T. S. Hall offered to pay him. He inquired what luck he had on the trip, and Hall showed him some gold and other money in his pocketbook. T. S. Hall denied bringing any gold back with him from California, but testified that, if he showed Simpson any, it was what had been taken in at the store in his absence.

Clara Webb, wife of appellee, testified that on Sunday before Jasper Webb, Sr., died, she heard him ask T. S. Hall for his money, and T. S. Hall answered, "I am keeping it; you don't need it;" that he asked for his money a second time, and received the same answer; that she went to the kitchen and told Cinda Hall what occurred in her hearing; that Cinda Hall said T. S. Hall had a part of the money, and went to the room and stopped the conversation. John Hall, Cinda Hall, and T. S. Hall denied the conversation or that Clara Webb was at the Hall home that day. Judge and Mrs. Griggs both testified that she and T. S. Hall were there on the day mentioned. Mrs. Lindsey testified that Clara Webb told her of the occurrence the day Jasper Webb died.

Sallie Simpson testified that she was at the home of John and Cinda Hall the Sunday when Clara Webb was there; that Clara Webb was there, but was on the front porch next to town, and remained there not more than 10 minutes; that she had a talk with Jasper Webb, who said he had some money; that he had divided all except enough to do him while he lived; he said, "T. S. Hall was going to be paid for his trouble in going after him, and the rest to my papa and mamma for keeping him; and this conversation was about a week after Jasper Webb came."

W. J. Watson testified that Jasper Webb, Sr., told him that he aimed for John Hall to have his money for taking care of him.

Cleve Webb testified that John Hall told him there would be \$900 or \$1,000 left by deceased after payment of expenses, and that, if each of the others would turn back the \$100 received by them before Webb left California, he would be willing to divide the whole sum equally. John Hall denied making the statement.

Rice Webb, father of the appellee and nephew of Jasper Webb, Sr., testified in substance as follows: Came to see his uncle

at the home of John and Cinda Hall and spent a week with them. Was told by deceased that he had deposited with the Bank of Scotland a draft in the amount of about \$1,500, and that T. S. Hall had in his possession \$1,200 or \$1,500 in gold belonging to him, the deceased. Deceased desired witness to take charge of and wind up the estate; wanted his property divided equally among his heirs. Deceased asked T. S. Hall why he did not put his money in the bank. T. S. Hall replied that it was all right any way. The attitude and conduct of defendant Cinda Hall, his sister, was resentful and unfriendly toward him. She seemed to resent his talking to his uncle, and her actions made him feel that he was not wanted at her home. No one was present while he was talking with Jasper Webb. He would not talk if any one came in while he was talking to him. Admitted that he later wrote to John Hall the letter exhibited with his deposition, in which he said that the deceased had told him that he had in the bank at Scotland \$1,000, and that T. S. Hall had \$1,000 in gold of his.

After the death of Jasper Webb, Sr., two letters were written to inquiring relatives by T. S. Hall. One was written for his father, and the other at the instance of his father, with directions to sign his mother's name to it. His mother, Cinda Hall, testified that she did not know of or authorize the letter. He explained that he had not written either letter as his father intended. In further explanation he said:

"Well, the way I understood the last one—I am not quite sure now, but I think he was there and had me to write it. The first one I know he was not there, and I must have wrote it sort by guesswork, and signed mother's name to it after he had told me what to write."

In further explanation he said:

"Papa came in one day when I was putting up the mail. I had my mind on my own business, whole he was telling me something like this to write to Manda Ellis: To write her that the old man was dead, and that he would not have anything left; counting anything for his expenses and trouble and for his mother's and his tombstone, it would leave him in the hole something like \$25. So, after he had gone out, or some time during the day, I happened to have time and thought about it; so I written about what I could think of. But he told me later I did not write it like he intended."

The letters are as follows:

"Scotland, Ark., Oct. 22, 1919.

"Manda Ellis, Spiro, Oklahoma—Dear Sis: I reply to your letter. Uncle Jasper died 14th of October. You said something about coming. If you wanted to come, why didn't you come while he was living? We paid all expenses while he was sick and burial expenses, and had to pay \$25 out of our own money, and would like, if you all are willing, to help me make this amount up. It wouldn't be much apiece. He

had nothing but what he sent in, and that was what we done and give you all.

"Your sis, Cinda Hall."

"Scotland, Ark., Nov. 1, 1919.

"Mr. Rice Webb—Dear Brother: Cleve [Webb] told me you wrote him and wanted to know about Uncle Jasper's money. Never had very much; so I would write you the truth about it, as I have heard so much about it, first one way and then another. You know a man can hear anything now. I know all about his money, and will tell you the truth about it, as I don't want anything that don't belong to me. After paying expenses and doctor bill and burial expenses, he had \$182 left, and I bought your mamma and him a tombstone apiece. So I thought that would be best to do with that little amount of money, as it wouldn't be much apiece. And Cleve said that would be what he would do with it, if he was me; so I done so. My wife said you wanted a pair of his glasses. Write me the kind of case they was in, and I will send them to you by mail. All well. It rains here every day. Write me a long letter when you have time.

"Yours, John Hall."

[1] Appellant first insists that the court erred in overruling the demurrer and refusing to transfer the cause to the circuit court. We cannot agree with this contention. The gist of the bill, according to its salient allegations, was to regulate and enforce a trust fund, which had been and was being diverted and misappropriated, without a complete and adequate remedy at law to prevent dissipation of the fund. The allegations state a cause of action peculiarly within the powers of courts of equity to examine. 25 C. J. 116, 117. It was said by this court in *Spradling v. Spradling*, 101 Ark. 451, 142 S. W. 848, that—

"Courts of equity have inherent and exclusive jurisdiction over all kinds of trusts and trustees. They have full and complete jurisdiction of trusts independently of statute, whether the same arise by express declaration and agreement, or result by implication of law. \* \* \* The court, therefore, did not err in overruling the demurrer to the complaint."

[2] The next contention of appellant is that the decree of the court is against the clear preponderance of the evidence. The evidence is quite voluminous; hence we have only attempted to summarize it. An extended written analysis of it could serve no useful purpose. Our conclusion, after a careful hearing and analysis of the evidence, is that Jasper Webb, Sr., had about \$1,500 when he left California for Arkansas; that it was his intention to pay the necessary expenses incident to his removal to Arkansas, and to give John Hall the balance for taking care of him the rest of his life. This was indicated in his first two letters; also indicated after reaching Arkansas by statements made to Sallie Simpson and W. J. Watson. This intention, thus expressed, is the only circumstance in the record tending to cor-

roborate the evidence of the appellants to the effect that the gift was consummated. All other statements made by Jasper Webb, Sr., to other witnesses tended to show that he changed his mind, and that the gift he intended to make was never consummated. Practically every statement and act of John, Cinda, and T. S. Hall during the illness and for a time after the death of Jasper Webb, Sr., indicate that he never gave any money to appellants.

We cannot reconcile a bona fide gift with the attempt at secrecy on the part of the Halls concerning the amount received and the disposition made of it. The two letters written to relatives by T. S. Hall, concerning the money of deceased and the disposition thereof, not only conflict with each other, but both abound in untruths concerning the amount of the money the deceased had before he started to Arkansas and the disposition made of it. The impression intended to be conveyed by the letters was that the \$500 sent from California and divided between the heirs absorbed all the assets of the deceased. The letters were evidently written to forestall or prevent an inquiry as to the disposition of about \$1,800 which had been reserved by Jasper Webb, Sr., at the time he sent the \$500 to the heirs. The explanation attempted for writing these letters simply makes a bad matter worse, for they do not explain. We cannot say the chancellor's finding against the gift was contrary to a clear preponderance of the evidence.

[3, 4] It is practically undisputed that at least \$1,000 of deceased's money was deposited to the individual account of T. S. Hall in the Scotland bank in September, and that the account had not been reduced below \$874.45 up to and including the time a check for \$1,175 was given to Dr. J. K. Hatchett in payment of 15 shares of stock. That check absorbed the balance, and all of an additional deposit made on that day, except \$96.41. The court did not err in declaring the balance on that day the property of the estate of the deceased, as it will be presumed that Hall checked prior to that time against his individual funds, and not against the trust funds. Nor did the court err, as contended, in declaring a lien upon the stock for the trust fund and making an order to sell the stock to satisfy the lien. To have simply impounded and delivered the stock to the administrator would have forced him to accept stock in lieu of his judgment, which might have been of less value than the judgment. The declaration of a lien and order of sale was in effect a foreclosure, cognizable in a court of equity, and not within the exclusive jurisdiction of a probate court, as suggested by appellants.

[5] The last contention of appellants is that the court erred in rendering a joint judgment against appellants. The allegations of the bill in effect charge a conspiracy against

appellants to divert the trust fund, and the allegations are fully sustained by the evidence. Under the theory and proof of a conspiracy, it was proper to render a joint judgment against the appellants.

No error appearing, the judgment is affirmed.

### HORNOR TRANSFER CO. v. ABRAMS. (No. 131.)

(Supreme Court of Arkansas. Oct. 8, 1921.)

#### 1. Bailment §31(1) — Bailee must explain loss of goods.

Bailees for hire, in exclusive possession of property when lost, must explain the loss thereof before the bailor, suing for their value, is put upon proof as to negligence.

#### 2. Bailment §33—Bailee for hire not liable for loss of goods in absence of negligence.

A bailee of goods for hire is not liable for loss thereof in the absence of negligence, and where evidence was legally sufficient to warrant a submission to the jury of the question whether or not loss was explained, and occurred without fault or negligence on the part of defendant bailee, court erred in simply charging to find for the plaintiff for the value of the goods, if they were lost while in the possession of the defendant.

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by Lillian Abrams against the Hornor Transfer Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

P. R. Andrews, of Helena, for appellant.

R. B. Campbell and John C. Sheffield, both of Helena, for appellee.

McCULLOCH, C. J. This is an action instituted by the plaintiff, Mrs. Abrams, against the defendants, Hornor Transfer Company, a copartnership, to recover the value of certain articles of personal property alleged to have been received from the plaintiff by the defendants at their warehouse and which were not returned on demand. The defendants in their answer denied that they were engaged in the business of operating a warehouse, or that they received plaintiff's property in that capacity, and denied that the property was lost by reason of any negligence on the part of the defendants.

There was a sharp conflict in the testimony concerning the circumstances under which defendants received plaintiff's property and the agreement between them with respect to it. It is uncontradicted that some time during the month of January, in the year 1918, plaintiff received at Helena certain bundles or packages containing the ar-

ticles in controversy, which had been shipped to her from Cincinnati, Ohio. The packages were shipped to Helena by steamboat. The defendants were agents at Helena for the steamboat company, and received all consignments of freight to the city of Helena. Defendants were also engaged in the transfer business in the city of Helena, hauling goods and other property for hire. On receipt of the bill of lading and on the arrival of the goods plaintiff's husband gave the bill of lading to defendants, and the goods were placed in the upper story of the elevator building; defendants having their office in the lower story.

The contention of plaintiff is that the defendants accepted the goods for hire, and expressly agreed, in consideration of the payment of the charges, to keep the goods as warehousemen. On the other hand, defendants contend that they were not engaged in the warehouse business, but were merely agents for the steamboat company, and were engaged in hauling for hire, and that at the request of plaintiff and merely for her accommodation they permitted her to place the goods in the second story of the elevator building without any agreement with respect to safely keeping the same. They contended that they did not operate a warehouse there, but had permitted several persons to temporarily place goods in the second story of the elevator building, and one of the defendants testified that they kept a watchman on guard at the building, and that he visited the second story of the building occasionally, to see that everything was in order and that there was no combustible matter, so as to avoid the outbreak of fire.

Plaintiff did not discover the loss of the goods until about a year after they had been placed in the building, and then made immediate demand for their return or payment which was refused, and this suit was instituted. The property consisted of a davenport, of the alleged value of \$65, a roll of bedding, towels, kitchen utensils, scarfs, chafing dish, an electric iron, and certain other articles; the whole being of the alleged value of \$231.50.

The court, at the request of the defendants, submitted to the jury the question whether defendants received the property as warehousemen to keep the same for hire, or whether merely as a gratuitous bailee. The court told the jury, in an instruction given at the request of defendants, that if they permitted the plaintiff to store the goods in the building for accommodation only, without compensation, the only duty that defendants owed the plaintiff with reference to the goods was to exercise slight degree of care in protecting the same, and that, if the goods were stolen from the building while defendants were exercising such care, there would

be no liability. The verdict being in favor of the plaintiff we must treat it as having settled in plaintiff's favor the question whether or not defendants received the goods as bailees for hire. But the court went further, and gave the following instruction, over the objections of defendants:

"If, on the other hand, you find from the evidence in this case that the defendant company was a bailee for hire—that is, that the goods were stored by plaintiff with the defendant company, and the defendant was to make a charge, or to charge for the storage of the goods—and they were lost while in the possession of the defendant company, then you will find for the plaintiff for the value of the goods, as shown by the evidence."

[1, 2] This instruction told the jury, in substance, it will be observed that if the defendants were bailees for hire, and if the goods were lost while in the possession of the defendants, the latter were liable for the value of the goods. It was error, we think, to give this instruction, for, even though the defendants were bailees for hire, they were only liable for negligence. *Bertig v. Norman*, 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943. It is true that, according to the testimony adduced, the defendants were placed in exclusive possession of the property, and it devolved upon them to explain the loss before the plaintiff could be put upon proof as to negligence. *Phoenix Cotton Oil Co. v. Pettus & Buford*, 134 Ark. 76, 203 S. W. 19. But there was evidence adduced by the defendants tending to explain the loss of the goods, and also tending to show that the same were lost without negligence on the part of the defendants. In other words, there was legally sufficient evidence to warrant a submission to the jury of the question whether or not the loss was explained, and occurred without fault or negligence on the part of the defendants. This being true, it was the duty of the court to submit those issues to the jury, rather than take them from the jury by the instruction given, which in substance told the jury that the defendants were liable if they held the goods as bailees for hire.

For the error in giving this instruction, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

HUMPHREYS, J., not participating.

#### NEWLIN v. WEBB. (No. 130.)

(Supreme Court of Arkansas. Oct. 3, 1921.)

1. Evidence §400(4)—Note containing reservation of title not contract of sale barring parol evidence.

A note for the purchase price of mules containing reservation of title did not constitute

a written contract of sale which would bar evidence of a parol warranty of the mules.

2. Set-off and counterclaim §13—May be set up in action for recovery of property and damages for unlawful detention.

A set-off and counterclaim could be set up in an action to recover possession of property and damages for detention thereof, and it was immaterial that the court did not render judgment for damages; admissibility of plea being tested by state of pleadings at time filed, under *Crawford & Moses' Dig. § 6236*.

3. Set-off and counterclaim §13—Held properly set up in action to recover property.

In an action to recover mules by reason of defendant's failure to pay a note given in payment therefor, defendant had the right to set up and establish a counterclaim based on breach of warranty in order to show that the debt evidenced by the promissory note, which was the basis of plaintiff's right to recover the possession of the property, had been extinguished.

Appeal from Circuit Court, Desha County; W. B. Sorrells, Judge.

Action by J. H. Webb against F. A. Newlin. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. H. Hays, of Arkansas City, for appellant.

Buckner & Golden, of Dermott, and E. E. Hopson, of Arkansas City, for appellee.

McCULLOCH, C. J. Appellee instituted this action against appellant in the circuit court of Desha county to recover possession of five mules and for damages for detention in the sum of \$35. It is alleged in the complaint that appellee sold the mules in controversy to appellant, and that the latter executed to the former a promissory note for the sum of \$500 for the balance of the purchase price, and that in said note there was a stipulation that the title to the mules should remain in appellee until the note was paid in full. The note was exhibited with the complaint. Appellant filed an answer and cross-complaint in which it was stated that the purchase price of the mules was the sum of \$1,850, of which \$1,350 was paid in cash and that the note was executed for the balance; that in the sale of the mules appellee orally gave a warranty that each of the mules "was sound and free from any and all defects." It is further alleged that two of the mules, of the value of \$800, "proved to be diseased, crippled, and absolutely worthless, and that the plaintiff was informed of said facts and failed and refused to make good his warranty." The prayer of the cross-complaint is as follows:

"Defendant says that by the failure of the warranty of the plaintiff, as aforesaid, and because of the condition of the mules described, he has been damaged in the sum of \$800, for

which he prays judgment as a set-off or counterclaim against the demand of the plaintiff; prays that the note be satisfied in full by cancellation, and for judgment over against the plaintiff for \$300, and for all other proper relief to which he may be entitled."

[1] The court sustained the demurrer to appellant's plea, and on failure to plead further rendered judgment against appellant and in favor of appellee for recovery of the possession of the mules, without damages. Counsel for appellee defend the ruling of the court, first, on the ground that the contract of sale was in writing, and that the writing cannot be varied nor anything superadded by proof of an oral warranty. The contract of sale was not in writing as the note for the purchase price containing reservation of title did not constitute a contract of sale. *Parrott Tractor Co. v. Brownfel*, 233 S. W. 706.

[2] It is next contended that the ruling of the court was correct for the reason that, this being an action for the recovery of possession of personal property, a counterclaim or set-off could not be asserted. This contention is not well founded for the reason, in the first place, that the action was one not only for the recovery of personal property, but for the recovery of money as damages for detention of the property in controversy. We held in *Smith v. Glover*, 135 Ark. 531, 205 S. W. 891, that in an action for recovery of real property, where damages for detention were also sought to be recovered, the action was in part one for the recovery of money, and that a counterclaim could be pleaded. The fact that the court did not render judgment for the recovery of damages does not deprive appellant of the benefit of his counterclaim, for the admissibility of his

plea must be tested by the state of the pleadings at the time same was filed. Appellant could not cut off the right to assert a counterclaim by withdrawing his claim for damages after the counterclaim was filed. *Crawford & Moses' Digest*, § 6236.

[3] There is still another conclusive reason why the ruling of the court was erroneous. Appellant had the right to establish his counterclaim in order to show that the debt evidenced by the promissory note, which was the basis of appellee's right to recover the possession of the property, had been extinguished. *Ames Iron Works v. Rea*, 56 Ark. 450, 19 S. W. 1063; *Ramsey v. Capshaw*, 71 Ark. 408, 75 S. W. 479; *Jones v. Blythe*, 138 Ark. 81, 210 S. W. 348. The case of *Ames Iron Works v. Rea*, supra, was one like this for the recovery of possession of personal property, and there was asserted a counterclaim for unliquidated damages, and Judge Battle, speaking for the court, said:

"The right to the possession of property sued for is essential to a recovery in actions of replevin. Any state of facts which will show the existence or nonexistence of such a right is, as a rule, pleadable in such actions. Thus, in an action of replevin by a mortgagee against the mortgagor to recover the possession of the goods mortgaged to him, the mortgagor can successfully defend the action by showing that the debt which the mortgage was given to secure has been paid."

For both of the reasons set out above, our conclusion is that the court erred in sustaining the demurrer to appellant's plea.

The judgment is therefore reversed, and the cause remanded, with directions to overrule the demurrer.

**RIGLEY v. PRIOR et al. (No. 22136.)**

(Supreme Court of Missouri, Division No. 2, June 23, 1921. Rehearing Denied July 19, 1921. Motion to Transfer to Banc Denied Aug. 8, 1921. Stipulation as to Costs Allowed Oct. 8, 1921.)

1. Trial  $\S$ 140(2)—Plaintiff not nonsuited for different testimony on second trial where uncontradicted and corroborated by other witnesses.

A railway employee suing for injuries from being thrown from a hand car struck by a train, though he testified on cross-examination at a former trial that he was a trackwalker and reported repair work to some one else, should not be nonsuited for testifying on the second trial that on the morning of the injury he was working as a track repairer, where he also testified at the former trial that it was his duty to go out on a hand car that morning, and the uncontradicted testimony of himself and other witnesses on the second trial was that his duties included section work, and that he was in the line of such duty when injured.

2. Master and servant  $\S$ 286(31)—Railroad's negligence in failing to sound whistle held for jury.

In an action for injuries to a member of a crew on a hand car struck by a train in a fog, held, on the evidence, that defendant's negligence in failing to sound the whistle with sufficient frequency was for the jury.

3. Master and servant  $\S$ 285(11)—Speed of train as cause of injury to hand car crew held for jury.

In an action for injuries to a member of a crew on a hand car struck by a train in a fog, held, on the evidence, that question whether the excessive speed of the train was proximate cause of the collision was for the jury.

4. Trial  $\S$ 219—Instruction as to defendants' duty to sound whistle frequently not erroneous, though not defining "frequently."

In an action for injuries to a member of the crew of a hand car struck by a train in a fog, an instruction that it was defendant's duty to frequently sound the bell and whistle was not erroneous because it did not define the word "frequently"; it being apparent that the whistle should be sounded frequently enough to warn the crew which was a question for the jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Frequent.]

5. Trial  $\S$ 191(11)—Instruction on effect of contributory negligence as reducing damages held not erroneous as assuming defendants' negligence.

An instruction that plaintiff's contributory negligence under the federal Employers' Liability Act would not defeat a recovery, unless it were the sole cause of the injury, but that the damages should be diminished proportionately, was not erroneous as assuming defendant's neg-

ligence and eliminating the idea of plaintiff's negligence as the sole cause of the accident.

6. Evidence  $\S$ 318(3), 471(17) — Finding on former appeal that injured employee was not in discharge of duty inadmissible as hearsay and conclusion.

In an action for injuries to a member of the crew of a hand car struck by a train, a finding of the Court of Appeals on a former appeal that plaintiff was a trackwalker and not in the discharge of his duty when injured was not admissible, being hearsay and a conclusion.

7. Damages  $\S$ 216(8) — Instruction to allow present cash value of sum reasonably compensating plaintiff for impairment of earning power not erroneous.

In a personal injury suit, an instruction to award plaintiff the present cash value of such sum as would fairly and reasonably compensate him for pecuniary loss resulting from impairment of earning power was not erroneous, though wages were higher than at the time of the injury.

8. Damages  $\S$ 216(4) — Instruction to allow present cash value of such sum as "will reasonably compensate" for mental and physical pain not erroneous; "will be reasonable."

In personal injury suit, an instruction to allow plaintiff the present cash value of such sum as would fairly and reasonably compensate him for his mental and physical pain was not erroneous as allowing compensation for suffering at the time of the injury on the basis of the present value thereof, the estimate including suffering, past, present, and future, and "will reasonably compensate" and "will be reasonable" meaning measured by present cash value.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compensation.]

9. Appeal and error  $\S$ 216(2)—Appellant cannot complain of vague instruction where it offered no instruction on subject.

An appellant cannot complain of an instruction which is vague in directing how to estimate damages where it offered no instruction on the subject.

10. Damages  $\S$ 131(4) — Verdict for \$12,500 for internal injuries from which plaintiff had practically recovered held excessive by \$5,000.

In a personal injury suit, where plaintiff, 53 years old at the time of the trial, had suffered a hernia near the stomach, an inguinal hernia, and a discolored lump on the right side of the spine near the kidney, but at the time of the trial was nearly cured, a verdict for \$12,500 was excessive by \$5,000.

Walker, J., dissenting in part.

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

Action by George Rigley against Edward B. Prior and others, receivers of the Wabash Railroad Company. Judgment for plaintiff, and defendants appeal. Affirmed on condition of remittitur.



N. S. Brown and Homer Hall, both of St. Louis, and Sebree & Sebree, of Kansas City, for appellants.

Atwood, Wickersham, Hill & Popham, of Kansas City, for respondent.

WHITE, C. An action for personal injuries. The plaintiff recovered judgment in the circuit court of Jackson county, November 21, 1919, for the sum of \$12,500. The plaintiff was in the employ of the defendant and lived north of the Missouri river about seven miles east of Kansas City, at or near Randolph, in Clay county. About 7:30 in the morning, January 19, 1914, he boarded a hand car with a crew at Randolph and started westward to repair some track between that point and Kansas City. The crew consisted of a Mr. Anderson, who was foreman, the plaintiff, and four other men. The plaintiff assisted in propelling the hand car. The morning was very foggy; the men could see a distance of only about 20 or 30 feet ahead. They had proceeded a mile or more westward from Randolph and had crossed what are termed the twin bridges when a Wabash train coming from the west in the fog ran upon the hand car and knocked it off, killing all the other men, and inflicting injuries upon the plaintiff, for which he brings this suit.

The plaintiff introduced evidence to show that it was usual for heavy fogs to hang over the track along the river at that point at that time of year; that it was the custom for trains passing through the fog at such times to sound the bell continuously, blow the whistle at frequent intervals, and run slowly; running slowly meant 10 or 12 miles an hour. Across the river from Kansas City, and about 5 miles west of Randolph, is what is termed block 223, whence signals were sent to Randolph indicating trains in the block. While the crew was waiting at Randolph a train was in the block, and they waited until it passed eastward before starting. There were two parallel tracks used by the Burlington, the Rock Island, and the Wabash Railroad Companies. The trains on those tracks used the north track going west and the south track going east. The hand car was on the south track when met by the train going east. Shortly before the collision a train on the north track going west passed the hand car.

The plaintiff testified that as they proceeded he and the crew were listening for trains and heard no bell and no whistle from the train which ran them down. He testified that he could have heard the whistle half a mile and had heard it that distance; that he was listening and was in a position to hear the bell and the whistle. Other evidence was offered by the plaintiff to show that crews on hand cars going through the fog always listened and watched for trains that might cause them trouble.

The train was running at the rate of about 25 miles an hour. The defendant introduced evidence to show that the whistle was blown at intervals of about two or three minutes, and once or twice after the train had passed the Milwaukee bridge, which was about a mile and a quarter west of the place of collision, and that the bell was rung continuously. On that evidence the jury returned a verdict, judgment was rendered as stated, and the defendant appealed. On a former trial a verdict was returned for \$4,500, and on appeal to the Kansas City Court of Appeals the judgment was reversed, and the cause remanded.

I. The appellant asserts that the judgment should be reversed because the plaintiff changed his testimony from what it was at the first trial. On appeal from the first trial (Rigley v. Wabash R. R. Co. (App.) 204 S. W. 737) the Kansas City Court of Appeals held that the plaintiff could not recover on two grounds: First, because there was nothing to show that the plaintiff belonged to the crew of that car or why he was on it; he appeared merely to have been there with no suggestion that he was ordered there; his duties as an employee of the railroad company were those of trackwalker, and therefore he was not in the line of his duty at the time of his death. Second, he could not recover, because, being a trackwalker, it was his duty to look out for trains.

In his testimony at the last trial the plaintiff said he had been at work for the company for 12 or 14 years; on the morning of the injury he was engaged at track work, was working on that section repairing the track; that his business consisted of walking the track, but on the morning of the injury he was working as track repairer, a section man; that a trackwalker walks the tracks and he never walks the track on a hand car; he had worked on that particular section for six or seven years, and besides being trackwalker he did section work; section work consisted in going out on the track with a gang, laying rails, or doing anything to keep the track up. He further testified that on the morning of the injury he with the crew was going to repair track near the Milwaukee bridge, and he knew beforehand what was to be done there. The evidence showed that before starting from Randolph the foreman went into the station and talked to the station agent, and that it was customary for the foreman in such case to ascertain about the trains. The plaintiff himself was not permitted to testify as to any orders given him by the foreman because the foreman was dead at the time of the trial. It was shown by the two sons of the plaintiff who testified, and who were not present at the former trial because they were with the A. E. F. in France, that plaintiff's work consisted of going over the track and

working on the track and going out on a hand car for that purpose, and that he put in a part of his time as a section man. One witness for the plaintiff said he was present in Randolph in the morning and saw the hand car when it started; he knew Mr. Anderson, the foreman; he saw the crew put the car on the track and get on the car, and heard Mr. Anderson instruct Rigley to go on; he saw them putting the tools on the car; he heard Anderson say, "Come on boys, let's go; everything is clear; everything will be safe," and they all got on the car, including Rigley, and moved off. This evidence, and it is uncontradicted, sufficiently shows that the plaintiff was in the line of his duty that morning, and that he was not working as a trackwalker.

The point made by appellant is that the plaintiff changed his testimony from the first trial, where he testified that he was a trackwalker. On cross-examination at the first trial Rigley, in answer to leading questions of defendant's counsel, testified that his business was to walk along the track and see that the track was in good condition, and that was all he did; that he walked up and down the track and looked at the rails and bolts and everything, to see that it was in repair, and if it was not in repair he reported it to some one else; it was not his duty to repair it.

In redirect examination the plaintiff showed he had also testified on the former trial that it was a part of his duty to go down on that hand car that morning, and that he was on duty at that time.

It is claimed that his present testimony so changes what he swore then that he ought not to recover.

[1] This court has held that, if a plaintiff on a second trial, without a reasonable explanation, changes his testimony from that given at the first trial as to facts material to his right of action, he ought not to be credited with telling the truth, and ordinarily should suffer nonsuit. *Steele v. Railroad*, 285 Mo. loc. cit. 110, 111, 175 S. W. 177. In this case the statement of the plaintiff, where he said he was a trackwalker and that was all he did, and that he reported repair work to some one else, were all in answer to leading questions asked by defendant's counsel. He answered simply "Yes, sir," and "No, sir," to the questions asked. He said at the same time that it was his duty to go out on a hand car that morning.

The evidence at the present trial sufficiently shows that, while he was a trackwalker, he had the additional duty to assist in repairing the track; that he did section work also as a part of his regular work. This was shown by witnesses other than the plaintiff. No attempt was made by defendant to show that it was not true, and defendant must have known whether plaintiff's duties included section work or not. The question

at issue was whether he was in the line of his duty at the time he was injured. The evidence showed without contradiction that he was.

If on the former trial the plaintiff was induced by the skillful cross-examination of defendant's attorney to make statements contrary to the facts, he should not be nonsuited for telling the truth about the matter now.

[2] II. Appellant claims the demurrer should have been sustained because there was no proof of actionable negligence on the part of the defendant. The evidence showed without contradiction that there was a heavy fog the morning of the accident, and that such fogs were of frequent occurrence along the river at that point; that it was necessary for section men to pass along the track in foggy weather in a hand car, and that hand cars were to be expected upon the track; that it was the custom for trains running through such fogs to run slowly, 10 or 12 miles an hour, sound a whistle at frequent intervals, and ring the bell continuously. The defendant objected to the word "custom," but all defendant's witnesses testified that it was the uniform "practice" to blow the whistle and sound the bell at such times. One of plaintiff's witnesses said it was the custom to blow the whistle at such times every 50 or 75 yards.

The appellant now says there is no substantial evidence to show negligence in failing to observe the custom or practice. It is also argued that the noise of the hand car would prevent to some extent those on it from hearing the bell or whistle, and that the train which passed on the other track immediately before the collision probably made such a noise as to drown the sound of the bell and whistle. The plaintiff testified that he could hear the whistle half a mile when it sounded. He said he and the crew were propelling the hand car and listening and looking for trains. He did not hear either the whistle or the bell. Appellant introduced witnesses, including the engineer, fireman, conductor, and brakemen, to testify that the whistle was sounded and the bell rung. Some of them testified that the bell was rung continuously and that the whistle was sounded at intervals. None of them were very definite as to just when or how often the whistle was sounded. The engineer said he sounded the whistle at intervals of two or three minutes. He was running 25 miles an hour. As nearly as he could "recall," he sounded the whistle twice after he crossed the Milwaukee bridge, which was a mile and a quarter from the place of collision. There is no positive evidence on the part of the defendant that the whistle was sounded at all within a half mile of the place of collision. The testimony of the plaintiff is positive that it was not sounded. This is not ordinary negative evidence,

such as given by an inattentive witness who is not interested in noticing whether a certain signal is given, such testimony as is frequently given in railroad cases where a bystander testifies he did not hear a whistle or a bell. *Dutcher v. Railroad*, 241 Mo. loc. cit. 169, 145 S. W. 63. Here were six men on a hand car, every one of them directly and intensely interested in hearing any whistle or bell that might be sounded; their lives depended upon their hearing; they were listening for the purpose of hearing. That none of them heard is a reasonable inference, because, if any one of them had heard the whistle or the bell, the others would have been notified and the hand car removed from the track. Upon this evidence it was a question for the jury whether the defendant was negligent in failing to sound the whistle with sufficient frequency to warn the parties on a hand car, or any employee who might be in a dangerous position on the track.

[3] Another act of negligence alleged was the excessive speed. The appellant claims the speed of 25 miles an hour was not the proximate cause of the collision, because it is not shown that it could have been avoided if the train had been running at a lower rate of speed. It is pure assumption to say that a train running at half the speed would have caused the same injury, or one like it. If the train had been running at half the speed from the time it crossed the river, the hand car would have been to its destination and off the track. If not, the men on the hand car would have had double the time in which to jump for their lives after they saw the train appearing in the fog; the force of the collision, if there had been one, would necessarily have been much less. It was a question for the jury as to whether an excessive rate of speed was the cause of the injury.

It is possible that the noise of the hand car and the confusion of sounds caused by the train which had just passed may have prevented those on the hand car from hearing the bell, or, if they heard it, from locating its direction; but all that was for the jury to consider in determining whether proper care was exercised.

[4] III. The appellant assigns error to the giving of instruction A, the principal instruction given on behalf of the plaintiff, which told the jury it was the duty of the defendant "to frequently and at short intervals to sound the bell and whistle on said train." The objection is that the instruction did not define the word "frequently" nor tell the jury what was meant by it. The instruction did tell the jury that the whistle should be sounded "as a warning of the approach of said train to those on said hand car." It is apparent that the whistle should be sounded frequently enough to serve that purpose. It was for the jury to say whether or not that was done. If the instruction

had told the jury that frequently meant every 100 yards, or every quarter of a mile, or anything of that kind, defendant's counsel would have been urging more valid objection to the instruction.

[5] IV. In an instruction on the measure of damages the jury were told that, if they found the plaintiff failed to exercise ordinary care for his own safety, then the damages, if any were awarded, should be diminished accordingly. Then a further instruction, D, given for the plaintiff, defined contributory negligence as a failure on the part of the plaintiff to exercise ordinary care, any negligent act or omission of plaintiff which concurred with the negligence, if any, of defendants, in causing the injury, and then continued:

"You are further instructed, however, that if you should find from the evidence that plaintiff was guilty of contributory negligence, yet the act of Congress under which this suit is brought provides, and you are instructed, that contributory negligence, unless the sole cause of the injury, does not defeat a recovery altogether, but the damages, if any awarded, shall be diminished by the jury in the proportion which the contributory negligence, if any, of plaintiff bears to the combined negligence, if any, of both plaintiff and defendants, and your finding shall be in accordance herewith."

The appellant asserts that the use of the words "contributory negligence" assumes that appellants were negligent and eliminates at once the idea that plaintiff's negligence could be the sole cause of the accident. The jury had been told in the other instructions that they must find the defendant was guilty of negligence in several particulars in order to authorize a verdict for the plaintiff. It is attributing to the jury an unusual subtlety to suppose they would apply such refinement of reasoning to the interpretation of the word "contributory." This instruction is based solely on the defense of contributory negligence. It does not authorize a verdict on any finding whatever. It simply calls attention to that defense and tells the jury what is necessary to prove in order to defeat recovery on that ground. It does not affect or purport to affect the main issues of the case as put to the jury in the other instructions, and is not erroneous.

[6] V. The defendant offered in evidence the opinion of the Kansas City Court of Appeals, as the same is reported, rendered when the case was before that court on appeal from the former trial. In that opinion the Court of Appeals in its analysis of the facts finds that the plaintiff was a trackwalker and was not in the discharge of his duty at the time he was injured. Appellant has offered no authority nor any reason why this evidence should be admitted. It is not only pure hearsay, but a conclusion from the

facts, and not competent evidence on any theory.

[7] VI. The appellant complains of the instruction given for plaintiff on the measure of damages. This instruction, after telling the jury they should take into account the nature of the injuries, bodily pain, and mental anguish, if any, suffered by the plaintiff, and such as the jury should find the plaintiff has suffered and would suffer in the future, his medical expenses, not exceeding \$200, "impairment of his ability, if any, to work and earn money resulting directly from such injuries," then directed them to award plaintiff "the present cash value of such sum in damages as the jury shall find and believe from the evidence will fairly and reasonably compensate him for his mental and physical pain, if any, his medical expense, if any, and his pecuniary loss, if any, resulting directly from any impairment, if any, of his earning power, all as above restricted and set out, and resulting directly from such injuries, if any, so received."

The objection to that instruction is the use of the expression "present cash value." Appellants argue that it allows the jury to estimate plaintiff's loss of earnings in 1914 by the present standard of earnings when wages are much higher. An analysis of the instruction shows that the award of damages authorized were on account of: (a) Physical and mental pain, past and future; (b) medical expenses; (c) impairment of earning power. The jury were not authorized to give plaintiff damages for loss of "earnings," a totally different thing from loss of earning power.

In awarding damages for impairment of ability to earn money, the jury necessarily must base their estimate upon the present disability, whether it is permanent or curable. They must estimate the probable duration of it, just as in a death claim they estimate the expectancy of life of the person killed and the pecuniary loss to the widow or children. They must give a lump sum as their measure of the present value of the loss. 8 R. C. L. p. 479; *Morton v. S. W. Tel. & Tel. Co.*, 217 S. W. 835; *Hurlburt v. Bush*, 224 S. W. loc. cit. 327; *McWhirt v. C. & A. R. R. Co.*, 187 S. W. 830, loc. cit. 836. It was the rule applied by this court in the case of *Greenwell v. C., M. & St. P. Ry. Co.*, 224 S. W. 404, loc. cit. 410. The loss of earning power was estimated and compensation allowed at the present value of such compensation.

[8] Should a different rule be applied in estimating compensation for pain and suffering, when it is continuing? If the suffering were wholly in the past, it might be well to direct the jury to consider only compensation reasonable at the time the suffering was incurred. But when the estimate must include suffering, past, present, and future, covering a long period of time before the trial—five

years in this case—what is the jury to do? Estimate the cash value of the compensation in 1914 and subsequent years separately? Or divide the time in monthly periods and figure out the pain and suffering of each month? Instructions indicating the present value of the compensation for suffering have been held proper. *Reynolds v. Transit Co.*, 189 Mo. 420, 88 S. W. 50, 107 Am. St. Rep. 360. Such sums as "will reasonably compensate him," was held correct in *Dean v. Railroad*, 199 Mo. loc. cit. 393, 97 S. W. 910. "Such sum as you find will be reasonable compensation to her for mental and physical pain and suffering" (past and future) was approved as the proper measure in *Krinard v. Westerman*, 216 S. W. loc. cit. 942. "Will reasonably compensate" and "will be reasonable" cannot mean anything else than measured by present cash value.

[9] If the instruction is somewhat vague in directing how to make the estimate, the appellant cannot complain, because it offered no instruction on the subject. *Hurlburt v. Bush*, 224 S. W. loc. cit. 327; *Powell v. Railroad*, 255 Mo. loc. cit. 454, 164 S. W. 628; *Breen v. United Rys. Co.*, 204 S. W. loc. cit. 523.

[10] VII. It is claimed that the verdict is excessive. The evidence shows the plaintiff was 53 years old at the time of the trial. He was not allowed to recover anything for loss of earnings. The pain and suffering which he incurred and the impairment of earning capacity was all that could be considered by the jury except his medical expenses of \$200. The evidence showed that he was thrown down an embankment and lodged against a tree. The physician who examined him found a hernia in the region of the stomach and also an inguinal hernia and a discolored lump on the right side of the spine in the region of the kidney. There was blood in the plaintiff's urine afterwards. He was treated for several months. At the time of the trial he was nearly cured; there was no evidence visible of the inguinal hernia. The physician, however, stated that he had observed some difference in "impulse," on that side from the other side. Owing to the disuse of muscles on the left side, they had become atrophied somewhat. There was a weakness in the muscles of that side. The physician also noticed a tendency to break out in a profuse unnatural perspiration. He attributed that to a nervous condition. Physicians for the defendant testified that they found nothing wrong with the plaintiff at the time of the trial. It is difficult to believe that his injuries were permanent, although they were painful. The only thing that remained at the time of the trial was some discomfort and a certain weakness of partially atrophied muscles on the left side, making it difficult for him to lift things. Considering the elements of damage which the jury were al-

lowed to take into account and the nature of the injuries, we think the verdict was excessive to the amount of \$5,000. If the plaintiff will, therefore, within 10 days from the delivery of this opinion remit from the amount of his judgment \$5,000 as of the date of the judgment, the judgment will be affirmed; otherwise it will be reversed and remanded.

RAILEY and MOZLEY, CC., not sitting.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All concur, except WALKER, who dissents in opinion filed.

WALKER, J. I concur in this opinion, except as to the affirmance conditioned upon the entry of a remittitur in the amount of the verdict. I deprecate the custom arbitrarily, as I construe it, exercised by appellate courts in reducing the amount of verdicts. The triers of the fact are much better qualified to pass fairly upon this question than a judge sitting smugly in his chambers with nothing to direct his judgment or influence his conclusion except the cold record. If this verdict shocked the moral sense, in that it was out of all proportion as a compensation for the injuries inflicted, ample opportunity was afforded for an intelligent reduction of same in the trial court. This not having been done, we should hesitate to interfere unless the amount of the verdict is glaringly excessive, in which event the case should be reversed, and remanded for a new trial.

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STATE ex rel. JOPLIN & P. RY. CO. v.  
PUBLIC SERVICE COMMISSION  
OF MISSOURI. (No. 22592.)

(Supreme Court of Missouri, in Banc.  
Oct. 10, 1921.)

On petition for rehearing. Denied.  
For original opinion, see 233 S. W. 388.

PER CURIAM. Rehearing denied.

DAVID E. BLAIR, J. (dissenting). The record shows my concurrence in a separate opinion in the result reached in the majority

233 S.W.—53

opinion in this case. When the motion for rehearing was passed on, I had concluded that I was in error in concurring in the result, and voted to sustain the motion for rehearing, and as no opinion was written in support of the court's action in overruling the motion for rehearing, I feel constrained to state my reasons for favoring such rehearing.

The majority opinion holds, and the order entered requires, that respondent must approve bonds issued or to be issued under the terms of relator's first mortgage to reimburse relator for certain expenditures made more than five years prior to the date of the application filed with respondent for authority to issue same. The Legislature has not empowered respondent to approve bond issues for expenditures for such improvements completed more than five years before the date of the application. Respondent has no powers not conferred upon it by the Legislature, and this court has no power by judicial action to extend or broaden those powers, and should not undertake to compel respondent to perform any act it is not empowered by the Legislature to perform.

The Legislature attempted to provide a period of grace for the approval of bonds issued to reimburse railroads for money expended out of income for certain proper purposes prior to five years before the filing of the application, if such application be filed before January 1, 1914. Section 10466, R. S. 1919. Relator was prohibited by the very terms of its mortgage and the state of its earnings from taking advantage of such period of grace. Of course, the Public Service Commission Act (Rev. St. 1919, §§ 10410-10550) could not thus ruthlessly cut off relator's right to issue bonds provided for by its first mortgage antedating such enactment. Such legislation is violative of our Constitution, as an impairment of existing contracts.

I think we should have denied the permanent writ, and held the issue of bonds sought by relator to be valid under the peculiar circumstances here existing, without application to or order from respondent.

For these reasons, I desire to withdraw my separate concurring opinion, and to be noted as dissenting to the majority opinion, and also marked as dissenting to the action of my Brethren in overruling respondent's motion for rehearing.

**LINK v. ATLANTIC COAST LINE R. CO.**  
et al. (No. 16650.)

(St. Louis Court of Appeals. Missouri. June 21, 1921. Rehearing Denied Sept. 19, 1921.)

1. Trial  $\Leftrightarrow$  156(2, 3)—On defendant's demurrer at close of case, case must be most favorably considered for plaintiff.

On defendant's demurrer at the close of the entire case, plaintiff must be given the benefit of all testimony that has been adduced on her behalf and any favorable testimony given by defendant's witnesses, in addition to which plaintiff must be allowed the benefit of reasonable inferences of fact on all proof, and for the purposes of considering the demurrer such testimony of defendant's witnesses as is contradicted must be excluded.

2. Carriers  $\Leftrightarrow$  320(8)—Submission of question of negligence of carrier to jury held proper.

Where there were facts and circumstances on which reasonable men might differ as to whether defendant was guilty of negligence proximately causing the injuries complained of, by failing to exercise a proper degree of care in furnishing plaintiff a reasonably safe means for boarding its train, the court properly submitted the case to the jury.

3. Trial  $\Leftrightarrow$  233(1)—Withdrawal of attorney of codefendant held sufficient to prevent jury's thinking codefendant was still in the case.

A jury could not have been misled by language of an instruction into thinking that a codefendant was still in the case when its attorney, who had been present in the court and had taken part in the trial, cross-examining plaintiff's witnesses, withdrew from the active trial of the case on the sustaining of Pullman Company's demurrer at the close of plaintiff's case.

4. Carriers  $\Leftrightarrow$  414—Railroad company held responsible for operation of train to which Pullman is attached.

The railroad company, and not the sleeping car company, is responsible for the operation of train to which sleeping car or Pullman under separate ownership is attached, or of which train it is a part.

5. Carriers  $\Leftrightarrow$  280(1)—Common carrier owes duty to use utmost care, skill, and diligence to transport passengers.

It is the duty of a common carrier to use the "utmost care, skill, and diligence" to transport its passengers, which means the care, skill, and diligence that a cautious man in similar employment would use.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Utmost Care and Skill.]

6. Carriers  $\Leftrightarrow$  416—Instruction held not to permit finding liability of railroad company without finding it was due to negligence of railroad company or Pullman Company's employees.

A general instruction covering all phases of a case wherein plaintiff received an injury

in boarding a Pullman car held not to permit finding of liability on part of the railroad company, if plaintiff's fall was found due to a foot box's uneven and unsafe position without a finding that it was due to negligence of the railroad company or the Pullman Company's employees.

7. Damages  $\Leftrightarrow$  130(2)—\$2,995 held not excessive for injury to leg.

In action for injuries received in boarding a Pullman car in which plaintiff's left ankle was turned and she was bruised about her hips, legs, and spine, a verdict for \$2,995 held not excessive.

8. Carriers  $\Leftrightarrow$  416—Amended instruction for defendant railroad company in suit for injuries in boarding Pullman car held correct.

An amended instruction for defendant in a suit for injuries received by plaintiff when boarding a Pullman car, requiring the jury, in order to find for plaintiff, to find the railroad company guilty of negligence in failing to place a foot stool in a safe position or on an even surface of the platform, and further to find plaintiff was not guilty of contributory negligence in failing to catch the handrail of the car, or give her child, which she was carrying, to an employé, was correct, and covered defendant's theory of the case.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Action by Albertina Link against the Atlantic Coast Line Railroad Company and another. From a judgment for plaintiff, defendant named appeals. **Affirmed.**

H. R. Small, of St. Louis, for appellant.

Chas. E. Rendlen, of Hannibal, John A. Hope, of St. Louis, and Harrison White, of Hannibal, for respondent.

BECKER, J. Plaintiff recovered a judgment in the sum of \$2,995 against the said Atlantic Coast Line Railroad Company, one of the defendants below, in her action for damages for personal injuries. At the close of plaintiff's case, the court indicating that it would sustain a demurrer on the part of the other defendant, the Pullman Company, plaintiff took an involuntary nonsuit as to said defendant with leave to set the same aside. Defendant Atlantic Coast Line Railroad Company in due course appeals.

Plaintiff alleges in her petition that as she was in the act of boarding a Pullman car, which was a part of a train of cars belonging to the defendant railroad company in a passenger station at Jacksonville, Fla., she stepped upon the usual stool or foot box such as is customarily provided for such purpose, and at the moment when plaintiff had one foot upon the said stool "it turned over or tilted over while plaintiff was thereon, due to the negligence and carelessness of the defendant in placing it upon an uneven surface upon said platform, or due to said stools un-

even and unsafe condition so that the same was not steady and secure and said means of boarding said car was negligently made insecure," and that by reason thereof plaintiff, "without her fault in any wise contributing thereto, was thrown violently against and upon the steps of said coach, and her left ankle was turned, twisted, and permanently disabled; plaintiff's body, hips, legs, and lower spine, were sprained, wrenched, bruised, and injured."

The defendant's answer was a general denial coupled with a plea of contributory negligence.

Appellant here seriously contends that plaintiff failed to make out a case entitling her to go to the jury.

[1] In considering the case on defendant railroad company's demurrer at the close of the entire case, as we must, we must give plaintiff the benefit of all testimony that has been adduced on her behalf, as well as that of any favorable testimony given by defendant's witnesses, and discard, for the purposes of considering the demurrer, such testimony of the defendant's witnesses as is contradicted. In addition thereto we must allow plaintiff the benefit of the reasonable inferences of fact on all the proof. *Fritz v. Railroad Co.*, 243 Mo. 62, loc. cit. 77, 148 S. W. 74; *Stauffer v. St. Ry. Co.*, 243 Mo. 305, loc. cit. 316, 147 S. W. 1032; *Williams v. Railroad Co.*, 257 Mo. 87, 165 S. W. 788, 52 L. R. A. (N. S.) 443; *Peters v. Lusk*, 200 Mo. App. 372, loc. cit. 379, 206 S. W. 250; *Schulz v. Railroad Co.*, 223 S. W. 757.

We readily concede that the question thus raised is a close one, but, viewing the record before us in the light outlined above, we have come to the conclusion that plaintiff made out a prima facie case entitling her to go to the jury.

According to plaintiff's own testimony, she, accompanied by her husband, her four children, and her husband's brother, entered the station of the defendant railroad company at Jacksonville, Fla., to travel to St. Louis, and on being directed to the Pullman car, for which they had tickets, three of plaintiff's children preceded her into the Pullman car, stepping upon the stool or foot box placed next to the steps of the car for the purpose of the passengers' convenience in entering same. Plaintiff followed the said three children, carrying her fourth child, of the age of one year, in her left arm. On her right wrist plaintiff carried a small pocketbook. Plaintiff placed her left foot on the foot box, and without taking hold of the handrail of the car raised her right foot from the station platform up to within a few inches of the lowest step of the Pullman coach when the foot box tilted and caused her to fall, throwing her forward on to the steps of the car, injuring her. There were no Pullman porters in the immediate vicinity of the steps of said car when plaintiff reached the foot box, but

there were two or three porters at the next coach. She injured her ankle and was bruised about her limbs, hips, and spine. At the time that plaintiff fell her husband and her brother-in-law were some 8 or 10 feet away engaged in surrendering the railroad and Pullman tickets to the conductor. Her husband, hearing her scream as she fell, hurried to her assistance and aided her up the steps and into the car.

In plaintiff's cross-examination we find the following questions and answers:

"Q. Now, what did you do when you came up to this step? A. I put my left foot on the stool and then put my right foot, or attempted to step on this step, and the stool tilted or turned.

"Q. Did you take hold of that handhold? A. No, sir; I had the baby in my arm.

"Q. You didn't attempt to take the handhold at all? A. No, sir; I didn't have time to. \* \* \* The accident happened before I had time to put my arm to the handhold.

"Q. You just stepped on that stool without taking hold of anything? A. Yes, sir; on the stool; and before I could have time to grasp with my right hand the stool turned. \* \* \*

"Q. You just put your foot up there and just fell? A. No, sir; I put my foot up there and the stool turned and I fell."

Joseph Link, a son of plaintiff, who at the time plaintiff met with her injuries was nine years of age, testified that he entered the Pullman car just ahead of his mother, and that when he stepped on the foot box to enter the car the stool "kind of tilted a little bit," but that he did not tell his mother of this fact until after she had fallen. This witness, when asked on cross-examination as to how much the stool tilted when he stepped upon it, replied that it tilted about one inch or an inch and a half.

Eugene Link testified that he was a brother-in-law of plaintiff and made the trip with her to St. Louis and was present at the station and saw plaintiff "just about the time she fell." With reference to the station platform this witness testified that "there were cracks or crevices in the platform and the boards; it wasn't a new platform; it looked like some boards were a little bit higher than others." In his judgment some of the boards were from one-half to one inch higher than others and some of the cracks and crevices were an inch wide. He further testified this was the condition of the platform at the place where the foot box in question stood at the time plaintiff met with her injuries. He also testified that plaintiff's husband immediately went to plaintiff's assistance upon her falling and helped her up the steps of the car and into the coach; that he looked at the foot box after plaintiff had fallen and found that the "box was tipped up, but not clear over." And in answer to the question, "Was any part of the box in the crevice you describe?" he answered, "Yes, sir."

"Q. One of the corners, by the side, or what part of, if you know? A. Well, it was the corner of it.

"The Court: The corner of what did you say? A. In a crevice."

On cross-examination the witness testified that all four feet of the foot box were not on the platform, and that it was tipped up on one corner. And in answer to the question, "It was just standing on one foot?" he answered, "Yes, sir; either in a crevice or standing on the platform."

"Q. You don't know whether it was in a crevice? A. I didn't say I did.

"Q. Well, you say then that you don't know whether it was in a crevice or not? A. No, sir."

Plaintiff's husband, A. L. Link, testified that plaintiff and the children were walking a little ahead of the witness as he came down the platform to the train; that he himself was carrying two grips; that some eight or ten feet from the entrance of the Pullman car he set the grips down and took his tickets out of his pocket and handed them to the conductor, who stated, with reference to the Pullman car which they were to board, "that is the car," indicating the one which plaintiff endeavored to enter. He testified he did not see plaintiff when she actually fell, but was attracted by her scream. He immediately turned around and ran over and picked her up. He testified that the boards on the station platform were a little uneven; some probably one-half to three-quarters of an inch higher than the others, with about a half inch crack between them. The witness further testified that he looked at the foot box or stool immediately after his wife fell and it was completely turned over on its side, and that as he stooped to pick plaintiff up he noticed the cracks in the platform where the foot box was lying.

The defendant's testimony showed it is the practice in starting from railroad stations to examine the foot boxes to see that they are in good condition, and that the foot boxes are placed on a square surface so that they will not tip and "to make them safe and square." The defendant did not produce any witness who testified that such an examination had been made on the occasion in question of the particular foot box, nor did any witness for the defendant testify that he had placed the foot box on the platform.

There was testimony to the effect that foot boxes such as the one in question are part of the regular equipment and for the convenience of ingress and egress of the passengers on Pullman cars; that the distance from the top of the foot box to the lowest step of the car steps of the Pullman car was about six inches.

Defendant adduced testimony tending to prove that the station platform was "in comparatively good condition," that the foot box

was in good condition and stood on a "solid surface," and that plaintiff, when she attempted to board the car, placed her right foot on the foot box and grabbed the hand rail with her right hand, then turned her head to speak to some one standing on the station platform, and that plaintiff, while her head was thus turned, endeavored to put her left foot upon the first step of the platform steps, but missed it, causing her to fall upon the car steps.

[2] We are inclined to the view and so hold that we have here a state of facts and circumstances on which reasonable men may well differ as to whether or not the defendant was guilty of negligence, which was the proximate cause of the injuries complained of, by a failure to exercise the proper degree of care in furnishing plaintiff a reasonably safe means for boarding its train, as charged in plaintiff's petition, and that therefore the court properly submitted the case to the jury. *Migge v. Ry. Co.*, 75 Wash. 197, 134 Pac. 815; *Southern Railroad Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015.

The second point made by appellant is that the court erred in giving instruction No. 1 at the request of plaintiff. Said instruction covers the entire case and directs a verdict. Defendant criticizes said instruction in several particulars, none of which, however, after a careful reading of the instruction, do we find tantamount to reversible error.

[3] Plaintiff's suit was not alone against the appellant railroad company, but also against the Pullman Company, and, as stated above, at the close of plaintiff's case the court sustained a demurrer as to the said Pullman Company, whereupon plaintiff took a nonsuit with leave to set said aside. It is here urged that the instruction is misleading in that from its language the jury might infer that the Pullman Company as well as appellant here had been retained as a defendant in the case. This point is without merit. The jury could not have been misled in this respect in that throughout the presentation of plaintiff's case the Pullman Company was represented by a special attorney who cross-examined plaintiff's witnesses, but withdrew from the active trial of the case upon the court sustaining the Pullman Company's demurrer at the close of plaintiff's case.

[4] It is also urged that the instruction is erroneous in that it permits the jury to find defendant liable for what would have been negligence on the part of the Pullman Company, but as to which the court in sustaining the Pullman Company's demurrer held that the Pullman Company was not negligent. It is readily apparent from a reading of the record the the court's reason for sustaining the Pullman Company's demurrer was its belief that plaintiff had failed to show that the Pullman Company was the owner of the foot box in question, and that one of its employes



had placed it upon the platform where plaintiff met with her injuries. But, as is stated in the case of *Siegel v. Railroad Co.*, 186 Mo. App. 645, loc. cit. 654, 172 S. W. 420, 422:

"A railroad company, a common carrier, is responsible for the operation of the train to which a sleeping car or Pullman, as commonly called, is attached, or of which train it is a part; the sleeping car company, if the sleeping car is under a separate ownership, not being responsible for the operation of the train."

[5] And, as our Supreme Court held in the case of *Walker v. Railroad Co.*, 178 S. W. 108, it is the duty of the common carrier to use the utmost care, skill, and diligence to transport its passengers. This utmost care, skill and diligence is what a cautious man in similar employment would use.

"Carriers of passengers should anticipate both old and young women, feeble and delicate people, as well as the strong and robust, will seek passage on their cars and provide suitable platforms or steps for that purpose."

And so under this record whether the Pullman Company, upon a proper showing, should have been held equally liable with the defendant appellant, or whether it may be liable over to the defendant appellant for any damages which the latter may be required to pay on account of the injuries complained of here, are questions which need not be here considered.

[6] Nor can we rule that under the said instruction the jury might find liability of the defendant if it found plaintiff's fall was due to the foot box's uneven and unsafe position, without finding that the same was due to the negligence of the defendant or the Pullman Company's employes.

[7] Nor does the instruction mislead the jury in submitting plaintiff's alleged injuries, as is contended for by appellant, in that an examination of plaintiff's own testimony we find substantial testimony with reference to each of the alleged injuries which are submitted to the jury in said instruction; and we are satisfied that the amount of the verdict is moderate in light of all of the evidence in the case.

While the instruction bears evidence of having originally been drawn in contemplation that plaintiff's case would be submitted

to the jury as against both the defendants, and that when the plaintiff was forced to take a nonsuit as against the Pullman Company, plaintiff changed the said instruction to conform to the new situation, leaving the resulting instruction somewhat cumbersome and not as concise as counsel should have made it, yet on the whole it fairly and correctly submitted the case to the jury.

[8] Nor can appellant be heard to complain of the amended instruction given by the court for defendant, as in our view it concisely and fully covered defendant's theory of the case. Said instruction is as follows:

"The court instructs the jury that you cannot presume or imply negligence from the mere fact alone of plaintiff falling upon or against the steps of the car and being injured, and that you can find for the plaintiff only in the event that you further find and believe from the preponderance—that is, the greater weight—of the credible testimony that the defendant Atlantic Coast Line Railroad Company was guilty of negligence in one of the following particulars:

"(1) In failing to place the footstool upon an even surface upon the platform.

"(2) In failing to place the footstool in a safe and even position.

"And you must further find, before you can render a verdict for the plaintiff, that such act or acts of negligence on the part of the defendant Atlantic Coast Line Railroad Company tended directly to cause the injury to plaintiff.

"And you must further find from the evidence, before you can find for the plaintiff, that the injuries complained of, if any you find, were not directly caused by any of the following acts of the plaintiff, if you so find that she was guilty of any of them and that it or they were negligent, as follows:

"(1) In plaintiff's failing to take a secure hold with her hand of the handrail of the car.

"(2) In plaintiff's failing to give the child she carried to an employé while she boarded the car."

It follows from what we have said above that we do not find any error in the record prejudicial to defendant's rights.

The judgment should be, and the said is hereby, ordered affirmed.

ALLEN, P. J., and DAUES, J., concur.

**MEEKS v. STATE. (No. 6298.)**

(Court of Criminal Appeals of Texas. June 1, 1921. Rehearing Denied Oct. 12, 1921.)

**1. Criminal law §1099(10) — Statement of facts not signed by attorneys or approved by trial judge not considered.**

Portion of record purporting to be a statement of facts, but neither signed by the attorneys nor approved by the trial court, cannot be considered.

**2. Criminal law §1091(4)—Bill of exceptions complaining of answer to question, without giving answer or disclosing name of witness, held insufficient.**

Bill of exceptions complaining of action of court in admitting answer to question, without showing the answer or stating name of witness, held insufficient for consideration.

Appeal from Criminal District Court, Dallas County; C. A. Pippen, Judge.

Porter Meeks was convicted of robbery, and he appeals. Affirmed.

A. U. Puckett, of Dallas, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

**HAWKINS, J.** Conviction was for robbery. Punishment was assessed at 25 years in the penitentiary.

[1] No statement of facts which can be considered by this court accompanies the record. We find on file a question and answer transcript of the evidence, certified to by the official reporter, but even this is not certified to by attorneys or by the trial judge; even if it were we could not consider it. Section 601, p. 309, Branch's Annotated Penal Code. There is in the record what purports to be a statement of facts, but it is neither signed by the attorneys nor approved by the trial judge, and hence the same cannot be considered. If we were permitted to consider the same, the facts stated therein are sufficient to warrant the conviction in this case, beyond question.

[2] Only one bill of exceptions appears in the record, which is here set out in full:

"Be it remembered that upon the trial of the above entitled and numbered cause, the state introduced the following testimony, to wit: 'I will ask you if you were arrested on March 18, 1914, at Tulsa, Okl., charged with highway robbery?' Which testimony was objected to by the defendant at the time it was offered, upon the following grounds, to wit, because said testimony was immaterial, irrelevant, and improper, and tended to inflame and prejudice the minds of the jurors against the defendant. And the court overruled said objections and admitted said testimony, to which decision of the court the defendant then excepted, and tenders this bill of exceptions, and asks that the same be signed and filed as a part of the record in this cause."

It will be observed that the bill fails to show any answer to the question, yet it appears to be a complaint as to the admission of testimony. This court does not know who the witness was to whom the question was propounded, whether the accused or some other witness. It is scarcely necessary to add that in no respect does the bill comply with the requirements of the law. We refer only to the general rules with reference to bills of exceptions as given in Branch's Annotated Penal Code, § 207, etc.

The record discloses no fundamental errors.

Judgment is affirmed.

**ARDRY v. STATE. (No. 6337.)**

(Court of Criminal Appeals of Texas. June 15, 1921. Rehearing Denied Oct. 12, 1921.)

**1. Criminal law §726, 728(5) — Retaliatory remarks of prosecutor held not error in absence of special charge requesting withdrawal.**

Improper remarks of the prosecutor that defendant's counsel went out of the record and told the jury what a notorious character prosecuting witness had been, but did not tell them about defendant's family, two of whom had been to the penitentiary, were not error, in face of the provocation, and in the absence of a special charge requesting withdrawal, though the proper practice would have been to object to opposing counsel's improper argument instead of resorting to like infringement of the rule.

On Motion for Rehearing.

**2. Criminal law §1038(3), 1056(2), 1186(4) — Omission to submit issue not reversible error in absence of exceptions or requested instructions.**

Under Vernon's Ann. Code Cr. Proc. 1916, art. 743, prohibiting reversal except for error injurious to defendant's rights and requiring that all objections to charges and refusal or modification of special charges be made at the trial, where defendant, charged with assault with intent to murder, took no exceptions to and requested no special instructions to supply an omission of the court to submit the issue whether the assault was made to prevent the injured party from removing benches from a church of which defendant was custodian, the Court of Criminal Appeals cannot grant relief; no fundamental error having been committed.

Appeal from District Court, San Augustine County; V. H. Stark, Judge.

Bill Ardry was convicted of assault with intent to murder, and he appeals. Affirmed. Motion for rehearing overruled.

H. B. Short, of Center, and E. T. Anderson, of San Augustine, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

HAWKINS, J. Conviction was for assault with intent to murder. Punishment assessed at two years in penitentiary.

Appellant was charged with assaulting one Butler Davis. All parties were negroes. It is not necessary to set out the evidence. It is sufficient to sustain the finding of the jury. Immediately after the assault on Butler Davis (who was an old negro man), several of his sons seem to have severely "man-handled" appellant in resentment of the attack on their father. The trouble arose over a controversy as to whether dinner should be served in church or out on the church grounds.

Only one bill of exceptions appear in the record.

While the prosecuting attorney was making his closing argument, he said:

"Gentlemen of the jury, Mr. McLaurin got out of the record and told you that he had been knowing the prosecuting witness, Butler Davis, for a long time, and what a notorious character he had been, but he did not take the stand and testify. Mr. McLaurin didn't tell you about the Ardry negroes, and that two of them had been to the penitentiary."

When objection was made, the court admonished the district attorney to stay in the record. It does not appear any further objectionable language was indulged in, and no charge was requested directing the jury to disregard the argument.

It is to be regretted that so many cases before this court disclose the fact that attorneys on both sides in many instances are seized with an uncontrollable desire to discuss matters dehors the record. The prosecuting attorney seems to have been provoked to his breach of legitimate argument by similar action on the part of opposing counsel. Of course, the proper practice would have been to have objected to appellant's counsel making the improper argument in the first instance, and not have resorted to like infringement of the rules in reply.

[1] There was no intimation that appellant had been to the penitentiary. In the absence of a special charge requesting withdrawal of the improper statement, we do not feel, in face of the provocation, to hold the remarks reversible error. Branch's Crim. Law. p. 32, § 62, collection of authorities; Norris v. State, 32 Tex. Cr. R. 172, 22 S. W. 592.

The judgment is affirmed.

On Motion for Rehearing.

[2] Appellant urges that the issue was raised that any assault made by appellant was to prevent the injured party from removing benches from the church, of which appellant was custodian, and that fundamental error was committed when the trial judge omitted the submission of this issue to the

jury. We do not discuss the question as to whether the issue claimed was fairly raised by the evidence. If it be conceded that the issue was raised and omitted from the court's charge, in the absence of exceptions because of such omission, or special requested instructions to supply same, made or requested at a time when the court might have corrected the alleged omission, this court is without authority to grant relief. The latter clause of article 743, C. C. P., reads:

"All objections to the charge, and on account of refusal or modification of special charges shall be made at the time of the trial."

Appellant's contention would have been not without merit prior to the amendment of 1897; but the decisions of this court construing that part of the article just quoted, and found annotated in volume 2, Vernon's Crim. Statutes, on page 519, are against appellant's position. Hence we are constrained to hold no such fundamental error was committed as to require a reversal of the case.

The motion for rehearing is therefore overruled.

## RETTIG v. STATE. (No. 6329.)

(Court of Criminal Appeals of Texas.  
June 22, 1921. Rehearing Denied  
Oct. 12, 1921.)

1. Rape  $\S$  46—Witness held properly permitted to testify as to condition of ground where assault was claimed to have taken place.

In prosecution for assault with intent to rape, in which prosecutrix and her sister claimed to have been assaulted by defendant and another, a witness to whom the girls had told the particulars, and had pointed out the direction of the place where it had occurred, and who testified to having followed tracks of two girls and two men, could testify as to condition of the ground, grass, and underbrush, where it appeared that the place so described was the same place as that described by the girls.

2. Witnesses  $\S$  298½—Court cannot require prosecutrix in rape case to subject herself to examination by physician.

In prosecution for assault with intent to rape, in which defendant claimed to have had frequent intercourse with prosecutrix prior to the alleged assault, the trial court cannot require prosecutrix to be examined by physicians appointed by the court to ascertain whether she had led a virtuous life.

3. Rape  $\S$  59(23)—Jury should be instructed on aggravated assault only where issue is fairly raised by evidence.

The court, in a prosecution for assault with intent to rape, should instruct on aggravated assault only where the issue is fairly raised by the evidence.

**4. Rape  $\S$ 59(23)—Evidence held not to require instruction on aggravated assault.**

In prosecution for assault with intent to rape, evidence held not to require instruction on aggravated assault.

**5. Criminal law  $\S$ 938(1)—New trial on ground of newly discovered evidence properly denied.**

In prosecution for assault with intent to rape, denial of motion for new trial on ground of newly discovered evidence held proper where witnesses were present at the time of the trial, and where the testimony of two of the witnesses would have been inadmissible as hearsay, and the testimony of the third would merely tend to impeach the testimony of prosecutrix.

**6. Criminal law  $\S$ 730(7)—Improper argument cured by instructions.**

In prosecution for assault with intent to rape, district attorney's argument that the sister of the prosecutrix had also been knocked down and raped by defendant's companion, if improper in that there was no evidence thereof, was cured by the prompt action of the court in stating that there had been no testimony as to such facts, and that the jury should disregard the argument, and in giving a written instruction to the same effect.

Appeal from District Court, Rusk County; Chas. L. Brachfield, Judge.

Monnie Rettig was convicted of assault with intent to rape, and he appeals. Affirmed.

R. T. Jones, of Henderson, for appellant.  
R. H. Hamilton, Asst. Atty. Gen., for the State.

**HAWKINS, J.** Conviction was for assault with intent to rape Allie Jordan, alleged to have been committed on or about the 16th day of April, 1919, and punishment was assessed at three years' confinement in the penitentiary.

Allie Jordan and her sister Nancy were negro girls, and upon the day of the alleged offense had been washing for the family of Mr. Sam McKnight. About 1:30 o'clock in the afternoon they finished their work and started home, going through the fields. When about 200 yards from McKnight's place, they met two negro men, the appellant in this case, Monnie Rettig, and Harvey Johnson. According to the testimony of the two girls, both the negroes were armed with pistols, and, with the pistols displayed, ordered the two girls across the field and into a strip of woods. This point was about 300 yards from the home of W. B. Harvey. Allie Jordan says that at this point the appellant threw her down, pulled up her clothes, pulled out his male person, and was getting on top of her; that she was struggling all the time, and that her sister got a stick and began to beat him, and that between her efforts and the efforts of her sister she got away from the

appellant and ran towards Mr. Harvey's house; that about the time she got loose from appellant Harvey Johnson caught hold of her sister and pulled her off to one side; that she, Allie, went to Mr. Harvey's house and reported to him that a negro man was ruining her sister, and wanted him to go down and help her. She claims when she got loose from appellant he shot at her, and told her if she did not come back he would shoot her God damn head off.

The testimony of Nancy Jordan is substantially the same. She claims that, after Harvey Johnson took her away from where she was beating appellant, that he (Johnson) made an assault on her; that Allie got loose from the appellant by her help. She claims to have hollered for help, and says that Johnson got her down and got on her head, and told her he would beat her God damn brains out. She further says that Mr. Harvey and another party came to where she was, and that Johnson was on top of her when they got there. This witness also says that appellant fired one shot after Allie had got away from him, and run off.

W. B. Harvey testified that Allie Jordan came to his house crying on the evening in question, and wanted him to go make Harvey Johnson turn her sister loose. He saw the appellant going through the field to the big road as Allie Jordan was coming through the field, and saw him get within a short distance of her, and he seemed to be saying something to her, but does not know what it was; that she did not stop or have any conversation with him. This witness went to where Nancy Jordan and Harvey Johnson were, and described the condition of the ground and grass as being wallowed down, as though there had been tussling or fighting. Appellant did not testify himself, but offered evidence to the effect that he and Allie Jordan had been exchanging letters, which was admitted by her, and showed by one witness that upon the day in question a note had been carried to her while she was at Mr. McKnight's place, and that in reply to the note she had told the messenger to telephone appellant and tell him "Alright." She admits getting the note while she was at McKnight's, but disclaims having sent any message of any kind to the appellant. She also denied that there had ever been any improper relations between her and appellant, but admitted that they were sweethearts, and that she had been writing to him and he to her for some time. The foregoing is a sufficient statement of the facts, without going further into details.

[1] Complaint is made that Mr. Sam McKnight was permitted to testify for the state describing the condition of the ground, grass, and underbrush where the alleged assault occurred, the objection being that no one pointed out to him the place, and that there

is no sufficient evidence that the place he described was in fact the scene of the alleged offense. When we look to the record we find that the two Jordan girls had been washing for McKnight's family the day of the alleged offense. Mr. McKnight and his wife were in town when it occurred, and heard about it on their return home. He says the girls came and told the whole thing; that where the girls told him they first talked to them (the negro men) was at a little branch near his (witness') house; that he went the direction they said it occurred, and there were the tracks across the field, the two girls' tracks close together, and the tracks of the two men; that he followed the tracks across to the next hollow, and there found the place he described. When we take the description of the girls as to their first meeting with the men, and their movements afterwards, and the location of the place of the assault, it leaves no doubt but that the witness was describing the same place mentioned by the girls, and we think no error in this respect is disclosed.

[2] While Allie Jordan was testifying, and in response to questions by appellant's attorney, she denied that she had been meeting appellant and having intercourse with him, and asserted that she had never had intercourse with any man. Appellant's attorney then requested the court to appoint three reputable physicians to examine her, asserting that if such examination revealed that she was not virtuous it would support the theory that she had been theretofore indulging in sexual pleasure with appellant, and strongly tend to discredit her testimony, as to the alleged assault. We know of no rule of law that would authorize the trial judge to require a witness to subject herself to such an examination, or any right to enforce such an order, if made.

The court declined to charge upon aggravated assault, and appellant requested a special charge upon that subject, as follows:

"You are further instructed that, under the laws of this state, where an adult male commits an assault upon the person of a female, under such circumstances which would amount to only a simple assault were it committed upon another adult male, such assault amounts, under the laws of this state, to an aggravated assault. And it matters not whether the intention of said adult male in making such assault upon the person of a female, is for the purpose of committing a battery upon the person of such female, or whether the intention of the adult male in making such assault upon the person of such female is to forcibly, and against her consent, take liberties with her person, such as forcibly kissing her or embracing her. And in this connection, you are instructed that, if you should believe from the evidence that the defendant, Monie Rettig, on the occasion set out in the indictment in this case, he being an adult male, caught hold of the person of the prosecutrix, Allie Jordan,

she being a female, against her will and consent, and that he used force in so doing, yet, if you should further believe from the evidence that the defendant on such occasion did not do so for the purpose of forcibly raping or having carnal intercourse with the said Allie Jordan, then you cannot find him guilty of an assault with intent to rape, but only of an aggravated assault."

[3, 4] Where the issue is fairly raised by the evidence, the court should instruct the jury on aggravated assault, but where the evidence does not raise the issue such charge should not be given. For many cases collated, see Branch's Anno. P. C. vol. 2, § 1712. No testimony was offered by appellant as to what occurred at the scene of the alleged offense. He did not testify. Therefore we must ascertain the facts from the two girls who were present. From their testimony there is left no doubt as to the purpose and extent of the assault and the intent with which it was made. Nothing in evidence would authorize the conclusion that appellant's outrageous conduct was for any purpose short of a forcible copulation with prosecutrix. His theory, as embraced in the requested charge, that the assault was for some less culpable reason, finds no support in the testimony, and was properly refused.

[5] One error assigned is the failure of the court to grant a new trial on the ground of newly discovered testimony. All of the witnesses from whom such testimony was expected to be elicited were in attendance upon the trial, two of them having testified. There is no claim that they suppressed any information when interrogated about the case. There was simply a failure to ascertain by an investigation what witnesses present knew about the case. The affidavit of two of the witnesses attached to the motion for new trial show their testimony would be inadmissible, as it is hearsay, and undertakes to show what another party's opinion was as to whether or not appellant was guilty. The affidavit of the other witness goes only to impeaching testimony against prosecutrix. For the reasons stated above, we find no error on the court's part in overruling the motion for new trial, where sought for alleged newly discovered testimony. *Williams v. State*, 45 S. W. 572; *Powell v. State*, 36 Tex. Cr. R. 377, 37 S. W. 322; *Halliburton v. State*, 34 Tex. Cr. R. 410, 31 S. W. 297.

[6] The appellant, in his fifth bill of exceptions, complains that the district attorney, in making his closing argument for the state, said: "Nancy Jordan testified that Harvey Johnson knocked her down and raped her." It appears that counsel for appellant at once objected to said remark, on the ground that Nancy Jordan had given no such testimony. A controversy seems to have then arisen between the district attorney and the judge as to whether such

testimony had been elicited, whereupon the judge told the district attorney that there had been no such testimony from Nancy Jordan or any one else, and upon request instructed the jury to disregard the argument, and gave a written instruction to the jury to the same effect. If there was any error in the use of such language by the district attorney, the prompt action of the court, in our view, corrected the same, and we believe the bill of exceptions presents no error. Upon an examination of the statement of facts, however, we are not sure that the district attorney went very far afield in drawing the conclusion he seems to have drawn in making the statement complained of. We find that Nancy Jordan did testify that, when she was beating the appellant with a stick, undertaking to make him desist from his attack upon her sister, Harvey Johnson took hold of her and carried her off to one side, and that when she hollered for help Johnson threw her down and got on her head, and told her he would beat her God damn brains out. Further in her testimony it appears that Harvey Johnson laid his pistol down by his side, and she says when Mr. Harvey and Mr. McQuirter got to her that Harvey Johnson was on top of her, and that Johnson remarked, "Dar, now," and got up. As the matter is presented in the bill of exceptions, we think no such error is shown as will require a reversal of the case.

Having considered all matters of which appellant complains, we are constrained to hold that nothing is contained in the record that would authorize the reversal of this case, and the judgment is affirmed.

#### On Motion for Rehearing.

Appellant insists we were in error in holding that the issue of aggravated assault was not raised by the evidence, and that McCullough v. State, 47 S. W. 990, is decisive of the question. We have again examined the facts of the instant case in the light of the McCullough opinion, and are unable to bring ourselves to the conclusion that it should control in the present case. The learned judge who wrote in the McCullough Case did not undertake to set out all the facts, for we find this language:

"Other facts in connection with this matter, unnecessary to be stated, tend to show that appellant may not, at the time, have entertained the intent to accomplish his purpose at all hazards, but merely that the assault was for the purpose of persuading the prosecutrix to have carnal intercourse with him."

No arms were used in that case which would have excited fear. The entire record before that court evidently did not impress them as the facts in the present case appear to us.

Believing the proper disposition was made of the case in our former opinion, the motion for rehearing is overruled.

#### VRAZEL v. STATE. (No. 6226.)

(Court of Criminal Appeals of Texas. June 1, 1921. Rehearing Denied Oct. 12, 1921.)

**Indictment and information  $\Leftrightarrow$  125(42)—Count in indictment for manufacturing and possessing liquor held duplicitous.**

A count in an indictment charging that accused manufactured "and" possessed intoxicating liquor was duplicitous, each of such offenses not necessarily involving the other.

Appeal from District Court, Milam County; John Watson, Judge.

Henry Vrazel was convicted of manufacturing and possessing intoxicating liquors, and appeals. Reversed, and cause ordered dismissed.

R. Lyles, B. P. Matocha, and Robt. M. Lyles, all of Cameron, and T. H. McGregor, of Austin, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Milam county for manufacturing and possessing intoxicating liquor, not for medicinal, mechanical, scientific, or sacramental purposes, and his punishment fixed at one year in the penitentiary.

There were two counts in the indictment. The trial court submitted only the second, which charged that appellant manufactured and possessed the liquor in question; the jury being told in the charge that if they found appellant unlawfully manufactured or possessed such liquor they should convict. A motion to quash said count upon the ground that same was duplicitous and charged therein two separate and distinct felonies was overruled, and our Assistant Attorney General concedes in his brief that under the authority of Todd v. State, 229 S. W. 515, this was error. Finding ourselves in accord with his position, without discussion of the other matters raised on the appeal, the judgment will be reversed, and the cause ordered dismissed.

#### On Motion for Rehearing.

The state moves a rehearing. The ground of the motion is that manufacturing liquor and possessing liquor, though made separate offenses by the Dean Act, necessarily involve each other; and in such case two separate and distinct offenses may be charged in the same count. Nicholas v. State, 23 Tex. App. 317, 5 S. W. 241, State v. Randle, 41 Tex. 292, and

(233 S.W.)

Prendergast v. State, 41 Tex. Cr. R. 362, 57 S. W. 850, are cited as supporting the state's position. In the Nicholas Case no motion to quash for duplicity was made before judgment, and the court held it came too late afterward; the opinion indicating grave doubt as to the sufficiency of the indictment. In both the Randle and Prendergast Cases it was charged that the accused established a lottery, and by means of said lottery disposed of certain property. Judge Devine, in the Randle Case, says:

"The establishing of the lottery, as charged in the indictment, was merged in the disposing of certain property by reason of the lottery thus established. It is, in truth, taking the indictment together, but a charging of one offense."

And Judge Henderson in the Prendergast Case says:

"While it is true they are distinct offenses, yet they are different phases of the same transaction, and not repugnant to each other. Duplicious or repugnant matter will not be tolerated in the same count."

The Randle Case, *supra*, further quotes the rule as follows:

"Where the offenses are of a distinct nature, neither of them capable of being resolved into the other, it is error to join them in the same count. Where they are several in their nature, and yet of such a character that one of them, when complete, necessarily implies the other, there is no such repugnancy as to make their joinder improper. In fact, under such circumstances, it is less embarrassing to the defendant to be thus charged than to have each stage of the offense split from the context and set in a distinct count. 2 Whart. Preced. of Indict. and Pleas, 834."

If this text used the word "each" instead of the word "one," it appears to us that same would more nearly state a correct rule in regard to the exception set forth.

We do not doubt that liquor may be manufactured by one not in manual possession thereof, and certainly liquor may be possessed by one who had nothing to do with its manufacture, and we are of the opinion that each of these offenses does not necessarily involve the other.

The motion will be overruled.

# GUNTER v. STATE. (No. 6243.)

(Court of Criminal Appeals of Texas. June 8, 1921. Rehearing Denied Oct. 12, 1921.)

## 1. Criminal law §1159(3). — Conviction on conflicting evidence not disturbed.

In a prosecution for robbery, in which defendant claimed an alibi, and the conflict of

evidence was settled by the jury, the Court of Criminal Appeals will not undertake to say that the evidence did not sustain conviction, where two credible witnesses identified defendant.

## 2. Robbery §17(3)—Description of property in indictment held sufficient.

Description, in indictment charging robbery, of the property taken as a specified amount in money, *held* sufficient.

## 3. Robbery §17(4)—Value of property taken need not be stated in indictment.

The value of property taken in a robbery need not be stated in the indictment.

## 4. Criminal law §413(1)—Defendant's statements, when declining to escape from county jail, not admissible.

Testimony as to defendant's statements in declining to escape with other prisoners from county jail after his arrest *held* properly excluded, being self-serving.

Appeal from District Court, Stephens County; G. O. Bateman, Judge.

Wilburn Gunter was convicted of robbery, and he appeals. *Affirmed*.

Tom Leach, D. M. Doyle, and E. W. Bounds, both of Fort Worth, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Stephens county of robbery, and his punishment fixed at seven years in the penitentiary.

[1] Appellant and Joe Adams were members of a party at a camp in Stephens county. Most, if not all, of the men were workers on oil wells. On the afternoon before the alleged robbery, appellant, Adams, Tyler, the alleged injured party, and several other men were engaged in a game of poker, and money was displayed by Tyler and a man named May and others. This was October 19, 1920. During that night a call was made for men to come to a certain well and do some casing. Adams was on the crew called, but excused himself and did not go. Appellant also remained in the camp. The evidence showed that the men who responded to said call worked at the particular job until about midnight on the 20th; that about 6 o'clock on the afternoon of the 20th, Tyler had occasion to go back to camp, and there saw appellant and Adams, who asked him about what time the party expected to get through, and he told them about 12 o'clock that night. About the time mentioned, and as the party of men who had been engaged in said casing were returning to camp in an automobile, they were held up

by two men at the point of pistols and robbed of various amounts of money. The indictment in the instant case charged robbery of Tyler, from whom the testimony showed they obtained \$41.

On the trial Tyler and May positively identified both Adams and appellant by their voices and seeing their faces during the robbery. As the party in the automobile was leaving the scene, Carpenter, one of the men in the automobile, said it sounded like Joe Adams' voice, and some one else said it was Joe and this appellant. Lee, one of the men in said car, testified he was excited, but when the fact was mentioned he thought he recognized Adams' voice. The defense was an alibi; appellant's brother, sister-in-law, nephew, and some other witnesses corroborating substantially appellant's own evidence that he was in the tent of his brother-in-law at the time of said robbery. The companion case of *Adams v. State* (No. 6242) 233 S. W. 844, is this day decided, and many of the questions raised in the record now before us are discussed and disposed of in the opinion in that case and will not be further referred to. That opinion disposes of the statements of Carpenter and others directly after the alleged robbery, and also of the objections to what transpired in the poker game on the day preceding said robbery.

The conflict of evidence as to appellant's presence and participation in the robbery was settled by the jury, and we cannot undertake to say that the verdict is not supported. Two witnesses, apparently credible, testified positively to their identification of appellant as one of the robbers.

A number of bills of exception were taken, which are not discussed in appellant's brief; but we have examined each of same, and find none of them containing error, for which reason we conclude same were not here urged by able counsel representing appellant.

[2, 3] The four special charges refused contained nothing not in the main charge. A description in the indictment of the property alleged to have been taken in the robbery as \$41 in money was sufficient, and proof of such fact met the requirements of the law. The value of the property taken in a robbery case is not necessary to be stated in the indictment. These questions have been settled in many decisions.

[4] That appellant declined to escape with other prisoners from the county jail after his arrest herein, together with what he said at said time, was properly rejected, when offered in evidence by appellant, as same was purely self-serving.

No error appearing in the record, the judgment of the trial court will be affirmed.

### ADAMS v. STATE. (No. 6242.)

(Court of Criminal Appeals of Texas. June 8, 1921. Rehearing Denied Oct. 12, 1921.)

1. Criminal law  $\S$  1118—Ruling on motion for continuance not considered, in absence of the motion, notwithstanding clerk's affidavit that it was lost.

Overruling of motion for a continuance will not be considered on appeal, where the motion is not in the record, notwithstanding clerk's affidavit that the motion was filed and overruled, and subsequently lost, since lost records should be substituted in the manner prescribed by Rev. St. art. 2157.

2. Criminal law  $\S$  1169(2)—Testimony as to declaration held not ground for reversal, in view of other testimony.

In prosecution for robbery, the admission of testimony as to a declaration made by one of the victims to the others, after the commission of the crime, that the defendant was one of the robbers, held not ground for reversal, where the four victims all testified during the trial; two of them definitely identifying defendant as one of the robbers.

3. Criminal law  $\S$  369(15), 370 — Evidence that defendant engaged in poker game for money with victims of robbery admissible.

In prosecution for robbery, in which two of the victims identified defendant as one of the robbers, testimony as to defendant being engaged in the game of poker for money with victims of robbery on the second day preceding the day of the offense would have been admissible, as bearing on the ability of the victims to identify the robbers, and as bearing on the knowledge of the defendant that the victims were in possession of money.

4. Criminal law  $\S$  1128(4)—Disqualification of judge cannot be established by ex parte affidavit filed in Court of Criminal Appeals.

The disqualification of the judge who tried the case cannot be established, on appeal from conviction, by ex parte affidavit filed in the Court of Criminal Appeals.

5. Criminal law  $\S$  1158(1)—Remedy for judgment, void because of disqualification of judge, in a proceeding in a court of jurisdiction to determine issues of fact.

If a judgment of conviction is void by reason of the disqualification of the trial judge, the remedy is not to show such disqualification on appeal, but a proceeding to have the judgment set aside in a court having jurisdiction to determine the issues of fact.

Appeal from District Court, Stephens County; V. L. Shurtleff, Special Judge.

Joe Adams was convicted of robbery, and appeals. Affirmed.

Tom Leach, D. M. Doyle and E. W. Bounds, both of Fort Worth, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.



MORROW, P. J. Conviction is for robbery; punishment fixed at confinement in the penitentiary for a period of seven years.

[1] In the absence of the application for a continuance, which is not in the record, we are unable to appraise the merits of the bill of exceptions complaining of the action of the court in overruling the motion. The affidavit of the clerk, filed in this court, to the effect that the motion for a continuance was, in fact, filed and overruled, and subsequently lost, does not suffice. Lost records should be substituted in the manner prescribed by the statute. *Lunsford v. State*, 1 Tex. App. 449, 28 Am. Rep. 414; *Rogers v. State*, 48 Tex. 406, Revised Civil Statutes, art. 2157.

[2] The bill complaining of the receipt of evidence that after the robbery one of the victims remarked to the other that the robbery was committed by "Blackie" Gunter and Joe Adams shows no error. The bill is too meager to inform the court of the circumstances under which the declaration was made; but, if the statement of facts be looked to in aid of the bill, it is not apparent therefrom that the evidence was not admissible as a part of the *res gestæ*. If it were not so, the evidence is not harmful to a degree requiring reversal, inasmuch as the parties who made and heard the declaration all testified as witnesses; two of them definitely identifying the appellant and Gunter as the persons who made the assault, and the others relating circumstances pointing thereto.

The witnesses Lee, Carpenter, May, and Tyler were riding in an automobile at nighttime. They were stopped and robbed by two men. The witnesses were all well acquainted with the appellant and Gunter, knew their appearance, and knew their voices. Lee testified, describing the robbery, and said:

"I heard one of the men only talk, and did not recognize his voice until Slat's mentioned it, and then I thought I heard Joe Adams' voice, but was not sure. Their faces were covered. I was excited. I do not mean to tell the jury I know who either one of these parties were. I don't know who they were."

Carpenter testified that he heard the voice of one of them; that he heard the other one's voice, but could not tell what he said; that two words, one voice said, were like Joe Adams' voice. Witness also said that he and Adams were still friends, and that he might be mistaken as to Adams' voice.

May testified that, upon reaching a point about 500 yards from the tent, Joe Adams and Wilbur Gunter jumped in front of them and hollered, "Stop!" that they had a flashlight, and that he saw a gun in the hands of Joe Adams, who hollered, "Hands up!" that the witnesses got out of the car and were lined up; that Joe Adams held the gun on them while they were searched by Blackie Gunter.

"I know it was Adams and Gunter because, when they jumped in front of the car, the car light threw light on Adams without the handkerchief and he run back several steps. I heard them talk—both Joe Adams and Blackie Gunter told us to line up. I am positive it was them, and I knew them. Gunter had an automatic and Adams had a revolver. Adams had a flashlight. I had seen him with a flashlight several times at the camp."

Tyler testified in substance as did May, declaring that he recognized both Adams and Gunter; that he saw their faces before they pulled their masks over them; that he saw a gun in appellant's hand, but not in Gunter's hand.

"I heard the voices of these men. It was the voice of Adams and the voice of Gunter. I could not be mistaken about that. After we all got in the car and drove a little piece, Carpenter spoke up and said that it was Adams and Blackie, and Lee said, 'Yes; that is who it was.'"

There was evidence that the appellants were working at the camp in which the parties robbed, or some of them, were also working. There were introduced circumstances suggesting that appellant and Gunter absented themselves from the company of the injured parties upon the occasion mentioned and intercepted them. Details of this testimony it is deemed unnecessary to relate. See *Gunter v. State* (No. 6243) 233 S. W. 843.

[3] The bill complaining of the admission of evidence that the appellant, on the second day preceding the offense, engaged in a game of poker with some of the parties who were afterwards robbed, shows no error. The bill does not state any surrounding facts, and does not show that the parties were engaged in gambling. If the statement of facts be looked to, to supplement the bill upon this point, we find that the witness Tyler testified that he was acquainted with appellant and Gunter; that he was running a casing crew; that he was working on his car, and they had a poker game in the tent; that he saw some money in front of May, but could not tell the amount. "I had some money in front of me." If this evidence was more specific, to show that appellant engaged in a game of poker for money, we think it would disclose no error. It was relevant to show the relation of the parties, as bearing upon the ability of the injured parties to identify the assailants, and also as bearing upon the knowledge of the appellant that May and Tyler were in possession of money.

[4, 5] There is filed in this court an affidavit suggesting that the special judge who tried the case was disqualified. Whether he was qualified or not depends upon the facts. These cannot be established by an *ex parte* affidavit filed in this court. If the judgment be void by reason of the disqualification of

the trial judge, the remedy is to be sought in a forum whose jurisdiction will enable it to determine the issues of fact.

Finding no error justifying a reversal of the judgment, its affirmance is ordered.

### TAYLOR v. STATE. (No. 6343.)

(Court of Criminal Appeals of Texas. June 15, 1921. State's Rehearing Denied Oct. 12, 1921.)

1. Larceny  $\S$ 3(4)—Farmer, taking possession of supposed stray pig, without intent to appropriate it, not guilty of theft.

A farmer, who takes possession of a pig interfering with his crops, thinking it a stray hog, and intending, not to appropriate it, but merely to estray it, or take legal steps to dispose of it, is not guilty of theft.

2. Larceny  $\S$ 68(2)—Whether defendant took pig merely with the intention to estray. It held for the jury.

In prosecution for theft of a hog, evidence held to require submission to jury of whether the defendant had taken the pig in his possession, after it had interfered with his crop, thinking it to be a stray pig, with the intention, not to appropriate it, but merely to estray it, or take legal steps to dispose of it.

3. Larceny  $\S$ 3(2)—Where property is taken for legal purpose, but thereafter appropriated, original taking not theft.

If one takes property for legal purpose, and thereafter conceives the intent to appropriate it, and does so appropriate it, his original taking would not be theft.

4. Criminal law  $\S$ 721½(2)—District attorney's argument, that defendant's wife would have given testimony showing defendant's guilt, if used as witness, not error.

Where defendant's wife had been sworn as a witness, but had not been used, district attorney's statement in argument that he believed defendant's wife, if used as a witness, would have sworn to facts believed by such attorney to show defendant's guilt, held not error.

Appeal from District Court, Henderson County; W. R. Bishop, Judge.

Adolphus Taylor was convicted of the theft of a hog, and he appeals. Reversed and remanded.

Miller & Miller, of Athens, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Henderson county of the offense of theft of a hog, and his punishment fixed at two years in the penitentiary.

[1, 2] By various special charges, the re-

fusal of which is complained of by bills of exceptions approved by the trial court, appellant sought to have his theory of the case presented to the jury. Appellant appears to have taken preliminary steps to raise a crop upon the land of the owner of the alleged stolen hog, but after the matter of theft arose said relationship seems to have been severed. The facts disclosed that appellant did not deny taking the hog in question. It was a small pig, and was carried by appellant to the home of his father-in-law, at which place it was recovered by the officers and restored to the owner. Appellant testified that the pig was interfering with his crop, and that he thought it was a stray, and that he consulted several people about what he should do, and they gave him advice, the substance of which was that he could do nothing more than to take the pig up and keep it until it could be legally estrayed. A Mr. Avant, who was consulted by appellant in regard to the matter, promised him that he would obtain legal advice for him the first time he went to town. Several other witnesses testified to the effect that appellant consulted them about said stray hog. There is some confusion in the record as to whether the hog he was talking to these people about was the pig in question, or another hog which appears to have been in the neighborhood; but this did not deprive appellant of his right to have an affirmative charge to the jury submitting the theory upon which he relied, and which was that the hog in question was that which he took up as an estray, and about which he consulted the various witnesses mentioned.

[3] There were a number of charges, presenting in various ways the theory relied upon by appellant. We do not think it necessary for the court to have given all of same in charge, but do think material error was committed by refusal of the court to submit said issue. The jury should have been substantially told that, if appellant took the pig in his possession, not intending at the time to appropriate same, but intending only to estray it or take legal steps to dispose of same, then he should be acquitted. It is also true that if one takes property for a legal purpose, and thereafter conceives the intent to appropriate same, and does so appropriate it, his original taking would not be theft.

[4] We do not think any error appears in the argument of the district attorney to the effect that, if the wife of appellant had been used as a witness, said attorney believed she would have sworn facts believed by him to show appellant's guilt. The wife of appellant had been sworn as a witness, but was not used.

Without further discussion of the case, for the errors above mentioned, the judgment will be reversed, and the cause remanded.

## On Motion for Rehearing.

The state, in a motion for rehearing, urges that, in giving special charge No. 5 for the appellant, the trial court gave the law substantially as stated by us in the original opinion as that to which appellant was entitled. Said special charge wholly omitted the essential element of the belief of the accused that the alleged stolen hog was an estray at the time he took same into his possession. There can be no question of the right of appellant to have the jury affirmatively told that, if he believed when he took up said hog that it was an estray, and that he did not then intend to appropriate it, he should be acquitted.

The motion for rehearing will be overruled.

## HOWARD v. STATE. (No. 6345.)

(Court of Criminal Appeals of Texas. June 15, 1921. Rehearing Denied Oct. 12, 1921.)

1. Criminal law  $\S$  507(1)—Girl living in house where liquor was manufactured, who was present at time of its manufacture, and tasted it, not an "accomplice."

In prosecution for manufacturing intoxicating liquor, a young girl who lived with defendant's mother in the house in which the liquor was alleged to have been manufactured, who had been present at the time the liquor was made, and had tasted it, was not by reason thereof an accomplice within the rule as to the corroboration of an accomplice's testimony.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. Criminal law  $\S$  507(1)—That witness was present at time of offense does not constitute witness an "accomplice."

The mere fact that a witness had been present at the time of the commission of an offense does not constitute the witness an accomplice within the rule as to corroboration of an accomplice's testimony.

3. Criminal law  $\S$  369(6)—Testimony as to purchase from one accused of manufacturing liquor admissible.

In prosecution for manufacturing intoxicating liquor, testimony that witness bought certain quantities of liquor from the defendant held admissible, as corroborative of the fact of such manufacture, and as illustrative of fact that manufacture was not for one of the excepted purposes.

4. Criminal law  $\S$  1045, 1056(2)—Error in charge not fundamentally erroneous not reversible in absence of exception or refusal of requested charge.

Unless the charge is fundamentally erroneous, either in its affirmative statement of the law, or by reason of failure to state the law, an error therein will not be held reversible unless the charge is excepted to at the time it is

given, or a charge correctly presenting the matter is refused, under Vernon's Ann. Code Cr. Proc. 1916, art. 735.

5. Criminal law  $\S$  1056(1)—Failure to submit issue as to corroboration of accomplice not reversible error in absence of exception.

When there is no question but that the record presents ample corroboration of the accomplice's testimony, or when it does not appear that the conviction rests upon the uncorroborated testimony of accomplice, failure to submit issue as to sufficiency of evidence to corroborate accomplice is not reversible error in the absence of an exception.

6. Intoxicating liquors  $\S$  236(19)—Evidence held to sustain conviction of manufacturing.

In a prosecution for unlawfully manufacturing intoxicating liquor, evidence held to sustain conviction.

Appeal from District Court, Kaufman County; Joel R. Bond, Judge.

Gene Howard was convicted of unlawfully manufacturing intoxicating liquor, and he appeals. Affirmed.

Cooley & Crisp, of Kaufman, for appellant.

H. R. Young, Co. Atty., of Kaufman, and R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Kaufman county of the offense of manufacturing intoxicating liquor, not for medicinal, scientific, mechanical, or sacramental purposes, and his punishment fixed at confinement in the penitentiary for a period of five years. The record is before us without any exception taken to the court's charge, and without any request for special instructions, and without a bill of exceptions to the introduction or rejection of any evidence. In his motion for new trial appellant complains that he was convicted on the uncorroborated testimony of accomplices; also that the trial court failed to tell the jury that certain witnesses were accomplices, and did not submit to the jury the issue as to whether such witnesses were accomplices, and did not submit the law of accomplice testimony; that appellant had no opportunity to procure counsel; and that the evidence does not support the conviction.

[1, 2] We do not think this record discloses a case resting on the uncorroborated testimony of an accomplice or accomplices. The main state witness was a young girl who lived in the house with appellant's mother, in which house the alleged manufacturing of liquor took place. This girl testified fully to appellant's manufacture of such liquor on more than one occasion. The only ground upon which any claim is put forward by appellant that she was an accomplice rests on her statement that she tasted said liquor,

and on some occasions drank a little of same, and that she was present at the time the liquor was made. The mere presence of a witness at the time of the commission of an offense does not call for an instruction on the law of accomplice testimony, or constitute such witness an accomplice. *Smith v. State*, 28 Tex. App. 309, 12 S. W. 1104. In our opinion, the fact that said witness stated that she had tasted the liquor in question, and drank a portion thereof, would not make her an accomplice. The state introduced evidence of officers to the finding in the house of appellant's mother of the apparatus identified and described by the girl as being that with which the liquor was manufactured. As far as we may determine from the evidence and the testimony of the witnesses, said apparatus appeared to be amply sufficient for the purpose for which it was apparently used. Said apparatus was introduced in evidence before the jury.

[3] In the record appears the testimony of one Jerry Williams that on different occasions, about the time appellant is charged to have manufactured said liquor, said witness had bought certain quantities of same from appellant. The fact that one purchases intoxicating liquor from one accused of the manufacture thereof might be admissible as corroborative of the fact of such manufacture, and also as illustrative of the fact that such manufacture was not for one of the excepted purposes. The fact of purchase, however, would be but a circumstance in a case wherein the charge was manufacturing.

[4, 5] It appears to be the law of this state since 1913 that, unless the charge of the court be fundamentally erroneous, either in its affirmative statement of the law, or by reason of its failure to state the law, an error therein will not be held reversible unless there be exception taken to such charge at the time it is given, or a charge correctly presenting the matter be refused. Article 735, Vernon's C. C. P.; *Childs v. State*, 81 Tex. Cr. R. 21, 193 S. W. 664; *Debth v. State*, 80 Tex. Cr. R. 4, 187 S. W. 341. When there is no question but that the record in a given case presents ample corroboration of the accomplice testimony, or when it does not appear that the conviction rests upon the uncorroborated testimony of accomplices, the failure of the trial court to submit that issue would not be held reversible error by this court in the absence of such exception.

[6] We are not at all inclined to agree with the contention of appellant that this conviction is not supported by the testimony, or that it rests upon the uncorroborated testimony of accomplices. Appellant was represented on the trial by counsel who seem to have developed his theory of the case fully.

We find no error appearing in the record, and an affirmance is ordered.

#### On Motion for Rehearing.

It is urged that the case should have been reversed for failure to submit the law of accomplice testimony. No exception being taken to such failure, and no request appearing for the submission of such issue, no reversible error would appear under the facts. In *Huggins v. State*, 85 Tex. Cr. R. 205, 210 S. W. 804, we said:

"No request for the submission of the questions whether the rule of accomplice testimony governed the state's witnesses having been made, their status would not be available to appellant upon appeal unless they came within the accomplice rule as a matter of law and there was not sufficient corroboration. We do not think they were accomplices as a matter of law. *Sanchez v. State*, 48 Tex. Cr. R. 591, 90 S. W. 641, 122 Am. St. Rep. 772; *Wright v. State*, 7 Tex. Cr. App. 574, 32 Am. Rep. 599; *Allison v. State*, 14 Tex. Cr. App. 122; *Jones v. State*, 48 Tex. Cr. R. 336, 88 S. W. 217, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759. If the contrary were true, however, we think the circumstances detailed in appellant's testimony afforded sufficient corroboration."

This is approved in *Chandler v. State*, 230 S. W. 1003. If certain witnesses were accomplices, as contended by appellant, but which we are not prepared to admit, still, it appearing in the record that there is ample evidence to corroborate said witnesses, the failure to submit such issue by the court would not constitute reversible error.

The motion for rehearing is overruled.

#### SANTIKOS v. STATE. (No. 6295.)

(Court of Criminal Appeals of Texas. June 8, 1921. Rehearing Denied Oct. 12, 1921.)

1. Criminal law §400(3)—Tax assessor's testimony as to contents of inventory of taxable property held admissible.

In prosecution for operation of theater on Sunday, in violation of Pen. Code 1911, art. 302, in which defendant denied ownership of theater, tax assessor's testimony as to contents of inventory of property rendered by defendant for taxation, constituting a public record in assessor's office, held admissible as a circumstance against defendant upon the issue of ownership, in view of Rev. St. arts. 7547, 7562, though assessment was not taken by the assessor in person, but by one of his deputies, and though assessor was not present at the time and was not acquainted with defendant's signature.

2. Criminal law §1169(2)—Admission of evidence harmless in view of other uncontradicted evidence sustaining finding.

In prosecution for operation of theater on Sunday in violation of Pen. Code 1911, art. 302,

involving issue of defendant's ownership of theater, the admission of tax record to prove ownership, if error, was harmless where there was sufficient uncontradicted evidence aside from such record to support the finding of the jury as to defendant's ownership.

Appeal from McLennan County Court; Giles P. Lester, Judge.

L. Santikos was convicted of violating Pen. Code 1911, art. 302, prohibiting the exhibition of certain amusements for pay upon Sunday, and he appeals. Affirmed.

W. L. Eason, of Waco, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

MORROW, P. J. Conviction is for violation of article 302 of the Penal Code, prohibiting the exhibition of certain amusements for pay upon Sunday. Appellant assails the correctness of the court's ruling in admitting in evidence, over appellant's objection, the assessment of his property for taxes. The evidence shows that the amusement was conducted on Sunday for pay in a place called the Royal Theater. The ownership of the theater was in issue. The state relied upon circumstances to establish the ownership of the property; that is, to establish the connection that appellant had with the operation of the theater. By one witness it was proved that the appellant admitted that he was the owner of the theater. It was shown that appellant had his office over the room in which the theater was conducted, and was often seen about the theater.

The operator of the machinery declined to disclose the name of his employer, for the reason that it would incriminate him, and the assistant manager refused to name the manager, or to state whether the appellant was connected with the business or not. Others testified that the Royal Theater was the appellant's place of business; that he had his office upstairs; that he ran the theater, and managed it; and that he admitted that he owned it.

In the bill of exceptions it was shown that the tax assessor appeared as a witness, and stated that he had an inventory of the property rendered by the appellant for taxes in McLennan county for the year 1920; that he did not make the assessment in person, but that it was done by one of his deputies;

that he was not present at the time; that he was not acquainted with the signature of appellant; that this inventory was a public record of the assessor's office, and bore date April 20, 1920.

The offense was charged to have been committed on the 23d day of January, 1921. Our statute (Rev. St. art. 7547) requires of the assessor that he ascertain and take a list of the taxable property, and provides in detail for a form of assessment blanks. See article 7362. Touching this character of evidence, Mr. Wigmore, in his work on Evidence, says:

"The duty of a tax assessor requires him ordinarily to ascertain, for each piece of property, the person owning or occupying it and the value of the property. It is also clearly his duty to record the facts thus ascertained. The only objection to the admissibility of his record as evidence of these facts must arise from the principle already considered (ante, § 1635), that the record of the assessor is not of his own personal deeds or observation, but of facts occurring without his observation. This objection is of no force when the officer's duty clearly requires him—as in the assessor's case—to depend upon investigation. If the assessor does not merely record the sworn statement of the claimant, but also satisfies himself by independent means, and follows his own judgment, his finding deserves some credit."

Among the cases cited by the author supporting the text as applicable to the ownership of property, we mention *Winter v. Bandel*, 30 Ark. 362; *Tolleson v. Posey*, 32 Ga. 372; *Painter v. Hall*, 75 Ind. 208; *Beckman v. Hamlin*, 23 Or. 313, 31 Pac. 707; *Fudge v. Marquell*, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; *Ivey v. Cowart*, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160.

[1, 2] We think the testimony was evidence of the contents of the public record, admissible as a circumstance against the appellant upon the issue of ownership. If in that view we were mistaken, the receipt of the evidence could not work a reversal, for the reason that there is no evidence controverting the admission and circumstances which the state introduced, and which were sufficient, aside from the tax record, to support the finding of the jury that the appellant was the owner of the Royal Theater.

The judgment of the trial court is therefore affirmed.

**GILLETT v. HUDSPETH. (No. 1162.)**

(Court of Civil Appeals of Texas. El Paso.  
May 5, 1921. Rehearing Denied  
Oct. 6, 1921.)

1. **Frauds, statute of §148(2)—Release of interest in land presumed in writing, where fact not alleged.**

Where the facts with reference to a release of an interest in land were pleaded generally, and it did not affirmatively appear whether the agreement was in writing, the presumption is that it was.

2. **Frauds, statute of §146—Statute works no change in pleadings, but establishes rule of evidence.**

The statute of frauds works no change in the pleadings, but establishes a rule of evidence.

3. **Frauds, statute of §56(5)—The statute applies to every agreement to alienate existing interest in land.**

The statute of frauds applies to every agreement to alienate an existing interest in land.

4. **Frauds, statute of §63(1)—Contract to pay attorney's fees from moneys, goods, or other property recovered in suit, held not to convey estate in lands.**

A contract to pay attorneys one-third of "all moneys, goods, chattels, or other property" recovered in a suit conveyed no present vested estate in lands, so as to invalidate a subsequent verbal release of an attorney's interest therein; lands not being specifically mentioned, and there being no evidence aliunde of such intent, and the last paragraph expressing the understanding of the parties that payment was to be "out of all moneys that may be recovered out of said suit," general words used after specific terms being limited to things of like kind and nature.

5. **Frauds, statute of §63(1)—Where contract to pay attorney's fees did not convey interest in lands, prior to acquisition of such interest, one could verbally waive his interest in the contract.**

Where a contract to pay attorney's fees from property recovered in a suit did not convey an interest in lands, a partner of the attorney executing such contract could, prior to the subsequent acquisition of lands in payment of such fees, waive his interest in the contract by a verbal agreement, or abandon such interest by repudiating the contract and failing to perform his part.

6. **Attorney and client §30—Attorney, by repudiating his part of agreement, held to have waived interest in land acquired by his partners.**

In action by attorney to recover an interest in land acquired by a former partner under a contract for the payment of fees from moneys, goods, and other property recovered in a suit, facts held to show that plaintiff repudiated and refused to perform his part of the contract, so that he waived or abandoned such interest.

7. **Attorney and client §30—Attorney held estopped to claim interest in land acquired under contract for payment of attorney's fees.**

Even if a contract for the payment of attorney's fees from moneys, goods, and other property recovered in a suit conveyed an existing interest in lands so recovered, a partner of the attorney executing such contract, who, declaring he had no faith in the client's claim, refused to take part in the prosecution of the suit, and expressly declared he would take no share in the fee to be earned, was estopped to assert any interest in lands subsequently acquired in payment of such fees.

8. **Attorney and client §30—Whether attorney authorized partner to manage litigation properly submitted to jury.**

In an action by an attorney to recover from a former partner an interest in land acquired as fees under a contract with a client, the court did not err in submitting to the jury questions as to whether plaintiff authorized defendant to manage the litigation; they being material on the question of whether defendant's expenditures were properly chargeable against the partnership.

9. **Attorney and client §30—Evidence of expenditures in prosecution of litigation held admissible in action by former partner to recover interest in fees.**

In an action by an attorney against a former partner to recover an interest in lands acquired under a contract with a client for the payment of attorney's fees from moneys, goods, and other property recovered in a suit, evidence of expenditures incurred by defendant in prosecuting such suit were admissible; they being proper credits in case it was held the contract conveyed an interest in lands and that plaintiff was not estopped to assert his claim.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

Action by J. A. Gillett against C. B. Hudspeth and another. Judgment for defendant Hudspeth, and plaintiff appeals. Affirmed, and motion for rehearing overruled.

F. G. Morris, of El Paso, for appellant.

A. J. Harper, Geo. E. Wallace, A. H. Culwell, and Jos. M. Nealon, all of El Paso, for appellee.

**HARPER, C. J.** This suit was instituted by appellant against C. B. Hudspeth and L. A. Dale for a partnership accounting. Specifically, plaintiff seeks to recover a half interest in certain land which he alleges was acquired by Hudspeth as fees under and by virtue of two contracts made with Mary Luna Jackson, for herself and her daughter Fannie, during the existence of the law partnership: (1) Representing the latter as a claimant for a half interest in the estate of E. R. Jackson, and as common-law wife; (2) Representing Fannie Jackson in the recovery of an interest in same estate. It was

alleged that the contracts were entered into during the partnership, prosecuted in part after the partnership had been dissolved, and that there were no debts existing against the firm, except those owing to Hudspeth for advancements made by him as expenses of litigation, etc., which should be ascertained and refunded, and after such refund plaintiff asked judgment for one-half of the value of the lands received by virtue of said fee contracts.

Defendant Dale was made party, that he might be precluded by the judgment. He disclaimed any interest. Hudspeth answered by: (1) General denial. (2) Pleaded settlement of all partnership business of the firm of Gillett, Hudspeth & Dale October 12, 1912. (3) By third paragraph in answer admitted that he entered into the contract described, first, with Mary Luna Jackson January 1, 1912; second, with Fannie Jackson April 7, 1912, "and that defendant and W. C. Linden and Jerome Shield, as a condition of such employment the contract contemplated and provided for and they agreed with Mary Luna Jackson to pay all the expenses of contesting the will of E. R. Jackson, deceased, and to advance to Mary Luna Jackson sufficient money to pay all living expenses, and defendant intended at said time that plaintiff should have a share in the fruits of such employment, provided plaintiff would pay one-half of the expense of the litigation, advance a portion of the expenses of Mary Luna Jackson, and assist in conducting the litigation; that in order to realize anything in the litigation it would be necessary for Mary Luna Jackson to establish that at the time of his death she was the common-law wife of E. R. Jackson; that shortly thereafter, while plaintiff and defendant were returning from Austin, where they had been engaged in other business, they stopped at San Antonio and had a conference with the attorneys for other claimants, whose interests were adverse to those of Mary Luna Jackson, and who furnished to plaintiff and defendant a memorandum of evidence they claimed to have to show that Mary Luna Jackson was not the common-law wife of E. R. Jackson, and therefore entitled to no interest in his estate; that after receiving this information defendant requested plaintiff to go with him to Sonora, Tex., to assist in the trial of the will contest of E. R. Jackson, deceased, but plaintiff informed defendant that, in view of the information received at San Antonio, he had no faith in the claims of Mary Luna Jackson, or Mary Luna, to any portion of the estate of E. R. Jackson, deceased, and that he was unable and unwilling either to pay any portion of the expense of contesting said will, or any portion of the living expense of Mary Luna Jackson pending such litigation, and that, if defendant desired to conduct said litigation, he could do so in

his own behalf and at his own expense, and that plaintiff would not assist him in any way; that defendant then agreed that he (defendant) would conduct said litigation, and would himself pay such expenses, and plaintiff then and there agreed by his acts, or by his words, acts, and conduct led defendant to believe, that if defendant would do so anything realized from said litigation would be the property of defendant, and, acting under such agreement with plaintiff, defendant did advance Mary Luna Jackson her living expenses during the pendency of such litigation, and paid all expenses incurred in the contest of said will, and did conduct said litigation and ancillary litigation—this portion of defendant's pleading being to the effect that plaintiff repudiated defendant's act in entering into said contract with Mary Luna Jackson, and that plaintiff abandoned said case and repudiated it, and effected as to said piece of business a dissolution of the partnership and an accounting and partition, by which defendant was to and did assume all liability incurred by the making of said contract in consideration of receiving all benefits that might accrue from said contract." (4) Sets up specific instance of plaintiff's refusal to assist or participate in the defense or prosecution of the claims. (5) Sets up compromise with the Catholic Church, a legatee, in which he and others personally bound themselves to pay \$225,000, and plaintiff's refusal to assume any obligation when apprised of the proposed compromise, and alleged that plaintiff further informed him that he would not claim any interest in anything realized by the contest of the said will, thus setting up plea of abandonment by plaintiff. The balance of the answer is devoted to an enumeration of expenses incurred and moneys spent in paying of the compromise debt, etc., which he alleges would not have been done, but for the fact that plaintiff by his acts as enumerated led him to believe that he would claim no interest in property acquired by way of estoppel.

Plaintiff, by supplemental petition, demurred and specially excepted to the sufficiency of the verbal agreement to release an existing interest in lands, claimed the protection of the statute of frauds, and specifically denied the alleged agreement to release his interest in the one-eighteenth fee interest to be obtained.

Tried to a jury, submitted upon special issues, and upon the answers judgment was entered for defendant, from which plaintiff has appealed.

#### First assignment:

"The court erred in overruling plaintiff's demurrer to paragraph 3 of defendant's third amended original answer, wherein a verbal release of plaintiff's interest in real estate was pleaded."

[1] It will be noted, from the copy of third paragraph above, that the facts with reference to a release are pleaded generally, and it does not affirmatively appear whether the agreement set up was in writing or not. Therefore the presumption is that it (the contract) was in writing. *Anderson v. Bank*, 191 S. W. 836; *Graham v. Kessler*, 192 S. W. 299.

[2] This statute works no change in the pleadings, but establishes a rule of evidence. *Robb v. Railway*, 82 Tex. 392, 18 S. W. 707; *Cross v. Everts*, 28 Tex. 523.

The second is that it was error to permit witness to testify over plaintiff's objections that the release was oral. If we are correct in the holdings hereafter upon the questions, it was not error to admit the testimony over objections.

The third:

"The court erred in submitting to the jury special issue No. 1 in the charge of the court, over objections of plaintiff, because it appeared from defendant's pleading that the alleged agreement of plaintiff to release or disclaim all interest in the fees in land obtained from the Jackson estate, and from defendant's own testimony, as a witness for himself, that said agreement was a verbal agreement to release an interest in real estate, when the plaintiff had invoked the statute of frauds by demurrer, plea, exception to the evidence, and by objection in writing to the submission to the jury of the issue as to the existence of said verbal agreement."

Issue No. 1 reads:

"Do you find from the preponderance of the evidence that the plaintiff, Gillett, agreed with the defendant Hudspeth at any time prior to the settlement with the Cardinals of the Roman Catholic Church in America that he would claim no further interest in the estate of E. R. Jackson, deceased, or any proceeds therefrom?"

The jury answered, "Yes."

The fourth charges error in overruling plaintiff's demurrer to defendant's plea of estoppel of plaintiff to avail himself of the statute of frauds. The fifth and sixth urge that it was error for the court to submit issues Nos. 2 and 3, in that said issues, when taken together, as intended by the court, presented an immaterial issue, in that the facts upon which they sought a finding were not sufficient, when found for the defendant, to take the verbal alleged release of an interest in real estate out of the statute of frauds.

Issues 2 and 3 read:

"(2) Do you find from the preponderance of the evidence that the plaintiff, Gillett, by his words or actions, or either, or both, reasonably caused the defendant Hudspeth to believe that he would claim no interest in the E. R. Jackson estate, or in any proceeds thereof which might be received by the said Hudspeth, or by the firm of Gillett & Hudspeth?

"If you have answered the last preceding question in the affirmative, then answer the following question:

"(3) Do you find from the preponderance of the evidence that the defendant Hudspeth was thereby induced and caused to assume financial obligations or to incur risks of financial loss?"

The jury answered "Yes" to each of said questions.

The contract which is made the basis of this suit in substance is:

"Know all men by these presents, that I, Mary Luna Jackson, party of the first part, \* \* \* being desirous of securing my legal rights and my lawful interest into and in the estate of \* \* \* E. R. Jackson, deceased, \* \* \* for and in consideration of the legal services now rendered by O. B. Hudspeth and W. C. Linden, attorneys at law, \* \* \* parties of second part. I hereby constitute and appoint the said parties of the second part \* \* \* my true and lawful attorneys to enter suit and prosecute in my name a suit for the recovery of my interest in all property whatsoever and wherever owned and claimed \* \* \* by E. R. Jackson, deceased, to sign my name to all papers necessary in the prosecution of said suit for said property in my behalf, and to act for me and in my stead in all matters wherein it may be necessary and wherein I may be qualified to act, and I hereby obligate myself to pay the said parties of the second part one-third of all moneys, goods, chattels, or other property that may be recovered out of said suit in my behalf into and for my interest in any property owned or claimed by Jackson, deceased."

"It is further understood that the parties of the second part hereby agree to pay all expenses that they shall incur in the bringing of this suit, \* \* \* and hold the party of the first part blameless of any expenses. \* \* \* It is further understood that for and in consideration of the one-third to be paid by party of the first part out of all moneys that may be recovered out of said suit parties of the second part agree to prosecute said suit to final determination, unless same shall be compromised in or out of court."

[3] The statute of frauds applies to every agreement by which one promises to alienate an existing interest in land. So, if the foregoing contract conveyed an interest in lands to Hudspeth whilst he was in the partnership, and Gillett could not waive or abandon his partnership interest, except in writing, then appellant's contentions are well founded. *Sprague v. Haines*, 68 Tex. 215, 4 S. W. 371.

[4] The writing above does not obligate Mary Luna Jackson to convey lands, or any interest therein, unless the words "other property," in the sentence, "I hereby obligate myself to pay \* \* \* one-third of all moneys, goods, chattels, or other property," should be so construed. Land is not mentioned, and by the last paragraph of the contract the parties have placed their own construction upon it by the expression, "one-



third to be paid by party of the first part out of all moneys that may be recovered out of said suit." A rule of construction of contracts is that, "when general words are used after specific terms, the general words will be limited in their meaning to things of like kind and nature with those specified." *Farmers' & Merchants' Nat. Bank v. Hanks*, 104 Tex. 320, 137 S. W. 1120, Ann. Cas. 1914B, 368. *Alabama v. Montague*, 117 U. S. 602, 6 Sup. Ct. 911, 29 L. Ed. 1000; *Hills v. Joseph*, 229 Fed. 865, 144 C. C. A. 147; *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955-957; *White v. Ivey*, 34 Ga. 186, at 199; *State v. Black*, 75 Wis. 490, 44 N. W. 635; *Livermore v. Board of Freeholders*, 29 N. J. Law, 245-247; *Remick v. Boyd*, 99 Pa. 555, 44 Am. Rep. 124.

The doctrine of *eiusdem generis* applies in the construction of this contract. The writing itself does not mention lands; so, if it was intended by the parties to convey an interest in a vested estate by it, the intention of the parties to this effect should have been established by evidence allunde the writing, and we find no evidence as to the intention of the parties outside of the writing, so, following the rule of construction invoked by appellee, no present vested estate in lands was conveyed thereby. *Elliott on contracts*, 1531.

[5, 6] So, if the contract does not specifically convey an interest in lands then existing in Mary Luna Jackson, Gillett acquired no interest by virtue thereof, therefore had none to convey, waive, or abandon by parol agreement, nor by acts of abandonment or estoppel. So, if the writing does not bind Mary Luna Jackson to convey an interest in land in consideration of the legal services of Gillett & Hudspeth, the only way he (Gillett) could have acquired an interest was by reason of the fact that an interest came to him by performance of the contract, either by the partners acting together, or by reason of the fact that Hudspeth, as a part of his partnership's obligation, performed the services, and as a consequence of such services an interest was acquired and vested in him (Hudspeth) in trust for both. Of course, in the latter case, Gillett could have, before the interest was acquired, waived his interest by parol agreement, or have abandoned any interest by repudiating the contract and failing to perform his part. The pleading, proof, and verdict of the jury are all sufficient to support the judgment in this respect.

[7] But, conceding that the contract in writing of Mary Luna Jackson, above quoted, conveys an existing interest in lands to be recovered, the courts recognize that in settlement of partnership affairs, if not in fact in cases of parol agreement between parties other than partnerships, the facts pleaded and admitted to be true by stipula-

tion in this case are sufficient to authorize a court of equity to hold Gillett estopped to assert any interest in the property so acquired. *Sanger v. Slayden*, 7 Tex. Civ. App. 605, 26 S. W. 847, 852; *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476; *Kirk v. Hamilton*, 102 U. S. 79, 26 L. Ed. 79, 82 (2d col.); *Dickerson v. Colgrove* 100 U. S. 578, 25 L. Ed. 618; *Rowson v. McKinney*, 157 S. W. 271; *Whaley v. McDonald*, 194 S. W. 409; *Phoenix Land Co v. Exall*, 159 S. W. 474.

The following language from the Supreme Court of the United States in *Denver v. Roane*, supra, is peculiarly applicable to the facts here:

"By the agreement of copartnership he had undertaken to share in the labor and to promote the common interest of the firm, and that was the foundation of his right to share in its earnings. It may be that the mere neglect of his duty would not have extinguished that right, but a repudiation of his obligations, refusing to act as a partner, \* \* \* is quite a different thing. It may well be considered as a repudiation of the partnership."

In the instant case Gillett declared that he had no faith in the client's claim, refused to take any part in the prosecution of the suit, and expressly declared that he would take no share in the fee to be earned.

The seventh, eighth, and ninth urge that it was error to refuse to render judgment for appellant for one-half of the fee under the Fannie Jackson contract. This contract was for a definite money fee, and antedated or preceded the declarations next above on the part of the plaintiff, and the pleadings and evidence are such that appellant's right to an interest in this fee is ruled by the holdings with reference to the Mary Luna Jackson fee.

[8] By the tenth and eleventh it is urged that it was error for the court to submit the following questions:

"Do you find from the preponderance of the evidence that the plaintiff, Gillett, by his words or actions, or either or both, authorized Hudspeth to manage whatever interest in the Jackson estate as a result of the employment?"

—and the fifth virtually the same. These assignments are not followed by propositions, but it is suggested that the questions submitted immaterial issues. They are material upon the question of whether expenditures by Hudspeth were properly chargeable against the partnership, and as to these items we find as follows:

[9] By many other assignments it is urged that it was error to admit evidence of each of numerous items of expenditures set up by appellee, by his answer that, if Gillett should recover an interest in the land, then, in that event, such interest should be offset by one-half of such expenditures, and other assignments and propositions charge error in submitting these items to the jury because,

It is claimed, they are not proper items of expense against the partnership assets.

The holdings above necessarily call for an affirmance of the trial court's judgment, and therefore render it unnecessary for this court to pass upon these assignments; but appellant having specifically urged us, in view of a possible application for a writ of error to the Supreme Court, to pass upon all assignments in his brief, we have reviewed the questions raised and have reached the conclusion that they are without merit, in that the items of expenditure pleaded, and for which there is an affirmative finding for appellee, are proper lawful offsets and credits which should be allowed, if it should be held that the contracts conveyed an interest in lands, and that Gillett, under the facts, is not estopped to assert any interest therein. Therefore these assignments are all overruled, without giving in detail our reasons in each case.

**Affirmed.**

**On Motion for Rehearing and Motion to Correct Statements and Findings of Fact.**

The portion of the opinion quoted:

"Of course, in the latter case, Gillett could have, before the interest was acquired, waived his interest by parol agreement, or have abandoned any interest by repudiating the contract and failing to perform his part. The pleadings, proof, and verdict of the jury are all sufficient to support the judgment in this respect"

—was first a conclusion of law that the written contract with Mary Luna Jackson did not in fact provide for payment of any part of the fee, for representing her, in lands, and we think a proper conclusion.

It is next urged that the statement that the pleading, evidence, and verdict as to the waiver, being before any interest accrued, is incorrect. The opinion up to that point makes no statement as to where the waiver took place, but simply declares that under the law applicable to the pleadings and facts Gillett could waive his interest in the Mary Luna Jackson fee, because there were no pleadings or evidence that Hudspeth and Gillett as a partnership had a contract in writing providing for a conveyance of land in payment of any portion of the fee; therefore, under such state of fact, he could by parol agreement before the interest was acquired waive such interest by repudiating and abandoning the contract. The evidence shows that Gillett, immediately upon seeing the contract with Mary Luna Jackson, repudiated it, because it provided that the attorneys should pay her personal expenses pending the litigation. Again, the evidence shows that, as pleaded, he repudiated after the conference with the attorneys for the Catholic Church at San Antonio, and again when the final

compromise agreement with the proponent of the will was presented to him.

As to the proposition that the seventh assignment does not treat of the Fannie Jackson fee, the second proposition thereunder speaks of the "Jackson estate fees." We took this to be applicable to both fees. The other propositions thereunder are answered by other parts of the opinion.

As to the third matter urged in the motion to correct the findings, that the Fannie Jackson contract antedated the repudiation, this contract is dated April 7, 1912, but recites that it had theretofore been entered into, and Hudspeth testified that after compromise with the Cardinals of the Catholic Church, in which they agreed to pay the \$100,000 Fannie Jackson fee, Gillett refused to sign, and again asserted that he would have no interest in the fee (pages 95 and 96, S. F.). Again (on page 108, S. F.) Hudspeth says:

"For looking after the Fannie Jackson interest I was required to take this fee in land at \$4.50 per acre before the compromise agreement and partition"

—and hence before the last assertion of Gillett that he would take no interest, thus clearly showing that the contract antedated the declarations of repudiation, and according to the record the most of the work in the case, to finally acquire such interest as Hudspeth now has, which Gillett seeks to divide, was done after the date of the writing, and there is no evidence in this record that Gillett performed any services as a partner in the prosecution of the suits, etc., whereby the property as a fee was finally acquired.

**Overruled.**

#### **HUNT et al. v. EVANS. (No. 6381.)**

(Court of Civil Appeals of Texas, Austin.  
June 22, 1921. Rehearing Denied  
Oct. 12, 1921.)

**1. Deeds  $\S$  120—Construed to confer largest estate possible.**

A deed will be so construed as to confer upon the grantee the largest estate possible.

**2. Deeds  $\S$  115—Land identified by whole instrument.**

Misdescription of land in one part of a deed will not invalidate the conveyance, when the premises to be conveyed can be properly identified by the whole instrument.

**3. Deeds  $\S$  112(2)—General grant of survey covers entire acreage.**

The general grant of a survey will cover the entire acreage, although only certain specified parts are definitely described.

**4. Deeds  $\S$  111—Language added to clear up ambiguous description given effect.**

Any language which is added to a conveyance for the apparent purpose of clearing

up either an indefinite or an ambiguous description will be given such effect.

**5. Deeds**  $\S$ 114(3)—Instrument held to convey entire survey lying in several counties.

A deed of a survey lying in several counties held to convey the entire acreage in all of the counties, though it described it as being only in one county, where there was an added clause to the deed, stating that such survey was located partly in three counties.

**6. Contracts**  $\S$ 153—Every part of instrument given effect.

When possible, every part of a written instrument must be given effect.

**7. Deeds**  $\S$ 109—Wide latitude permitted in evidence of intention.

Wide latitude is permitted in the introduction of evidence to determine the intention of parties to a deed.

**8. Appeal and error**  $\S$ 742(6)—Proposition in brief held too general.

A proposition, "The finding of fact by the court that is not supported by any evidence will be set aside and not construed by the appellate court," submitted under an assignment of error involving several different questions, was too general, and did not specify the particular finding claimed not to be supported by the testimony, and the assignment could not be considered.

**9. Vendor and purchaser**  $\S$ 85—Evidence held sufficient to show parol rescission of contract under which land was conveyed.

In an action involving title to land, evidence held sufficient to show a parol rescission and cancellation of a contract under which the land was conveyed, or a parol sale back to grantor.

**10. Vendor and purchaser**  $\S$ 85—Party held equitable owner of land, and entitled to rescind by parol.

Where M. was indebted to P., and, being unable to pay the debt, offered to convey certain land in satisfaction of the debt to any party P. should designate, and thereafter P. sold the land to H. wholly on credit, with the understanding and agreement that, when H. had paid the amount due P. by M., the latter should make a deed, and the deed was made conveying the land to the wife of H., in consideration of H.'s promise to pay M.'s indebtedness to P., and thereafter M. killed H., and H.'s wife told P. that she could not hold or pay for the land, and he paid her for the work done on the land and improvements, and M. agreed to and did sell the land to T., who paid P., held, that P. must be considered as the equitable owner of the land until it was sold to T., and that he acted as such in orally canceling and rescinding the sale to H.

**11. Frauds, statute of**  $\S$ 129(11)—Parol sale upheld, where grantee pays consideration, enters on premises, and makes improvements.

Parol sale of land will be upheld, where the grantee pays all or part of the consideration, enters on the premises, and in reliance on his purchase makes or erects valuable improvements.

Appeal from District Court, Tom Green County; C. E. Dubois, Judge.

Suit by S. H. Evans against M. F. Hunt and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Lee Upton, guardian ad litem, and Anderson & Upton, all of San Angelo, for appellants.

Blanks, Collins & Jackson, of San Angelo, for appellee.

KEY, C. J. Appellants' brief contains the following statement, which is conceded to be correct:

"Appellee, C. H. Evans, instituted this suit in the district court of Menard county on the 8th day of August, 1919, against Mrs. M. F. Hunt, Mrs. Elsie McShan and her husband, D. W. McShan, Lee Hunt, Charley Hunt, Pearl Hathcock and her husband, Tom Hathcock, Lela Hunt, Lena Hunt, and Willie Hunt, the last three named being minors, in trespass to try title to section No. 16, certificate No. 2/19, J. Pointevent, situated in the counties of Menard, Concho, Schleicher, and Tom Green, said suit being in the statutory form of trespass to try title, and pleading limitation under the three, five and ten year statute of limitations. The district judge of Menard county appointed Lee Upton, a member of the firm of Anderson & Upton, as guardian ad litem for the minors. By agreement the venue was changed from Menard county to Tom Green county.

"Appellants answered by general denial and plea of not guilty, and disclaimed as to any interest in the north one-half of the land sued for, and pleaded specially their title to the south one-half; that is, that on the 1st day of June, 1905, G. D. McGuffin, being the owner of the entire section, sold and conveyed the south one-half thereof to Mrs. M. F. Hunt, the wife of T. L. Hunt; that the grantees took possession of said premises and established their home thereon; and that thereafter, on or about July 6, 1905, T. L. Hunt, the husband of Mrs. M. F. Hunt, was killed, and left surviving his wife, Mrs. M. F. Hunt, and their children, the other defendants herein. Appellee amended, and, in addition to the allegations in the original petition, alleged a verbal rescission, cancellation, and resale of the south one-half of said section back to McGuffin, making the issues to be tried the record title to the south one-half of section 16, the verbal sale or rescission from Hunt to McGuffin, and limitation. The parties agreed upon common source in G. D. McGuffin and agreed that the south one-half of said section of land was wholly in Menard and Schleicher counties.

"The case was tried on the 27th day of October, 1920, before the court without a jury, and resulted in a judgment for appellee for the land sued for and a cancellation of the deed made to appellant by McGuffin, and against the appellants on the cross-action for the land and rents."

The undisputed proof shows:

"That section 16, certificate 2/19, J. Pointevent, 615.5 acres, in Concho, Menard, Schleicher

er, and Tom Green counties, subsequently reduced to 605 acres, was awarded John Hughes, as an actual settler, February 6, 1903, on his application filed with the county clerk of Concho county, December 4, 1902, and filed in said office December 8, 1902, as grazing land at \$1 per acre; that John Hughes and wife conveyed said section 16 to G. D. McGuffin October 23, 1903; that G. D. McGuffin made final proof of occupancy and improvements of said land as assignee December 15, 1905, and filed same in said office December 19, 1905; that said section 16 stands on the records of said office in the name of G. D. McGuffin as substitute purchaser, and the annual interest was paid on said account to November 1, 1917."

Also the following agreed facts:

"(1) That G. D. McGuffin was the common source of title, and that neither party will be required to go back of him in making out the case. (2) That the land described in plaintiff's petition is situated in Menard, Concho, Schleicher, and Tom Green counties, state of Texas; that is, 296 acres in Menard county, 193 acres in Concho county, 58 acres in Schleicher county, and 58 acres in Tom Green county—and that the south one-half of said section is wholly situated in Menard and Schleicher counties. (3) That the plaintiff, J. S. Tisdale, Mrs. E. P. Tisdale, and G. D. McGuffin paid all the taxes due on the lands involved in this suit each year as they accrued from the time they were acquired by the said G. D. McGuffin and that they also paid all interest due the state of Texas on such lands; neither interest nor taxes ever having been paid by either Mrs. M. F. Hunt or her husband, Lee Hunt."

The defendants having disclaimed as to the balance of the land, it is only the south half of the original survey that is involved in this case, which, as shown by the foregoing agreement, is situated entirely in Menard and Schleicher counties. This being the case, when the plaintiff offered in evidence a deed, dated January 19, 1915, from G. D. McGuffin and wife, the common source of title, to J. S. Tisdale, under whom appellee holds title, the appellants objected, because it only purported to convey that part of the original survey situated in Concho county, which objection was overruled, and that ruling is complained of by the first assignment of error.

By the second assignment appellants charge that the court erred in construing that deed to include the land in controversy. The deed is described in the statement of facts as follows:

"Plaintiff next offered in evidence a deed from G. D. McGuffin and wife, Leonora McGuffin, to J. S. Tisdale, dated January 19, 1906, acknowledged on the 19th day of January, 1906, before A. D. Moss, notary public, Concho county, Tex., and recorded in volume 10, page 372, Deed Records of Concho county, Texas, which deed is as follows, to wit: Recites: 'We, G. D. McGuffin and Mrs. Leonora McGuffin, husband and wife, of the county of Concho and state of Texas.' Consideration: 'Nine hundred and twelve and  $\frac{5}{100}$  dollars, paid by J. S. Tisdale,

the receipt of which is hereby acknowledged.' Conveys all right, title, and interest in and to that certain parcel of land in the county of Concho and state of Texas, described as follows, to wit: 'Section 16, certificate 2/19, J. Pointevent, 615½ acres, more or less, awarded John Hughes by state of Texas 12-14-02, and we also transfer all the money paid on account of above land, principal and interest to state treasurer.' Said section 16 lies partly in Concho, Menard, Tom Green, and Schleicher counties."

The trial court held that the deed purported to convey all the right, title, and interest of the grantors in the original section 16 certificate 2/19, J. Pointevent, 615½ acres, awarded to John Hughes by the state of Texas, etc., and appellants challenge the correctness of that construction, and assert that, if it conveyed any portion of that tract of land, it was only that part situated in Concho county, which is no part of the south half of the survey, the land in controversy in this suit.

It is believed that the trial court ruled correctly. *Hancock v. Butler*, 21 Tex. 804; *Farris v. Gilbert*, 50 Tex. 350; *Cleveland v. Sims*, 69 Tex. 153, 6 S. W. 634; *Cartwright v. Trueblood*, 90 Tex. 535, 39 S. W. 930; *Calder v. Davidson*, 59 S. W. 300; *Hatcher v. Stipe*, 45 S. W. 329; *Lauchelmer v. Saunders*, 27 Tex. Civ. App. 484, 65 S. W. 500. The authorities cited support the following propositions:

[1] First. A deed will be so construed as to confer upon the grantee the largest estate possible.

[2] Second. Misdescription of land in one part of the deed will not invalidate the conveyance, when the premises to be conveyed can be properly identified by the whole instrument.

[3] Third. The general grant of a survey will cover the entire acreage, although only certain specified parts are definitely described.

[4] Fourth. Any language which is added to a conveyance, for the apparent purpose of clearing up either an indefinite or an ambiguous description, will be given such effect.

[5] It is true that, while it is first stated that the land conveyed is in Concho county, it is further described by the original section, certificate number, the name of J. Pointevent, the original grantee, and 615½ acres, more or less, awarded by the state of Texas to John Hughes, etc. This latter description covers the entire survey, and therefore, as held in *Hancock v. Butler* and *Cartwright v. Trueblood*, supra, it should be construed most favorably to the grantee. Also, the other three rules above stated tend to support the construction that the instrument was intended to cover the whole of section 16. The first part of the description refers to the land as located in Concho county, but it is thereafter declared to lie partly in Concho, Menard, Tom Green, and Schleicher counties.

[6] There is still another rule which applies to the construction of all written instruments, which is that, when possible, every part of the instrument must be given effect. *Urquhart v. Burleson*, 6 Tex. 502; *Moore v. Waco*, 85 Tex. 206, 20 S. W. 61; *Thompson v. Langdon*, 87 Tex. 254, 28 S. W. 931. If the deed in question is construed as contended by appellants, no effect will be given to that portion of the description that describes the land as "section 16, certificate 2/19, J. Pointevent, 615½ acres, more or less, which lies partly in Menard, Tom Green, Concho, and Schleicher counties"; whereas, if the rule just referred to be applied, and effect be given to every clause of the description, the result will be that the conveyance will be held to cover, not only so much of the section in question as lies in Concho county, but its entire acreage. Hence we conclude that, when all of its terms are considered, if the deed be construed alone and without reference to extraneous facts, it should be held to apply to the entire section of land; but, if it should be held that the description in the deed is ambiguous, then we are of the opinion that the extraneous facts justified the court in resolving the ambiguity in favor of appellee.

In the first place, witnesses testified that McGuffin sold the section in question to Tisdale, and that the latter went into possession thereof, and he and those holding under him had had continuous and peaceable possession thereof ever since the date of the conveyance in 1906. If McGuffin had only conveyed so much of the section as was found in Concho county, surely he would not have delivered the whole section to Tisdale, and certainly not the 114½ acres which were never conveyed to Mrs. M. F. Hunt, but constituted an integral part of the north half of the entire section.

Not only so, but Pope testified that McGuffin sold the whole section to Tisdale, and paid him the \$400 which Mrs. Hunt and husband had at one time agreed to pay. Tisdale and those who held under him paid the taxes and all interest due the state on the entire section for fifteen years.

[7] Wide latitude is permitted in the introduction of evidence to determine the intention of parties to a deed. *Harrison v. Boring*, 44 Tex. 255; *Latta v. Schuler*, 45 Tex. Civ. App. 237, 100 S. W. 166; *Stratton v. West*, 27 Tex. Civ. App. 525, 66 S. W. 244. And when this rule has been properly applied, and all the pertinent facts developed in this case considered, there is but little supporting the appellants' construction of the deed in question; but, on the contrary, the conduct of the parties and every fact and circumstance shown relative to the land comport with the construction which the trial court gave to the instrument.

[8] The third assignment of error involves

several different questions, and the only proposition submitted thereunder is:

"The finding of fact by the court that is not supported by any evidence will be set aside and not construed by the appellate court."

That proposition is too general, and does not specify the particular finding which it is claimed is not supported by the testimony, and therefore we hold that, as presented in his brief, appellant is not entitled to have that assignment considered.

On June 1, 1905, G. D. McGuffin and his wife, the common source of title, conveyed the south half of section No. 16, certificate 2/19, J. Pointevent, original grantee, to appellant, Mrs. M. F. Hunt; but the trial court held that the sale referred to had been rescinded, and therefore the subsequent sale by McGuffin and wife to Tisdale was valid. That holding is assailed by the fourth assignment of error. Upon that branch of the case, the trial court filed the following findings:

"Third. That some time prior to June 1, 1905, G. D. McGuffin, being indebted to one J. R. Pope in the sum of \$400, proposed to the latter that, since he did not want to take the south one-half of said section No. 16 in payment of his indebtedness, that if he (Pope) could sell such one-half section of land to some other person or persons able and willing to pay the debt, that he (McGuffin) would make conveyance thereof to such person or persons upon request. That thereafter, in pursuance of this agreement, which was accepted by Pope, the latter contracted to sell the said south one-half section of land to Lee Hunt, the husband of the defendant Mrs. M. F. Hunt, on a credit, the understanding being that the said Lee Hunt would pay the sum of \$400 to the said J. R. Pope. That thereupon, at the request of the said Pope, G. D. McGuffin made, executed, and delivered a school land deed of date June 1, 1905, as the same appears in evidence, wherein and whereby the said McGuffin and wife, Leonora McGuffin, conveyed the south one-half of section No. 16, certificate No. 2/19, original grantees J. Pointevent, to Mrs. M. F. Hunt for a recited consideration of \$400 and the assumption of the obligations of the original purchaser of said land to the state of Texas, said conveyance being in the form of an indenture signed by McGuffin and wife, and T. Lee Hunt and wife, M. F. Hunt, properly acknowledged and filed for record in the deed records of Menard county June 7, 1905. That, although such deed recited a cash consideration of \$400, no such amount was paid, but that the real consideration for the conveyance was the agreement on the part of Mrs. M. F. Hunt and her husband, Lee Hunt, to pay the \$400 due Pope by McGuffin.

"Fourth. That upon execution of the aforesaid deed the defendant Mrs. M. F. Hunt and her husband, Lee Hunt, took possession of the south one-half of section 16, erected a few tents thereon, did a little clearing and fencing, purchasing the wire for the fences on a credit from some party in Ballinger. That about July 15, 1905, Lee Hunt, the husband of the de-

fendant, was killed by McGuffin, and she thereafter sent for Pope, stated to him that she could not stay on the lands, and did not want them. That thereupon Pope agreed to cancel and rescind the purchase and sale agreement as hereinbefore shown, and to buy back the lands from her, in furtherance of which he paid her \$40 for the work which had been done on the premises, canceled the \$400 indebtedness, which he held against her and her husband on the land, and paid the party from whom she had purchased wire for fencing on time, loaning her \$25 with which to move from the premises. That, in connection with the rescission, cancellation, and repurchase as aforesaid, McGuffin agreed that the land might be taken back and that he would see them again and pay the \$400 indebtedness to Pope. That immediately after making the agreement as aforesaid Mrs. Hunt and her children, the defendants herein, abandoned the premises, and never made any claim thereto until the institution of this suit. That upon her abandonment as aforesaid G. D. McGuffin went into possession thereof, and on January 19, 1906, sold and conveyed the lands to J. S. Tisdale for \$912 cash, out of which he paid the \$400 due Pope. That McGuffin and Tisdale, and those holding title under them, paid the interest due the state of Texas and all taxes on the lands; neither interest nor taxes ever having been paid by Lee Hunt, Mrs. M. F. Hunt, or any of the defendants."

[9] As a conclusion of law, the trial court held that the testimony was sufficient to show a parol rescission and cancellation of the contract under which the south half of the section of land in question was conveyed to Mrs. Hunt, or else a parol sale by Mrs. Hunt. The court also held that the plaintiff had acquired title to the land in controversy under the ten-year statute of limitation. Upon the latter question we express no opinion, but sustain the ruling of the court below upon the first question; that is, the question of rescission or parol sale of the land from Mrs. Hunt back to McGuffin. We think the testimony supports the findings of the court upon that subject. J. R. Pope testified that McGuffin owed him several hundred dollars, and, being unable to pay the debt, offered to convey the south half of the section of land in question in satisfaction of the debt, to any party Pope should designate; that thereafter he (Pope) sold the land to Lee Hunt, wholly on credit, with the understanding and agreement that, when he (Hunt) had paid the amount due Pope by McGuffin, the latter would make a deed. As a matter of fact, the deed was made June 1, 1905, conveying the land to Mrs. Hunt, for a recited cash consideration; but the testimony was sufficient to show that the consideration was Hunt's promise to pay McGuffin's indebtedness to Pope.

Practically the only difference between the testimony of Mrs. Hunt and Mr. Pope on that subject was that she testified that, instead of agreeing to pay McGuffin's debt to Pope, her husband did so by transferring to

Pope certain notes. In that respect her testimony differed from Pope's; but the trial court had the right to accept the latter, and seems to have done so. Pope also testified that, when McGuffin killed Hunt, Mrs. Hunt sent for him (Pope) and told him that she could not make a living on the land, and did not want it; that he paid her for the work they had done on the place and for wire used in fencing, gave her \$25, and loaned her a horse to take her children to her relatives; that McGuffin agreed to sell the land, which he did to Tisdale, who paid him (Pope) McGuffin's debt, which the Hunts were to pay, and that the Hunts paid no part thereof.

[10] Under the equitable doctrine, which regards substance rather than form, and often proceeds upon the theory that what ought to have been done will be considered as having been done, it would seem that Pope should be considered the equitable owner of the south half of the section of land in question, until it was sold to Tisdale, and that he dealt with the same as such owner, not only in making the sale to Mrs. Hunt and her husband, but in canceling and rescinding the same with the former after the death of her husband. While there are many cases involving questions affecting the parol purchase and sale of land, there seems to be a dearth of authorities on the question of parol rescission or cancellation of a contract for the sale of land. However, in the case of *Ponce v. McWhorter*, 50 Tex. 562, where the facts were somewhat similar to this case, the court announced and applied the same equitable rule that applies to a parol purchase and sale of land.

[11] According to the testimony of Pope and other evidence bearing upon that question, it seems that the transaction between him and Mrs. Hunt was equivalent to a verbal sale by her for the purpose of discharging community debts; and if the purpose of the transaction was to cancel community debts, and as a result thereof the land was subsequently conveyed by the McGuffins to Tisdale, and valuable improvements placed thereon, as shown by the testimony, we think the court below decided the case correctly. Parol sale of land will be upheld, where the grantee pays all or part of the consideration, enters upon the premises, and, in reliance upon his purchase, makes or erects valuable improvements. All these requisites of a valid sale seem to appear in this case.

The consideration passing from Pope and McGuffin to Mrs. Hunt was: (a) The cancellation of the total purchase price originally agreed to be paid for the land; (b) the assumption of the payment of the balance due the state; (c) payment by Pope to Mrs. Hunt for what labor and work she and her husband had bestowed upon the premises, followed by possession and reconveyance of the

property by McGuffin to Tisdale and wife, who thereafter made valuable improvements on the premises, held possession of and claimed title thereto, paying interest due the state and all taxes as they accrued, without any adverse claim on the part of Mrs. Hunt or her children for more than ten years.

For the reasons stated, we conclude that the judgment should be affirmed; and it is so ordered.

Affirmed.

# BARNES et al. v. HORNE et al. (No. 6373.)

(Court of Civil Appeals of Texas. Austin.  
June 22, 1921. Rehearing Denied  
Oct. 12, 1921.)

## 1. Wills ⇐130—Instrument written wholly by party a will.

An instrument written wholly by a party and signed by him is his will, if it be testamentary in character, under Rev. St. arts. 7856, 7857, 7859.

## 2. Wills ⇐133 — Abbreviation of first name held sufficient signature.

A letter testamentary in character and signed, "Your brother, Ed.," was sufficiently signed to render it a valid holographic will.

## 3. Wills ⇐96—Instrument testamentary when it makes disposition to take effect at death.

An instrument is testamentary in character when it makes a disposition of the testator's property, or a portion thereof, to take effect at his death.

## 4. Wills ⇐293(6)—Other letters to be considered on issue of testamentary intent in letter offered for probate.

Where a letter was offered for probate as a holographic will, held, other letters written at about the same time should have been considered by the jury on the issue of testamentary intent.

Appeal from District Court, Falls County; Prentice Oltorf, Judge.

In the matter of the estate of Edwin D. Horne, deceased. A writing was offered as a will by Katherine H. Barnes and others and contested by Elsie T. Horne and others. From an adverse judgment, proponents appeal. Reversed and remanded.

Frank Oltorf, of Marlin, for appellants.

Ben H. Rice, Jr., of Marlin, for appellees.

## Findings of Fact.

JENKINS, J. Edwin D. Horne's legal residence was Marlin, Tex. He died in the naval hospital at Chelsea, Mass., September 23, 1918, intestate, unless the instrument hereinafter set forth is his holographic will. His only heirs at the time of his death were his brother, A. C. Horne, and his niece, Katherine H. Horne, now Barnes, who is

joined by her husband herein. A. C. Horne is dead, and appellees are his heirs.

At the time of his death, and for some time previous thereto, Edwin D. Horne was a member of the United States navy. On February 18, 1918, he wrote the following letter to his brother, A. C. Horne, then residing at Los Angeles, Cal.:

"Key West, Fla., Feb. 18, 1918.

"Dear Bud: I have received all of your letters and am sorry that I haven't answered before now.

"I have for the last month been trying to dig up a notary public and whenever I went to his office he happened to be out. They have only one in this town and if you catch him you are lucky; whenever I do I will send you the papers at once. I am going to take a day off this week and lay for him at his office, maybe I will have some luck. Elsie said she had an allotment check for Mother for \$40.00; if you can cash it, keep the money and use it toward the expenses of Mother's estate. I don't want you to pay all her debts. I want to pay half or all, it don't make any difference to me one way or the other.

"I have been trying for the last month to stop the allotment that was made out to Mother, but so far I have had little success; maybe these people in Washington will wake up some of these fine days and stop it.

"Just as soon as I can get those papers I will send them to you. I think that is a fair price for the house provided he pays cash which you said he would.

"I am also having a will drawn up and then I will feel better. You let me know about expenses and if you need any money. I am not much on that kind of work. I admit I should know lots more about it than I do, but as things stand I leave it up to you. I will furnish you with as much money as I can if you happen to need it in caring for the property.

"You are right when you said Katherine should have an education and I will do all I can to see that she gets one. I will do everything I can for her and everything I have is hers if I happen to cash in.

"I have sent her several dollars since Mother's death and she seems to appreciate it very much. I think Katherine is a good girl and I will do everything I can for her. If you are willing to share equally the home place with Katherine, so am I. You can fix that up to suit yourself.

"This is certainly a bum town. The only thing they make or have good here is cigars and they are very good. I am sending you a box of Gato's cigars; they are all Havana tobacco and I hope you will like them. They are fresh; I went down to the factory and bought them; they ought to be a few days behind this letter.

"I would like to be back in good old Los Angeles and see those fights again. I often think of Los Angeles and I have had the blues ever since I left there. I often think of that town.

"Will close for this time hoping to hear from you again, love to baby and Elsie, I am

"Your brother,

[Signed] Ed."

This letter was offered by appellants in the probate court of Falls county, as the last

will and testament of Edwin D. Horne, and was probated as such.

Upon appeal to the district court the case was submitted to a jury upon the following special issue:

"When Edwin D. Horne wrote the letter in question, did he intend same to operate of itself as a disposition of his property to take effect after his death, or, on the other hand, did he use the same by way of information to the person to whom written as to how he intended to make his will or as to what a will which he was then having drawn up would provide?"

To which the jury answered:

"We, the jury, find that the letter written by Edwin D. Horne to his brother, Clark Horne, was information as to his intents of a final will."

Thereupon judgment was entered against appellants.

The letter hereinbefore set out was wholly in the handwriting of Edwin D. Horne. He intended the signature "Ed." as his signature. At the time of writing this letter he was 25 years of age, and was of sound mind.

#### Opinion.

[1] An instrument written wholly by a party and signed by him is his will, if it be testamentary in character. R. S. arts. 7856, 7857, and 7859.

[2] A signature by initials is sufficient. *Pilcher v. Pilcher*, 117 Va. 356, 84 S. E. 667, L. R. A. 1915D, 902, and authorities cited in note to same.

[3] An instrument is testamentary in character when it makes a disposition of the testator's property, or a portion thereof, to take effect at his death. *Millam v. Stanley* (Ky.) 111 S. W. 296, 17 L. R. A. (N. S.) 1126; *Lindemann v. Dobossy*, 107 S. W. 111; *Fletcher v. Gates*, 63 S. W. 937; *Williams v. Noland*, 10 Tex. Civ. App. 629, 32 S. W. 328; *Morrison v. Bartlett*, 148 Ky. 833, 147 S. W. 761, 41 L. R. A. (N. S.) 39; *Webster v. Lowe*, 107 Ky. 293, 53 S. W. 1030.

Tested by the foregoing definition, a portion of the letter set out in our findings of fact, if taken by itself without reference to any other part of said letter, and without considering any other circumstances in evidence, is in the opinion of the writer testamentary in character. The part of said letter here referred to is as follows:

"You are right when you said Katherine should have an education, and I will do all that I can to see that she gets one. I will do everything I can for her and everything I have is hers if I happen to cash in."

Taken by itself, this language indicates a definitely formed purpose that, in the event of his death, his niece, the appellant herein, should have all of his property. If it was his intention so to declare, he had made a will,

though he may not have known it; that is to say, he may have erroneously supposed that it was necessary to repeat this declaration by certain formalities which he technically called a will.

If, on the other hand, he meant only to say that he expected to make a will, and to state how he intended to dispose of his property in such will, then the language used would not constitute a will.

We think that, taken in connection with other portions of the letter, and all of the facts in connection therewith, as shown by the evidence, the language quoted is rendered sufficiently ambiguous as to make the intention of the writer thereof a question of fact for the jury.

The form of the question submitted by the court is not, perhaps, the best manner in which this issue could have been submitted, but it is not sufficiently objectionable to constitute reversible error.

Three letters, one of January 10, 1918, one of March 5, 1918, and one of March 22, 1918, were read in evidence, but the court instructed the jury that they were to consider these letters only on the issue of the testamentary capacity of Edwin D. Horne. Appellant excepted to this instruction, and we sustain her assignment of error in reference thereto.

These letters show a great affection on the part of the writer for appellant, and also indicate his purpose to materially assist her financially. For instance, in the letter of January 10th he says:

"I had my life insured for \$10,000 and made out to Mother, none since she passed away. I am going to make it out to you; in case I am killed you will get \$57.00 a month for 240 months. That is the way the government pays it. Now if anything happens to me I want you to have it. The government will have your name and everything, so it won't be much to worry about on your part. I am afraid, dear little girl, I will never see you again, but here is hoping I come out alive, and believe me I will certainly die fighting."

[4] These letters should have been considered by the jury on the issue of testamentary intent.

For the error indicated, this cause is reversed and remanded for a new trial in accordance with this opinion.

Reversed and remanded.

KEY, O. J., and BRADY, J. We concur in the result announced in the foregoing opinion, but do not concur in all that is said therein. In fact, we consider it unnecessary, if not obiter dicta, for this court to express any opinion as to how the paragraph of the letter relied upon by appellants as constituting a will should be construed, if considered by itself, because, as is conceded by Mr. Justice JENKINS, it cannot be so considered; and therefore we prefer to express no opinion upon that abstract question.



**W. L. ELLIS & CO. v. QUANAH COTTON OIL CO. (No. 6358.)**

(Court of Civil Appeals of Texas. Austin.  
May 25, 1921. Rehearing Denied  
Oct. 3, 1921.)

1. Appeal and error  $\Leftrightarrow$ 742(1) — Substantial conformity to rules as to assignments of error, etc., sufficient.

A substantial compliance with the rules relative to assignments of error, propositions, and statements is enough, and the assignments may be considered notwithstanding the failure to conform to the letter of the rules where they do not call for any great labor on the part of the court.

2. Sales  $\Leftrightarrow$ 182(1) — Evidence held to make question for jury as to waiver of comparison with sample.

In a seller's action for breach of a contract for the sale of cotton by sample, evidence held to make a question for the jury as to whether the buyer waived inspection or comparison of the samples and committed the question of quality and grade to the sound judgment of the seller's representative.

3. Sales  $\Leftrightarrow$ 38(2)—Misrepresentation of quality by seller need not be willful to constitute fraud.

It was not necessary that a seller's false representation of the quality of cotton should be willful to constitute fraud, if it was made without knowledge whether it was true or false.

4. Sales  $\Leftrightarrow$ 182(3) — Whether buyer waived right to full amount and was bound to accept part complying with contract held question of fact.

Where a sale of cotton embraced 100 bales which were shipped in two lots, one of which, consisting of 12 bales, complied with the contract and the other of which did not, it was a question of fact whether the buyer waived its right to the full amount purchased so as to be liable for the price of the 12 bales.

**On Rehearing.**

5. Sales  $\Leftrightarrow$ 88—Whether sale was by sample held in issue under pleadings and evidence.

Though a seller of cotton suing for breach of contract did not plead a sale by sample, where the buyer did plead such sale and offered evidence tending to support that theory the issue was raised by the pleadings and the evidence.

6. Sales  $\Leftrightarrow$ 88—Evidence held to make question for jury whether sale was by sample.

In an action by a seller of cotton for breach of contract, evidence held to make a question for the jury as to whether the sale was by sample.

7. Sales  $\Leftrightarrow$ 387—Whether seller acted properly and promptly in retaking possession and selling on buyer's rejection held question of fact.

Whether a seller of cotton properly and promptly exercised its right to take possession of the cotton and resell it upon being advised by the buyer of its rejection and whether a resale on a holiday was proper were questions

for the decision of the jury, though the evidence strongly tended to show that no damage was caused by any delay, and it was agreed that the cotton brought the best price obtainable on the day of sale.

Appeal from District Court, Brown County; J. O. Woodward, Judge.

Action by the Quannah Cotton Oil Company against W. L. Ellis & Co. From a judgment on an instructed verdict for plaintiff, defendant appeals. Reversed and remanded.

W. J. Scott and McCartney, Foster & McGee, all of Brownwood, for appellant.

Harrison, Cavin & Key, of Brownwood, for appellee.

BRADY, J. Appellee sued W. L. Ellis, trading in the name of W. L. Ellis & Co., to recover damages arising out of an alleged breach of contract for the sale of certain cotton. The sale was of 100 bales of inferior grade of cotton, designated by the parties as type 9. The petition alleged that the cotton was finally accepted at Quannah, Tex., in two lots of 88 and 12 bales respectively, and that the acceptance was through I. E. Ellis, the duly authorized agent of appellant. It was further alleged that the cotton was shipped in the name of appellant as consignor to Houston, Tex., notify Anderson Clayton & Co., and that demand drafts were drawn on the same day by appellant upon himself, payable at Brownwood, where appellant was doing business. It was averred that the cotton was rejected by appellant, and payment of the drafts refused, because it was claimed the cotton was not equal to type 9. A resale of the cotton at Houston for appellant's account was alleged, and damages claimed for the difference in market value and other elements of loss, incident to the sale.

Appellant denied acceptance of the cotton and the authority of I. E. Ellis to bind him, as well as pleading that the quality of the cotton shipped was not up to the grade of the samples under which the sale was made. There was an averment of legal fraud by appellee in misrepresenting the grade of the cotton and inducing I. E. Ellis to accept and order the cotton shipped. It was also urged that the resale was made on a holiday, and not with reasonable dispatch, after appellee was informed of the rejection of the cotton.

The trial court gave a peremptory instruction for appellee, and from the judgment entered on the verdict this appeal was taken.

[1] There are a number of objections to the consideration of all the assignments, some of which are regarded as hypercritical. A careful examination of the criticisms has convinced us that they are all without merit, and invoke a too critical application of the rules. In the view of this court, the rules are intended to promote, and not to stifle, justice.

It is enough that there has been a substantial compliance. *Railway Co. v. Pemberton*, 106 Tex. 466, 161 S. W. 2, 168 S. W. 126.

The assignments will be considered on their merits. It is doubtless true that some of them do not conform to the letter of the rules, especially as to the scope of the statements under propositions. However, they do not call for any great labor on our part, and are not such gross violations as would justify us in disregarding them, especially where there has been an instructed verdict.

A careful consideration of the evidence has convinced us that the trial court erred in giving the peremptory instruction, because there were material issues of fact for the jury to decide. The sale was admittedly one by sample. While the evidence might have been sufficient to sustain a finding that there was a waiver of the right of inspection, and a final acceptance by appellant, after inspection, and in reliance upon the honest judgment of Mr. Kelly, we do not think the evidence of such a conclusive character as to justify an instructed verdict.

[2] It is unnecessary to set out the evidence in detail. The testimony of I. E. Ellis and W. L. Ellis, in reference to the limited authority of the former in this particular matter, and the positive testimony of I. E. Ellis that he told Mr. Kelly, the representative of appellee, that he knew nothing about such grades of cotton, especially type 9, and that they would expect Mr. Kelly to match up with the samples, while susceptible of another construction, might well have justified the inference that there was no intention to waive inspection or comparison of the samples, and no purpose to commit the question of quality and grade to Mr. Kelly's sound judgment. Indeed, Mr. Kelly's own testimony tends to support the latter view, since he testified that he made no effort or attempt to pass on type 9 cotton for I. E. Ellis. This is sufficient, we think, although there is other evidence, to make the question one for the jury.

[3] We also entertain the view that the evidence raised the issue as to whether or not appellee exercised due diligence to sell the cotton to the best advantage and within proper time. The testimony tended to show that the seller retained such control over the cotton until payment of the drafts to which the bills of lading were attached as that it could have taken possession and have resold the cotton when advised by the buyer that he had rejected it. Whether this could or should have been done at Quanah and more promptly than was done are questions of fact. Appellee did exercise this right when the cotton arrived at Houston. Whether it was done promptly or properly are questions primarily for the decision of the jury. This conclusion also applies to the claim that the cotton should not have been sold on a holiday.

[4] As to the question of fraud, the proper submission of any such issue upon another trial will depend upon the evidence. It does not seem to be seriously or specifically claimed that it was raised by the evidence in the record. It is thought proper to say, however, that if the issue should be presented, we agree with counsel for appellant that it is not necessary that a false representation should be willful. The trend of decisions by our Supreme Court has been steadily to the principle that it is as much fraud to misrepresent that which the party does not know to be true or false as to state it with absolute knowledge of its falsity. No person should be heard to say:

"It is true that I made a false statement of fact to another, upon which he acted, to his detriment, but I did not know it to be false."

As to the 12 bales of cotton, which are now admitted to have been up to type 9, it is insisted that we should at least affirm the judgment. Appellant bought 100 bales of that grade to fill orders from others. He was entitled to that quantity, unless he waived the right. We cannot say, as a matter of law, that he did waive it simply because there were two shipments of the lot, one of which came up to sample. This, too, would seem to be a question of fact.

The other questions raised will probably not arise upon another trial; hence we express no opinion upon them. For the reasons given, the judgment is reversed, and the cause remanded.

Reversed and remanded.

KEY, C. J., not sitting.

On Rehearing.

BRADY, J. Counsel for appellee have filed a strong and persuasive motion for rehearing. While not convinced that we were in error in our original opinion, there are certain phases of the argument on rehearing which we desire to discuss.

We stated that the sale in question was admittedly one by sample, and, in effect, that the chief questions on the appeal were whether there had been a waiver of the right of inspection by the buyer, or a final acceptance, after full inspection.

[5] It now appears that this statement was too broad, since the appellee did not plead a sale by sample and does not admit that such was the character of the sale. The statement was made in the original opinion, because the respective propositions in the briefs seemed to so treat the transaction. Be this as it may, appellant did plead a sale by sample, and offered evidence tending to support the theory. Hence the issue was raised by the pleadings and the evidence.

[6] Appellee has cited cases to the effect that the mere exhibition of a specimen of goods, during a negotiation for their sale,

does not necessarily make a sale by sample, but it must appear that the parties understood that they were dealing with reference to the sample. We do not doubt the correctness of this rule, and there is nothing in our opinion to the contrary. We simply held that there was evidence sufficient to make it a jury question whether the sale was by sample, and whether there was a waiver of inspection or final acceptance after inspection.

It is earnestly insisted that the undisputed evidence showed that, if there was any sale by sample, it was when the samples were taken and exhibited to I. E. Ellis at Quanah, when he ordered the cotton shipped and drew the drafts in payment; furthermore, that the undisputed evidence shows that W. L. Ellis & Co. waived inspection and committed the question of the grade or quality of the cotton, tendered for delivery, to the judgment of Mr. Kelly, who was the "spot cotton man" of appellee.

We will not undertake to set out the evidence in detail. As stated in the original opinion, there was ample evidence to raise these issues. Mr. Kelly testified that, at the request of I. E. Ellis, he made up and sent samples of "type 9" cotton to Brownwood long before the sale was made, for the examination and inspection of W. L. Ellis at Brownwood. He also testified that he kept a duplicate of that type at the Quanah office, and that the 88 bales came up to the type he had sent to Brownwood. Further, he testified that the 100 bales in controversy were bought by the same type that the 500 bales of the same character of cotton had previously been bought. A fair inference is that he meant the original type samples which he had sent to Brownwood.

The testimony of I. E. Ellis is to the same effect, and tends strongly to show that the cotton was bought by the samples originally sent to appellants' office at Brownwood. The testimony of W. L. Ellis tends to show that he understood the original samples were to be used for comparison with the cotton tendered for delivery.

I. E. Ellis also testified that the samples exhibited to him at Quanah were sent to W. L. Ellis for comparison with the original samples. It is contended by appellee's counsel that this testimony is nullified by his further statement that nothing was said before or at the time as to the purpose of sending the latter samples to Brownwood. We do not think so. If there was a conflict here, which does not necessarily appear, it was properly a matter for the jury.

As to the issue that there was a waiver of the right of inspection and an agreement to leave the question of quality up to Mr. Kelly, as the representative of W. L. Ellis & Co., or a final acceptance through I. E. Ellis, after inspection of true samples of the cotton actually shipped, we repeat that the evidence raises a jury question. We again call attention to Mr. Kelly's testimony that he made no effort to pass on type 9 cotton for I. E. Ellis; also to the testimony of the latter that he made no inspection of the samples, was not qualified to do so, and had the last-drawn samples sent to W. L. Ellis for comparison by him.

[7] Our opinion is also assailed because we held that the evidence raised the issue as to whether appellee might have lessened the damages by making a resale more promptly, and not on a holiday. We agree with appellee that the evidence strongly tends to show that no damage was caused by any delay, but it is not conclusive. There was evidence that there was a rise in the market for regular grades between the date the cotton was rejected and the date of sales. True, it was agreed that this cotton brought the best price obtainable on the day of sale, but this does not conclude the question. The regular market affects or influences the price for low-grade cotton to some extent. Therefore the sale on a holiday, when there was no regular market, and perhaps the failure to sell on an earlier day or at a more favorable time, might have affected the amount of damages. Of course, we cannot tell what the evidence will be on another trial, but we have sufficiently indicated our view of the matter.

Appellee insists that our opinion lays down a very dangerous rule, as applied to the cotton business, as it opens the doors to fraud by unscrupulous speculators. Specifically, the claim is that a buyer of cotton may order cotton, and then, after delivery, accept or reject it, accordingly as the market fluctuates in his favor or against him. In this we see nothing more than inheres in every sale by sample. If the vendor has properly protected himself in the terms of the sale, he would appear to be safe against fraud, if he only sees to it that the goods he delivers are what he impliedly represented by the samples exhibited.

Believing that the appeal has been correctly decided, the motion for rehearing is overruled.

Motion overruled.

KEY, C. J., not sitting.

**BOYD et al. v. JOHNSON et al. (No. 6498.)\***

(Court of Civil Appeals of Texas. San Antonio. April 13, 1921. Rehearing Denied Oct. 12, 1921.)

**1. Appeal and error ⇨927(7)—Appellant's evidence given most favorable effect on appeal from judgment on directed verdict.**

On appeal from a judgment on a directed verdict, appellant's evidence will be given its most favorable effect.

**2. Mortgages ⇨83—Grantor held estopped to set aside trust deed and sale thereunder.**

A trust deed and a sale thereunder will not be set aside, though the deed was executed with the understanding that the true amount of the debt would be ascertained and the instrument corrected accordingly, where plaintiffs took no action until more than three years after the execution of the deed, allowed the property to be sold without complaint, except that on the day before the sale, of which they had due notice, they filed suit to set aside the deed on the sole ground that the premises were a homestead, did not allege conditional delivery nor challenge the correctness of the consideration until nearly a year later, and, in setting up such defenses, alleged that the deed was executed in reliance on the representation of the lumber company, to which the debt was owing, and in the belief that building materials priced in the amount of the deed had been actually furnished.

**3. Mortgages ⇨342—To delegate power of sale to substitute trustee, every contingency authorizing substitution must occur.**

Trust deed provisions vesting in the trustee a power of sale must be construed with the utmost strictness, and, before such powers may be delegated to a substitute trustee, every contingency authorizing such substitution must precisely occur.

**4. Mortgages ⇨369(3)—Sale not set aside solely because price inadequate.**

A trustee's sale will not be set aside because the price brought was inadequate, where the deed of trust, appointment of the trustee, notice of sale, the sale itself, and the trustee's deed all appeared to be regular.

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Suit by V. L. Boyd and husband against T. F. Johnson and another. Judgment for defendants, and plaintiffs appeal. **Affirmed.**

E. B. Ward, of Corpus Christi, for appellants.

H. R. Sutherland and G. R. Scott, Boone & Pope, all of Corpus Christi, for appellees.

**SMITH, J.** On May 9, 1914, Mrs. V. L. Boyd (then Orr) executed a deed of trust by which was conveyed to H. W. Houck, trustee for the benefit of the Southland Lumber Company, lot 2 in block 2, Mussett addition to the city of Corpus Christi, in Nueces coun-

ty. It was recited in the deed of trust that the same was given to secure the payment of a note for \$617.77, executed by Mrs. Boyd on said date and payable to said lumber company and given to cover an account for lumber and materials bought of the company. On July 3, 1917, T. F. Johnson, substitute trustee, sold and conveyed the property to the lumber company, the beneficiary, for \$200, the sale being at auction and to the highest and best bidder. The value of the property at the time of the sale was from \$3,000 to \$3,500.

On July 2, 1917, Mrs. Boyd, joined pro forma by her husband, brought suit in trespass to try title against T. F. Johnson and the lumber company, alleging that the defendants were claiming an interest in the property by virtue of the deed of trust, and were about to sell the property thereunder, and were in fact then advertising such sale, and that the deed of trust was void because the premises covered thereby constituted the homestead of Mrs. Boyd. No other ground of invalidity was set up. Lis pendens notice was filed for record contemporaneously with the institution of the suit, but, notwithstanding this, the sale of the property was proceeded with and made the day after the filing of the suit and lis pendens notice. Subsequently, in April, 1918, the Boyds amended, setting up the sale of the land under the trust deed, and seeking to set aside the latter instrument and the sale thereunder, reaffirming the homestead allegations, and alleging, among other grounds, that the sale under the deed of trust was irregular, and the sale price grossly inadequate, that the amount of the debt to the lumber company was less than that recited in the note and deed of trust, and that Mrs. Boyd executed those instruments with the understanding that the true amount of the debt would be ascertained and the trust deed and note corrected accordingly, and that only because of this understanding she executed these instruments, and would not have otherwise done so, but that the lumber company failed and refused to furnish her an itemized statement of the account and to correct the recitations in the instruments, and that therefore there was no legal delivery thereof.

The defendants denied these allegations, alleged the legality of the trust deed and note, and of the sale, and sought recovery of and removal of cloud from title in the form of trespass to try title, to which the Boyds plead not guilty. In December, 1918, pending the litigation, the lumber company secured possession of the property by sequestration proceedings, and sought recovery from the Boyds of rent from the time of the sale to the date it took possession, alleging the value of the property to be \$2,500, and the reasonable rental to be \$1,200.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*For opinion as corrected on rehearing, see 234 S. W. 235.

Upon a trial by jury the lower court directed a verdict for both Johnson and the lumber company as to plaintiffs' suit, and for the lumber company on its cross-action for title to the property, and for such rent as the jury might find. The jury returned a verdict accordingly, fixing the amount of the rent to be \$90, and appropriate judgment was rendered on this verdict, and from this judgment the Boyds appeal.

[1] The first and chief question in the case is whether or not the trial court was warranted in directing a verdict for appellee. This question is raised in appellants' first assignment of error, in which it is contended that the deed of trust involved did not express the real consideration intended; that if that instrument was delivered it was with the understanding between Mrs. Boyd and the lumber company that the amount specified therein would be corrected at a later date; that this was the consideration and condition upon which the instrument was executed and delivered; that such correction was never made, and "consequently the deed of trust was not effective and never delivered, except conditionally, and the same and any sale thereunder in consequence thereof was void; at least the facts were sufficient to warrant the jury in so finding." These contentions call for a statement of appellants' evidence, which will be made as briefly as possible and will be given that effect which is most favorable to appellant, which should always be done in testing the correctness of the action of a court in directing a verdict.

[2] Late in the year 1912, Mrs. Boyd, then the widow Orr, arranged to rebuild, or add to, a certain residence belonging to her. From one source she bought some used lumber. But there was not enough of this used lumber to make the improvements she had in mind, so she arranged with the Southland Lumber Company, one of the appellees, to furnish such additional lumber and materials as would be needed to complete the improvements. She employed a firm of contractors to do the work, and directed these contractors to get the material from appellee, but not to get more than \$150 worth of such materials. She also told the manager of the lumber company that she wanted only \$150 worth of such materials, and directed him not to furnish the contractors more than that amount. The work proceeded, the house was completed, and Mrs. Boyd moved in. She accepted and used all the materials furnished by the company, without complaint. This was in January, 1913. Some time later she received a bill from the lumber company for \$709, and mailed a check for \$75 in response thereto. The lumber company kept pressing Mrs. Boyd for the balance, while the latter still questioned the correctness of the account, and insisted upon being furnished itemized statement thereof. At one time she was furnished such statement, but it was

mislaid by her before she examined it. Along about the 1st of May, 1914, the lumber company finally insisted upon settlement. A mutual friend of the parties, O. H. Johnson, interested himself in the matter, being prompted primarily, it seems, by a friendly desire to help Mrs. Boyd. He conferred with both parties, and, at the instance of the lumber company, presented to Mrs. Boyd the deed of trust and note in controversy, which had been prepared by the lumber company for that purpose. Mrs. Boyd refused to execute these papers, contending that the consideration recited therein was more than she owed the company. Johnson took the papers back to the company, reported results, and repeated Mrs. Boyd's objections. Again, at the instance of the lumber company, Johnson presented the papers to Mrs. Boyd for execution, stating in behalf of the company that there must be an immediate settlement, and that, if the amount of the debt as recited in the papers was erroneous, the company would, as soon as practicable, ascertain the true amount, and the papers would then be corrected in accordance therewith. Under these circumstances Mrs. Boyd executed the papers, and gave them over to Johnson, who delivered them to the company. Nothing was said one way or another about the question of delivery, but the circumstances conclusively show unconditional delivery. It is true that Mrs. Boyd at one time said in her testimony that she executed the papers "conditionally," but made no explanation of this conclusion, and did not undertake to say what the conditions were. It is apparent that she meant that she executed these papers upon the condition that the true amount of the debt would later be ascertained and the amount recited in the papers corrected accordingly. It has been held that a parol agreement of this character cannot serve to defeat a suit upon written instruments given in settlement of an account of this nature. *San Antonio Lumber Co. v. Dickey*, 27 S. W. 955. In that case the court said:

"The defense offered was that the paper purporting to be a duebill was given to plaintiff simply as a memorandum, and not as evidence of an amount due by defendant to plaintiff; that when it was given it was understood and agreed that it was only a memorandum, and that the amount it called for should be reduced by any sums that might afterwards be found defendant was entitled to in connection with the contract under which plaintiff agreed to furnish, and had furnished, defendant with lumber and material; but defendant had since found that plaintiff had charged him a higher and entirely different rate than had been agreed on, and, after considering payments made by defendant, that plaintiff was indebted to defendant in the sum of \$257.30, for which he asked judgment. \* \* \* There was no indefiniteness or ambiguity in the expressions of the paper. It evidences a settlement between the parties, and, as the evidence discloses this

evidence related to the sale of lumber and material, it was an admission of indebtedness to plaintiff of a certain sum in reference thereto, and is, in effect, a promise to pay that sum unconditionally. The answer shows it was given to and accepted by plaintiff. It was clearly inadmissible, over objections, to go behind it, and examine into matters of account preceding it, and out of which it grew, there being no attempt to avoid it for such cause as fraud, accident, or mistake. \* \* \* The basis of the defense and counterclaim was that at the time of giving the instrument the defendant, by oral understanding, reserved the right to certain allowances in a certain contingency. These the proofs show were connected with the account in respect to which the paper was given. That this could not be shown to the impairment of the terms of the writing needs no citation of authorities."

Now, if it had been shown that the note and deed of trust were given to Johnson, with the express stipulation that they should not be delivered to the lumber company until the question of the correctness of the amount was threshed out and settled, and the recited consideration changed accordingly, and that the recited amount was not substantially correct, a very different question might have arisen. But there was no such understanding here. And, while there was some testimony tending to throw some doubt upon the correctness of the amount of the consideration recited in the instrument in controversy, such showing was not sufficiently definite or conclusive to overcome the recitations in the written instrument solemnly entered into and unconditionally delivered. These instruments were executed, acknowledged, delivered, and recorded in May 1914. The Boyds took no steps to remedy the wrongs they now complain of until more than three years had elapsed. They stood by and allowed the property to be sold under the deed of trust, without complaint, except that on the day before the sale, of which they had due notice, they filed suit to set aside the deed of trust, upon the sole ground that the premises involved constituted a homestead. It was nearly a year later, and four years after the execution of these papers, that they set up allegations about conditional delivery, and challenged the correctness of the consideration for the note and deed of trust. And in the pleadings setting up these defenses Mrs. Boyd alleged that she executed these papers upon the representation of the lumber company officials that the company had actually furnished to her materials amounting in

price to \$692.17, "and relying upon this representation, and believing that said amount of material had been actually furnished for the construction of said house, she executed the note and deed of trust for said sum." We think these allegations, considered with the other circumstances above set out, absolutely preclude appellants from recovery upon the contentions made in the first assignment, which is accordingly overruled. The fifth and sixth assignments of error, related as they are to the first, are also overruled.

[3,4] By their second, third, and fourth assignments of error appellants contend that the price at which the property was sold under the deed of trust was grossly inadequate, and that such fact, taken in connection with alleged irregularities in the sale, requires that the sale be set aside. The provisions in a deed of trust vesting in the trustee the power of sale must be construed with the utmost strictness, and complied with in exact fidelity to every detail. And before these extraordinary powers may be delegated to a substitute trustee every contingency authorizing such substitution must precisely occur. But we have been unable to find any sort of irregularity in the sale, and appellants have pointed out none that seem to have actually occurred. As stated, the price brought by the property at the trustee's sale is inadequate; it is outrageously so. There seems to be no explanation for it, unless, indeed the filing of appellants' suit and its pendency notice the day before the sale brought about the low price, and, if this is true, then of course appellants cannot complain. The deed of trust, the appointment of the substitute trustee, the notice of sale, the sale, and the trustee's deed all appear to have been regular, and nothing is pointed out in the record as showing they were not. When Mrs. Boyd executed the deed of trust, she took the risk of the proceedings subsequently occurring thereunder being regular, and this court is without authority, under these conditions, to write a new contract for her.

Before a sale under the deed of trust can be set aside because of inadequacy of the price brought at a sale thereunder, there must appear to be some irregularity in connection therewith. Such irregularity, even the slightest or of the most trivial nature, would be sufficient here. But until such is shown the sale must stand.

All assignments are overruled, and the judgment is affirmed.

PAYNE, Director General of Railroads, et al.  
v. CUMMINS. (No. 6380.)

(Court of Civil Appeals of Texas. Austin.  
Oct. 12, 1921.)

**Appeal and error**  $\S$ 1062(1)—Form of question submitted harmless, in view of verdict.

The form of a question submitted to the jury, in not guarding against allowance of damages for a time barred by limitations, was harmless, there being nothing from which it can reasonably be said that the jury were misled, or that they allowed anything for such period.

Appeal from District Court, McCulloch County.

On rehearing. Denied.

For former opinion, see 232 S. W. 1118.

BRADY, J. In the original opinion in this case, we suggested that, upon another trial, the court should so frame the charge upon the issue of damages for permanent injury to the land as to prevent any allowance for such damages for any period barred by limitation; and it was stated that appellants' criticism of the manner of submitting this issue below appeared to be well taken. It was not intended by this statement to indicate that, in our opinion, there was reversible error in the form of the question, but the statement was rather a suggestion to the trial court, in event there should be another trial, to avoid any possible injury to appellants' legal rights. We have given careful consideration to the evidence in the record, and have reached the conclusion that, however objectionable the manner of submitting this issue below, it was not prejudicial to appellants, and, in any event, must be held to be harmless error. There appears to be no evidence indicating that the jury were misled, or that they can reasonably be said to have made any allowance for damages barred by limitation.

We have given due consideration to the several grounds urged in the motion for rehearing, but have concluded that the same must be overruled.

Motion overruled.

SILLIMAN v. OLIVER et al. (No. 6569.)

(Court of Civil Appeals of Texas. San Antonio. May 26, 1921. Rehearing Denied Oct. 12, 1921.)

1. Evidence  $\S$ 419(3), 432, 461(2)—Mortgages  $\S$ 37(2)—Trusts  $\S$ 43(3)—Parol evidence admissible to show failure of or additional consideration and intent; deed intended as mortgage.

As a rule parol agreements will not be allowed to vary the effect of plain recitals in a

deed, and when the grantor himself delivers a deed to the grantee it automatically becomes effective in accordance with the purposes plainly expressed thereon; but parol testimony may be received, showing that the cash consideration recited was not paid, and that other or additional consideration than that expressed was contemplated by the parties, or that the deed was intended as a mortgage, or to create a trust, and not to pass title, or that it was not executed or delivered with the intention that it should become operative as a conveyance.

On Motion for Rehearing.

2. Trespass to try title  $\S$ 4—Recovery by legal owner not permitted until reimbursement of person paying debt.

Where one rightfully obtains possession of land by paying a mortgage debt of the legal owner, thereby discharging the mortgage lien, the legal owner will not be permitted to recover the possession until he has reimbursed the one already rightfully in such possession.

Appeal from District Court, Val Verde County; Joseph Jones, Judge.

Action by W. B. Silliman against Walter Oliver and others. From an adverse judgment, plaintiff appeals. Reversed and remanded.

M. E. Sedberry, of Eldorado, Wardlaw & Elliott, of Sonora, Boggess, Smith & La Crosse, of Del Rio, and W. H. Lipscomb, of San Antonio, for appellant.

John J. Foster and Walter Gillis, both of Del Rio, and Douglas. Carter & Black, of San Antonio, for appellees.

SMITH, J. W. B. Silliman, plaintiff below and appellant here, brought this action originally against J. S. Pelt to recover title to and possession of an undivided one-half of 17,712 acres of land in Val Verde county, and for partition. Pelt pleaded against Walter Oliver upon the latter's warranty. In response to a peremptory instruction, there was a jury verdict against Silliman, and from a judgment appropriate to the verdict Silliman has appealed.

The legal title to the land was acquired by Oliver in a foreclosure proceeding by the payment of \$8,200, procured from a bank for that purpose upon the joint note of Oliver and Silliman. The title was conveyed direct to Oliver alone, in pursuance of an agreement between the two. This agreement embraced the further stipulation that Oliver go ahead and fence the land, and perhaps otherwise improve it, as a ranch. The project required more money, which neither party had, so the \$8,200 loan was transferred to another bank, enlarged and embraced in a new note for \$15,000, which was also jointly executed by Oliver and Silliman, who, in order to make it negotiable, procured Pelt to in-

dorse it. The money was thus obtained, the \$8,200 note retired, and Oliver proceeded with the improvement of the property. When the \$15,000 note became due, the holder refused a renewal, and demanded payment. Silliman had no money or property, was insolvent, and could do nothing towards relieving the situation. Oliver had no money, but did own considerable property in land and live stock, and with this property as security he procured a loan, on his individual note, from a St. Louis bank for about \$55,000, and out of this loan paid off the \$15,000 note. This loan was made through Silliman as agent of the St. Louis bank, and in this transaction Silliman got out from under the obligations supporting the venture, and did nothing further to carry the load, the entire burden of which rested alone upon Oliver then and thenceforth. Early in the negotiations, Silliman had paid a few small items of expense in the venture, the testimony conflicting as to the purposes and amounts of these payments, while it was undisputed that Oliver paid out as much as \$20,856 in cash in procuring and protecting the title and improving the property. Long before Oliver's \$55,000 note to the St. Louis bank matured, Silliman, as agent of the bank, demanded the payment of \$28,000 on the principal of the note, giving as a reason for the demand that the security was insufficient, or had been impaired. Oliver asked for indulgence, and time for rearrangement of his affairs, but Silliman curtly insisted upon immediate payment, and Oliver, without available cash, set about to meet the demand. He succeeded in borrowing \$10,000, which he applied on the loan, but this did not satisfy Silliman, who peremptorily demanded the balance, whereupon Oliver, finding himself unable to raise the money in any other way, and in apparent desperation resulting from Silliman's threatening attitude, sold and conveyed the land in dispute to Pelt for \$20,000 cash, Pelt assuming, in addition, an old outstanding vendor's lien note, originally held by Pecos county against the land, for \$15,712.

It appears that at the time Silliman and Oliver gave their joint note for \$15,000 Oliver executed a deed conveying to Silliman a one-half interest in the land, the consideration, as recited in the deed, being \$5,000 cash, which, according to the testimony, was not paid, and the assumption by Silliman to pay one-half of the Pecos county note for \$15,712. The testimony sharply conflicts as to the purposes for which this deed was given, and as to the circumstances under which it was given, delivered, subsequently surrendered, and redelivered, if at all. It was executed on August 2, 1917, but was not recorded until May 2, 1919. The conveyance from Oliver to Pelt was made on December 29, 1918, and recorded January 2, 1919, five months before the Oliver-Silliman deed was recorded.

Now, we have set out only such material facts as appear to be undisputed. They constitute only a skeleton outline of the case as made by the evidence. Every other fact in the case seems to be sharply in dispute. The testimony raises a number of material issues, among them being those of innocent purchaser, estoppel, the consideration and purposes of the Oliver-Silliman deed, and the question of the delivery and subsequent surrender and redelivery of that deed. These matters in our opinion should have been submitted to the jury, and to that end the judgment must be reversed and the cause remanded. The determination of the questions of law raised by the assignments of error depends so intimately upon the effect, force, and sufficiency of the evidence as to preclude any extended discussion of those questions here.

The court below admitted testimony showing the facts and circumstances, and the oral agreements and understandings between Oliver and Silliman, leading up to and inducing the execution of the deed from the one to the other, as well as the delivery, surrender and redelivery of the deed, and conduct and agreements of the parties subsequent to its execution. Appellant objected to the admission of this testimony upon the familiar grounds that the deed was the final expression of the parties into which all antecedent and contemporaneous parol agreements were presumed as a matter of law to have been merged; that where, as here, the deed was delivered in person by the grantor to the grantee, upon condition, it takes effect regardless of such condition. In the abstract, appellant's contention is correct, and elemental. But we think the peculiar circumstances of this transaction take the case out of that rule, and that the testimony objected to by appellant was admissible upon either one or another of the several questions of estoppel, innocent purchaser, and the purposes, consideration, delivery, surrender, and redelivery of the deed. Oliver contended in his testimony that he and Silliman had a definite oral understanding that Oliver was to take the title, and if Silliman should later on pay his half of the cost of the title and improvements the latter could take a half interest in the property; that when the \$15,000 note was executed by both parties Silliman suggested that Oliver execute to him a deed, which Silliman had prepared, conveying to the latter a half interest in the property to show that Silliman had an "equity in this thing," whereupon Oliver told him that he would give him the deed "according to our first agreement or understanding that this deed was to remain in my name until he was able to pay up, but he went on to say that he thought he ought to have something to show that he had an equity in the proposition, so I finally said to him, 'I will give you



a deed to it with this understanding, that this deed is not to be placed on record, or be considered a deed or anything, unless you are able to pay up your part of the \$15,000"; that when the \$15,000 became due and had to be paid, Silliman, insolvent and unable to help carry the load, "threw up his hands," surrendered the deed back to Oliver, and so conducted himself as to show he had washed his hands of the transaction, and by his conduct and in writing repeatedly recognized Oliver as the sole owner of the property. It was admitted, too, that Oliver had put nearly \$21,000 in cash in the property, and that Silliman was insolvent at the inception and throughout the whole of the transaction. Oliver testified also that Silliman never paid the \$5,000 cash consideration recited in the deed, or any part of it, and Silliman himself testified that he had never been able to take care of his interest in the property.

[1] Now, we are, of course, familiar with the rule that parol agreements will not be allowed to destroy, impair, or vary the effect of plain recitals in a deed, and that when the grantor himself delivers a deed to the grantee, it shall automatically become effective in accordance with the purposes plainly expressed therein. But, as we have said, there are a few well-known exceptions to this rule. Parol testimony may be received, for instance, showing that the cash consideration recited in the deed was not in fact paid (*Lanier v. Foust*, 81 Tex. 186, 16 S. W. 994), and that other or additional consideration than that expressed was contemplated by the parties (*Taylor v. Merrill*, 64 Tex. 494). So also is it proper to receive testimony of parol agreements upon which a deed is executed or delivered to show that the instrument was in fact intended as a mortgage, or to create a trust and not to pass title, or that it was not executed or delivered by the grantor with the intention that it shall become operative as a conveyance, which last seems to be the contention here of appellee Oliver. *Steffian v. Bank*, 69 Tex. 513, 6 S. W. 823; *McClen-don v. Brockett*, 32 Tex. Civ. App. 150, 73 S. W. 854; *Ivy v. Ivy*, 51 Tex. Civ. App. 397, 112 S. W. 110. In the case last cited the following from the Supreme Court of Pennsylvania is quoted with approval:

"The destruction of a written instrument by parol testimony may seem dangerous, and it

is so, but the community would be in a still worse condition if it were established as an inflexible rule that, when a man's hand was once got to an instrument, no matter by what means, the doors should be shut against all inquiry."

By his first assignment of error appellant complains of the overruling of his motion for peremptory instruction, and by his second he complains of the admission of the testimony above mentioned. Both assignments are overruled. But we sustain the third and last assignment, in which appellant complains of the adverse peremptory instruction to the jury.

Reversed and remanded.

#### On Motion for Rehearing.

[2] It is conceded by appellant Silliman that appellee Oliver expended approximately \$21,000 in improving the land involved and protecting the title thereto, and that throughout all the transactions he was rightfully in possession of the land. Silliman, however, sought to recover half of the property without offering to reimburse Oliver for any portion of these expenditures, which were made with Silliman's knowledge, acquiescence, and even procurement, and without which the property would surely have been lost, since Silliman himself was absolutely helpless in the matter. We think these facts clearly put Oliver in the attitude of one who rightfully obtains possession of property by paying the debt of the legal owner, thereby discharging a lien held against the property to secure such debt. In such case the legal owner will not be permitted to recover the possession until he has reimbursed the one already rightfully in such possession. *De Guerra v. De Gonzales*, 232 S. W. 896, and authorities there cited. Even if every other issue in the case should be resolved in favor of Silliman, it would nevertheless be a travesty upon justice, and a violation of every principle of equity, to permit him to recover the property in dispute without first requiring him to reimburse Oliver.

With this additional suggestion, appellant's and appellees' motions for rehearing are overruled.

**HELLER v. HELLER et al. (No. 8084.)**

(Court of Civil Appeals of Texas. Galveston.  
June 29, 1921.)

**1. Wills ⇐62—Survivor by accepting benefits under joint will bound by its disposition of the community estate.**

Survivor of joint testators by accepting benefits under the will was bound by its disposition of their community estate, and could not convey or otherwise dispose of any thereof contrary to provisions of the will.

**2. Wills ⇐692, 693(1)—Joint will held to authorize conveyance by survivor for services to estate.**

Authority in joint will to the surviving testatrix to sell or otherwise dispose of any of the community property and invest the proceeds or make such disposition as she might deem best, while not authorizing her to dispose of it contrary to the provision that on the death of both the property should be divided equally between all their children, empowered her to convey some of it in consideration of services rendered and to be rendered by the grantee in caring for and managing the estate.

Appeal from District Court, Fayette County; M. C. Jeffrey, Judge.

Action by Mrs. Augusta Heller, guardian, and others, against Moritz Heller. Judgment for plaintiffs, on the sustaining of demurrer to the answer, and defendant appeals. Reversed and remanded.

Edw. H. Moss, of LaGrange, for appellant.

George Willrich, of LaGrange, for appellees.

**PLEASANTS, C. J.** This is a suit by appellees against appellant to cancel a deed executed by Mrs. Anna Heller, deceased, to appellant, conveying 147.25 acres of land, and to recover of appellant title and possession of five-sixths of said land.

The plaintiffs and the defendant are the children and grandchildren of Theophilus Heller and Anna Heller, deceased. Theophilus Heller died in 1903, and his wife, Anna, in 1919. Prior to his death, Theophilus and Anna Heller executed a joint will, the provisions of which disposing of the property of the respective testators are identical. By this will Theophilus Heller, after directing the payment of his debts and the expenses of his last sickness and funeral, thus disposes of his property:

"III. All the then remaining property, be the same real or personal property, I hereby devise and bequeath to my wife Anna Heller née Munke, she shall have and hold the same together with all the rights and appurtenances thereto in anywise belonging during her life or until she may marry again in which case she shall make two equal parts of the then remaining property one to be styled her and the other

to be styled my part, and she may make such disposition of her part as she may deem fit, but my part shall be equally divided among the children of our marriage, viz.: Theophilus Heller, John P. Heller, Moritz Heller, Margaretha Heller, Agatha Heller and Thekla Heller.

"VIII. To the executrix of this my part of this my last will and testament I appoint my wife Anna Heller née Munke and I do hereby especially ordain and decree, that she shall not be held to give any bond or other security whatever for the carrying out and due performance of the dispositions of this agreement and my last will and testament."

These provisions are followed by identical provisions by which Anna Heller disposes of her property.

The remaining provisions of the will are as follows:

"IX. After the demise of both of us, Theophilus Heller and Anna Heller wife of Theophilus Heller, and neither of us having entered into a second marriage all of the then remaining property, both real or personal property, shall be equally divided between our children, and if any of our children or child shall have been married and subsequently demised the offsprings of such child or children shall receive the share due to such child or children, but in no case shall the surviving husband or wife of such child receive any benefit of our property, but the same shall be for the benefit of the said offspring exclusively.

"X. The survivor of either of us, Th. Heller or A. Heller née Munke, shall have the right to sell or otherwise dispose of any part of our community property and invest the proceeds of such sale or disposition as he or she may think best.

"XI. After the demise of both of us the honorable county probate court having jurisdiction shall appoint an executor with the will annexed to carry into execution the provisions of this will and testament."

At the time of the execution of this will and at the time of the death of Theophilus Heller, he and Anna Heller owned as community property 2,000 acres of land, of which the land in controversy is a part, and in addition thereto community property consisting of cattle and other personal property of considerable value.

Upon the death of Theophilus in 1903, Anna Heller had his will before set out probated in the county court of Fayette county, qualified as executrix thereunder, took possession of all of the community property, and held and enjoyed the same exclusively until her death in 1919.

On the 3d day of April, 1916, she conveyed to appellant, Moritz Heller, who is a son of Anna and Theophilus, the 147.25 acres of land in controversy. This conveyance is by deed with general warranty of title which recites that it is executed by virtue of the power vested in the grantor by the last will of Theophilus Heller, deceased, "and in con-

sideration of the sum of ten dollars paid by the grantee, and the further consideration of the love and affection I have to my son, the said Moritz Heller."

Plaintiffs' petition attacks this deed on the ground that Mrs. Heller having elected to take under the will of her deceased husband was estopped from disposing of the property devised by the will otherwise than as directed by the will, and that under the provisions of the will before set out she was not authorized to convey the property to appellant for the purposes and considerations expressed in the deed. They further allege that at the time of the execution of the deed Mrs. Heller was in a weak condition of body and mind and that execution of the deed was procured by appellant by his exercise of undue influence over the mind of his mother.

Appellant answered this petition by plea of not guilty and general denial of its allegations which were not thereafter admitted. The answer then admitted that—

"Appellees were the children and grandchildren of Theophilus and Anna Heller, deceased, as alleged by appellees in their amended original petition, and that Theophilus Heller and Anna Heller, during their lifetime, executed the joint and mutual will of date October 23, 1891, as alleged by appellees, which is marked 'Exhibit B,' to appellees' petition, and that said will was admitted to probate as to Theophilus Heller and Anna Heller as alleged by appellees; that after the death of Theophilus Heller, Anna Heller qualified as executrix of said will and took full charge and control of all of the property belonging to Theophilus Heller, Sr., and herself, and controlled and managed the same to the exclusion of the appellees in the case and all others; that the 147 acres of land conveyed to appellant by Anna Heller, now deceased, on April 3, 1916, was the joint and community property of Theophilus Heller and Anna Heller, as well as other property owned by them, and that appellant and appellees owned in common all of the property belonging to the estate of Theophilus and Anna Heller, deceased, that was yet on hand at the time of the death of Mrs. Anna Heller, the surviving wife of Theophilus Heller, deceased, of which the 147 acres of land was a part. Appellant further represents by his answer that Anna Heller, the surviving wife of Theophilus Heller, deceased, was vested with authority under the joint and mutual will of herself and deceased husband, and had the power and authority to make such deed as was made to appellant by the said Mrs. Anna Heller to the 147 acres of land, on April 3, 1916, and that this appellant was the owner in fee of said 147 acres of land; that said deed was made to appellant by said Mrs. Anna Heller for and in consideration of \$10 cash and love and affection that Mrs. Heller had for her son, Moritz Heller, and, while not so recited in the deed, yet the same was also executed for and in consideration of the services to be rendered and for services appellant rendered to his mother, Mrs. Anna Heller, surviving wife of Theophilus Heller, deceased, for the past 16 years, in assisting the said Mrs. Anna Heller in managing the com-

munity estate of herself and husband, which consisted of about 2,000 acres of land, of which 500 or 600 acres were in cultivation, and assisting his mother in caring for her stock and all other property belonging to said community estate of Theophilus Heller, deceased, and Anna Heller, all of which property was of such a nature as to render it impossible for Mrs. Anna Heller, surviving wife of Theophilus Heller, deceased, to care for in her own proper person, and she was compelled to call to her aid some one to assist her in caring for said property and managing said estate, and she did call to her assistance this appellant, who continually for the past 16 years prior to the death of his mother, the said Mrs. Anna Heller, looked after the wants of his mother and the management of the community estate of his mother and father, both in renting the premises and keeping the same in repair and in caring for the stock belonging to the community estate of his mother and father, and that the mother of this appellant, the said Mrs. Anna Heller, surviving wife of Theophilus Heller, deceased, did, on the 3d day of April, A. D. 1916, execute and deliver said deed to said 147 acres of land to this appellant in consideration of the services that this appellant rendered for his mother, and the services to be rendered by this appellant for his mother, which services were made necessary during said 16 years aforesaid for the assistance of the said Mrs. Anna Heller, now deceased, in caring for herself and the property of the community estate of herself and deceased husband, and were of the reasonable value of \$500 per year; that the appellant, Moritz Heller, did render services which were part of the consideration for which said deed was executed and did assist his mother in preserving and caring for the community estate of herself and husband up to the time of her death."

The trial court sustained a general demurrer interposed by plaintiffs to defendant's answer, and rendered judgment in favor of plaintiffs canceling the deed in question and for title and possession of an undivided five-sixths of the land in controversy.

Under appropriate assignments of error appellant complains of this ruling of the court, and we think the assignments should be sustained.

[1] We agree with appellee in their contention that Mrs. Heller having accepted benefits under the will of her deceased husband was bound by its disposition of the community estate of herself and the testator, and could not convey or otherwise dispose of any portion of the estate in violation of the provisions of the will. *Larrabee v. Porter*, 166 S. W. 395; *Sherman v. Goodson*, 219 S. W. 839.

[2] Section 10 of the will before set out expressly authorized Mrs. Heller to sell or otherwise dispose of any part of the community property and to invest the proceeds of sale or to make such disposition as she might deem best. While the general power of disposition of the property conferred by this section of the will considered alone is

unrestricted, the will must be construed as a whole, and this provision should not be construed as authorizing Mrs. Heller to give or devise the property or any portion of it contrary to the express provisions of section 9 of the will, which directs that upon the death of both of the testators all of the property shall be equally divided between all of their children.

To give section 10 a construction which would authorize Mrs. Heller to give the property to one of these children would defeat the manifest purpose and intention of the testator as evidenced by the will as a whole, and it should not be so construed.

This section does, however, expressly authorize a sale or disposition by the survivor of any part of the property and the investment of the proceeds as he or she may deem best, and any sale or disposition of the property made in good faith for the purpose of reinvesting the proceeds, or using same for the benefit of the estate, would be valid regardless of whether such investment or use was judicious; and we think under this provision of the will Mrs. Heller was authorized to convey the land to appellant in consideration of services rendered and to be rendered by him in caring for and managing the estate. She could have sold the land and used the money received from such sale in paying for the necessary services of a manager of the estate, and having this authority, it necessarily follows that she could convey the land in consideration for such services. *Hanna v. Ladewig*, 73 Tex. 37, 11 S. W. 133; *Livingston v. Koenig*, 20 Tex. Civ. App. 398, 50 S. W. 463; *Feebles v. Slaughter*, 182 S. W. 10; *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855; *Bevans v. Murray*, 251 Ill. 603, 96 N. E. 546.

If this was the real substantial consideration for the conveyance to appellant, as alleged in his answer, the conveyance should not be held unauthorized.

On the other hand, if the only consideration for the conveyance was, as stated in the deed, the sum of \$10 and love and affection, the transaction was manifestly an attempt on the part of Mrs. Heller to give preference to one of her children in the disposition of the community estate held in trust by her under the will of her deceased husband contrary to the clearly expressed desire and intention of the testator and should not be upheld.

We think appellant's answer was sufficient to raise the issue of fact above indicated, and the general demurrer thereto should not have been sustained.

It follows that the judgment of the trial court should be reversed and the cause remanded, and it has been so ordered.

Reversed and remanded.

# **CRAVEN et al. v. DAVISON. (No. 8147.)**

(Court of Civil Appeals of Texas. Galveston. June 30, 1921. Rehearing Denied Oct. 6, 1921.)

1. Injunction  $\S$  43—Against payment of moneys constituting moneys chose in action not granted.

A fund accruing to a contractor from a county for the construction of a road being but a chose in action, equity will not enjoin payment and collection, to aid a creditor whose claim was not reduced to judgment, where no fraud or trust was shown.

2. Injunction  $\S$  13—Refused where no probable danger to plaintiff's rights shown.

Irrespective of the existence of a probable right of a sublessee of a road building contract to a county fund payable to the contractor, or to damages for the latter's breach of contract in proceeding with the construction of the road after subletting the contract, payment by the county and collection by the contractor of sums payable during the progress of the work will not be enjoined where no probable danger to such rights was shown.

3. Injunction  $\S$  24—Not granted where public work injuriously affected.

Since the stopping, delaying, or hampering of the construction of a county highway from the county seat to the line of an adjoining county would work serious injury to county and public generally, payment to and collection by the road contractor of sums payable during the progress of the work will not be enjoined.

Appeal from District Court, Harris County; J. D. Harvey, Judge.

Action by Ben S. Davison against M. M. Craven and others. From a judgment granting a temporary injunction, the named defendant appeals. Reversed, and temporary injunction dissolved.

GRAVES, J. M. M. Craven held a written contract with the county of Gillespie, in Texas, under which he was to construct for it with gravel and crushed rock surfacing 17½ miles of roadway extending from the town of Fredericksburg west to the Mason county line. The work was to be paid for on unit prices, so much per acre for the grubbing, so much per cubic yard for the excavations, hauling, etc., with provision that, as the work progressed, 90 per cent. of the value of labor and material furnished by the contractor should be paid him each month by the county on the issuance of estimates thereof, the remaining 10 per cent. to be reserved by the county until completion of the entire enterprise.

Subsequently, also by an instrument in writing, Craven sublet this entire work to Ben S. Davison, their agreement being that Davison would undertake to carry out and

perform Craven's contract with Gillespie county according to its terms, for 90 per cent. of what the county was to pay Craven, 85 per cent. of the monthly estimates as paid by the county to go to Davison and 5 per cent. to Craven, and the 10 per cent. so reserved by the county to belong one-half to Davison and one-half to Craven.

These two individuals further constituted a bank at Fredericksburg and its cashier as their agent to receive the monthly vouchers from the county, collect the money, and divide it between them according to the above arrangement. With the knowledge of the county officials, this subtransaction between Craven and Davison was partially executed by Davison's entering upon and doing some of the work, and receiving through this Fredericksburg bank his agreed part of seven of the monthly estimate payments made by the county, all of which were issued in the name of Craven. Neither the commissioners' court nor the engineer of the county ever consented in writing or in any way that this work should be done by Mr. Davison, nor was the provision of the state highway department of Texas that "no work is to be sublet or assigned by the contractor without the written consent of the engineer and the written permission of the state highway engineer" carried out. This subletting of the work as between Craven and Davison, therefore, never became a legal contract or in any way binding upon Gillespie county.

With matters in this condition and at this stage, after ten of the twelve months allowed Craven for completion of the undertaking had elapsed, the county became dissatisfied with the way Davison was doing the work and in writing demanded of Craven that he himself proceed with the construction of the road, under penalty of being held on the bond he had made the county for the faithful performance of his contract; this Craven did to the exclusion of Davison, and the county thereafter refused to turn over warrants for the succeeding monthly allowances to the Fredericksburg bank and paid them to Craven direct until stopped by order of the trial court in this proceeding.

Davison then brought this suit for damages against Craven, claiming something over \$10,000 to be due him under the terms of their contract for what he had done, and the further sum of \$16,000 as a profit he alleged he would have made if he had been permitted to complete the contract.

On plaintiff's application the trial court first issued a temporary restraining order against defendant Craven, the judge, commissioners, and clerk of the county in their respective official capacities—effective until further hearing—directing Craven neither to transfer nor assign his contract with the county or any money accruing thereunder in any way, nor to receive or collect from the county, its officers or agents, any money or

estimates pursuant to the terms of his contract with it, and ordering the county officials named not to issue or deliver to defendant Craven or any one else than the Fredericksburg bank any warrant calling for the payment of or evidencing any indebtedness arising by virtue of the contract between Craven and Gillespie county.

On subsequent hearing, defendant Craven's answer and motion to dissolve having come in and both sides having submitted evidence, the court, after overruling the motion to dissolve, decreed as follows:

"And the court being further of opinion that the application and petition of plaintiff for a temporary injunction, restraining the defendant M. M. Craven from collecting certain moneys from Gillespie county and restraining the other defendants, as officers of Gillespie county, from paying the same to the said defendant, M. M. Craven, should be granted in part only; it being the purpose of the court to impound by injunction sufficient of said moneys to protect the plaintiff in his rights and at the same time not to interfere with the right of the defendant M. M. Craven to collect from time to time sufficient moneys to enable him to carry out the terms of his contract with Gillespie county.

"It is therefore ordered, adjudged, and decreed by the court that writ of injunction issue upon plaintiff giving bond in the sum of \$5,000 payable and conditioned as required by law, restraining and enjoining the defendant Craven from assigning or transferring or attempting to assign or transfer his contract with Gillespie county to any person, firm, or corporation; and also restraining and enjoining the defendant M. M. Craven from receiving or collecting or attempting to receive or collect from Gillespie county or the officers thereof any part of the 10 per cent. retained percentages provided by the terms of said contract to be kept and retained by Gillespie county until the completion of the work, whether such retained percentages have accrued in the past or shall hereafter accrue; and further restraining and enjoining the defendant M. M. Craven from collecting or attempting to collect from Gillespie county, its officers or agents, any sum or amount on account of deferred payments or monthly estimates now due or hereafter to become due under the terms of said contract in excess of 75 per cent. of the net amount of such deferred payments or monthly estimates remaining after the deduction of the 10 per cent. retained by the county under the terms of the contract until the completion of the work.

"And it is further ordered, adjudged, and decreed by the court that the defendants A. H. Kneese, as county judge of Gillespie county; Charles Lehne, Lorenz Wendel, M. Berg, and I. W. Lee, as county commissioners of Gillespie county; and Albert E. Klett, as county clerk of Gillespie county—be and they are hereby enjoined and restrained from paying or causing to be paid to the defendant M. M. Craven any part of the moneys which the said defendant, M. M. Craven, is enjoined and restrained from collecting under and by virtue of the terms of this order, or from paying said sums of mon-

ey or any part thereof to any person, firm, or corporation other than the Citizens' Bank of Fredericksburg, or to Wm. Bishwell, as cashier of said bank; and it is further ordered that, except as herein specifically granted, the application and prayer of the plaintiff for temporary injunction be and the same is hereby in all things overruled and denied. It is further ordered that the temporary injunction herein granted shall remain in full force and effect pending this litigation, unless otherwise ordered by the court."

From this judgment so granting the temporary injunction against him the defendant Craven appeals to this court, assigning against it here, among others not deemed needful to mention, the following grounds of complaint:

"(1) It being clearly shown that the plaintiff Davison was in no danger because of the insolvency of the defendant, or because of the defendant's dissipating and concealing his assets, and it further appearing that the contract made with Gillespie county was for a public work, to wit, building of a public road, and that enjoining said county or its officials from making a payment for said work as the work progressed would work a great injury to the public and to Gillespie county, the injunction should have been denied.

"(2) A suit by creditors' bill will not lie in Texas, the right of attachment or garnishment having been substituted for same, therefore a chose in action cannot be reached by an equitable suit to subject it to the payment thereof whether such chose in action be subject to garnishment or not.

"(3) The fund in the hands of the county of Gillespie not being subject to garnishment for the debt of Craven, no good can come from the injunction restraining said county or its officials from paying said money to Craven, but great injury will result to Craven thereby, and because an injunction will not be granted which cannot accomplish the purpose for which same is sued out, the injunction in this case should have been refused."

"(6) The court in granting an injunction should require a case of probable right and probable danger to the right without the injunction, and the pleadings of the parties and the evidence having shown that not only has the plaintiff not a probable right, but that the right which he claims is not in probable danger, the injunction should have been refused."

In our opinion, each and all of these objections are well taken. The statement of facts brought up with the record evidences the truth of the matters of fact they aver, and much more. As our foregoing recitation has disclosed, the subcontract between Craven and Davison was never a legal one nor recognized by Gillespie county, which at all times looked to Craven to discharge his obligation under his own contract to it. While it was alleged in the application for injunction that appellant had not sufficient property or means to respond to the claim for damages made, that he would unless restrain-

ed collect the full amount called for in his contract with the county, including the 10 per cent. reserved, or would assign the same to some one else, or would dissipate, conceal, and place the same beyond the reach of creditors, none of these averments were substantiated upon the hearing. On the contrary, the proof was undisputed that he was worth over and above all liabilities from \$60,000 to \$75,000, consisting of lands and other property located in different parts of Texas; that he had no intention of secreting, selling, or attempting to place any of it beyond the reach of his creditors; that when he had fully performed his contract with Gillespie county there would be in its possession and answerable for his debts from \$10,000 to \$12,000, and that he had given the county an acceptable bond for \$43,000 to assure it of compliance on his part with his agreement to build the road; finally, that he had offered, and again at this hearing tendered, to appellee Davison, a bond for \$16,000 conditioned in event he was permitted to collect the money as it accrued under his contract with the county, upon his paying the full amount of any final judgment with costs that might be rendered in appellee's favor against him in this cause, signed by sureties whose aggregate worth was not under \$250,000.

It was likewise shown that business and financial conditions at the time were such that, despite ample assets, it was difficult to finance an undertaking of the kind and magnitude of the one here involved.

[1] The fund accruing or to accrue to Craven from the county was at most but a chose in action, Davison's claim against him had not been reduced to a judgment, no case of fraud or trust was made out, and in such circumstances our courts have held that equity will not aid the creditor with injunction. *Bank v. Bass*, 177 S. W. at page 1022, par. 4, and authorities cited.

[2] Moreover, whatever might be determined as to whether or not Davison had a probable right in connection with this county fund or as to the damages he claimed, we think it entirely clear, under the pleadings and the evidence, that no probable danger to either was shown; that being true, injunction should have been refused. *Whitaker v. Hill*, 179 S. W. 539; *Gillespie County v. Land Co.*, 168 S. W. 9.

[3] The work here affected was a public one, the construction of a county highway from the county seat to the line of an adjoining county; it goes without saying that the stopping, delaying, or hampering of such a project by the harsh process of injunction would work serious injury to the county, its citizens, and the public generally.

Convinced that, under the facts developed, the writ of temporary injunction was improvidently issued, the decree so awarding it

is reversed, and this court's judgment is here entered in all respects dissolving it.

Reversed, and judgment rendered dissolving the temporary injunction.

### DAVIS v. HUBBARD et al. (No. 8141.)

(Court of Civil Appeals of Texas. Galveston. June 28, 1921. Rehearing Denied Oct. 6, 1921.)

**Elections** **275**—District court has no jurisdiction of contest of election of mayor in incorporated city.

The district court has no jurisdiction of a proceeding to contest an election for mayor of a municipal corporation, since Const. art. 5, § 8, giving the district court original jurisdiction of contested elections, is not self-executing, and since Rev. St. art. 3081, making the provisions of title 49, relating, among other things, to election contests, applicable "to all elections held in this state, except as otherwise herein provided," does not authorize such a proceeding, in view of failure to specify the forum in which such a contest is to be tried, as is done with reference to contested elections of other officers, under articles 3046-3063, 3077.

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Proceeding by Henry Davis against O. L. Hubbard and others, to contest an election for mayor of the town of Independence Heights. From a judgment sustaining a plea to the court's jurisdiction, plaintiff appeals. **Affirmed.**

Green & Boyd, of Houston, for appellant.  
Ward & Ward, of Cleburne, for appellees.

**GRAVES, J.** This was a proceeding brought in the Fifty-Fifth district court of Harris county to contest an election for mayor of the town of Independence Heights, a municipal corporation organized and existing under the general laws of Texas, with an alternative prayer, in event the court should find it proper and necessary, that the complained of election be set aside, and another one held. As brought it was purely an action to contest an election for mayor of a town incorporated under our general law, notice of which contest was alleged to have been given, with addition of only the general alternative request stated. The amended petition was not sworn to, but averred that, while plaintiff had in fact received the larger number of votes, the election officers had wrongfully made the returns show a tie vote between himself and the contestee, and had declared the latter duly elected. The trial court sustained a plea to its jurisdiction on the ground that our statutes on the subject of contested elec-

tions do not provide for the contesting of elections of municipal officers of cities and towns incorporated under general laws. The plaintiff below appeals, assigning that action as error.

We agree with the trial court, and order the judgment affirmed. It is quite true that section 8 of article 5 of our Constitution provides that the district court shall have original jurisdiction of contested elections, but the Supreme Court, in *Odell v. Wharton*, 87 Tex. 173, 27 S. W. 123, held that provision not to be self-executing, because it prescribes no rules by which the jurisdiction may be enforced, and a contested election, not being a civil suit or cause, and so not triable by proceedings had in such cases, must be specially authorized by the Legislature.

Later, in the case of *Compton v. Holmes*, 94 Tex. 578, 63 S. W. 621, that court, in answering certified questions from this court, further held that, under Revised Statutes, art. 1810 (now 3081), the district court was without jurisdiction to try and determine contested elections for officers of incorporated cities, towns, and villages—the precise question here involved. The trial court in this instance followed that holding, and no reason for departing from it is perceived.

The contention of appellant that the change of the word "article," as this statute read at the time the *Compton* Case was decided, to "title," in its present form of, "The provisions of this title shall apply to all elections held in this state, except as otherwise herein provided," makes a decided difference, and that, had the law been of the same form then as now, the jurisdiction of the district court would have been upheld, is not regarded as sound. We do not think the statute in its present form should be given any different effect or greater meaning than it had in 1901, but that, interpreting it in the broadest permissible manner, it can still only refer to contests provided by statute; and, none covering such an office as this one appearing, no jurisdiction attaches in a case of this character. This conclusion, we think, is emphasized by this consideration:

Article 3081 refers to the entire legislative title relative to elections (title 49), and yet there is within it no tribunal designated for the trial of an election contest for municipal office, as is specially done with reference to every other office to which our attention has been directed; for instance, contests for district attorney are to be tried in the district court where the candidate holding the certificate of election resides; for district judge, in a district court of the county of an adjoining district whose county seat is nearest that of the home county of the candidate having the certificate of election; for

justice of the Supreme Court and the Court of Criminal Appeals, by a district court of Travis county; for justice of a Court of Civil Appeals, in the district court of the county where the court has its sittings; for any county office, in the district court of the county where the election is held; and so on. Indeed, the entire group of articles from Revised Statutes, 3046 to 3063, inclusive, as we read them, have reference only to the offices specifically mentioned, not including a municipal office of the character of the one here in question. Article 3077 likewise deals with other elections than those for the offices referred to in the articles just mentioned, and therefore cannot cover this one. Since, therefore, no forum for the trial of a contest affecting this sort of an election was named, the conclusion is not unwarranted that none was intended to be; if article 3081 were otherwise construed, and it were held that its general purpose was to subject municipal elections to the provisions of title 49, there would still be no way of telling which one of the various tribunals so provided for other classes of contests should or could be resorted to for the settlement of one of this character.

It may be that appellant would have had a remedy in an action of suit for the office, or in a proceeding by quo warranto, but that question is not before us. The judgment has been affirmed.

Affirmed.

#### SMITH v. THOMPSON. (No. 1225.)

(Court of Civil Appeals of Texas. El Paso.  
May 26, 1921. Rehearing Denied  
Oct. 6, 1921.)

1. Appeal and error  $\S$  1040(3)—Sustaining demurrer not reversible error where evidence under the pleading was considered.

Bill of exceptions complaining that court sustained demurrer to pleading *held* not to present reversible error where subsequent bill of exceptions shows that evidence was admitted and considered by the court under such pleading.

2. Attorney and client  $\S$  182(3)—Attorney entitled to retain title papers on client's refusal to pay him money expended in procuring them.

An attorney employed to perfect title to land could retain title papers on client's refusal to pay him money expended in procuring them, under his agreement to so do.

3. Appeal and error  $\S$  1058(2)—Exclusion of testimony harmless where witnesses subsequently testified fully concerning the matters.

Refusal to permit witnesses to testify to certain matters *held* not ground for reversal where the witnesses subsequently testified fully concerning such matters.

4. Attorney and client  $\S$  134(1)—Attorney cannot recover, on termination of contract, more than what his compensation would have been if he had fully performed.

An attorney employed to perfect title to certain land under a contract entitling him to certain interest in the land for such services could not, on client's termination of contract before he had fully performed services, recover as reasonable value of the services, upon quantum meruit, more than the value of the land which would have been his compensation for his services had the title been perfected.

5. Attorney and client  $\S$  158—Attorney, having performed services, could not recover on a quantum meruit, but was limited to compensation specified in contract.

Attorney, who had agreed to perform certain services in consideration of a certain percentage of client's stock in corporation, having performed such services, could not recover reasonable value of service upon quantum meruit, but was confined to a recovery of the specified proportion of client's corporate stock.

Appeal from District Court, Erath County; J. B. Keith, Judge.

Action by John E. Smith against R. L. Thompson, in which defendant filed a cross-action. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Jas. W. Smith, of Cordell, Okl., for appellant.

Chandler & Pannill, of Stephenville, for appellee.

HARPER, C. J. Appellant, J. E. Smith, brought this suit against appellee, R. L. Thompson, for damages alleged to have been suffered by reason of the fact that defendant accepted employment as attorney at law to represent plaintiff in a number of lawsuits, and by reason of the negligent and careless manner in which he handled the cases, and his willful and wanton failure and refusal to perform the services for which he was employed, and for possession of certain title papers, or their value, to certain lands, which is the subject-matter of the cross-action of defendant noted below.

Defendant answered by general demurrer, special exceptions, general denial, and specially pleaded that he had refused to deliver the title papers, because plaintiff had failed and refused to pay him the moneys expended by him in procuring them, and by way of cross-action pleaded as follows:

That on the 22d day of March, 1916, the plaintiff entered into the following contract with L. M. Frank and himself as attorney at law:

"State of Texas, County of Erath.

"This contract made in duplicate, on the day and date hereinafter set forth by and between J. E. Smith, of Erath county, Texas, hereinafter called first party, and L. N. Frank and R. L. Thompson, attorneys at law, of Stephen-



ville, Brath county, Texas, hereinafter called second party, witnesseth:

"First. That first party has this day employed second party to represent first party in the investigation of the title and possession and such other and further investigation as is necessary to vest title to said land in first party under the terms of a certain contract had by first party with one W. L. Wright of St. Louis, Mo., and other parties connected with said contract; the title and possession of which land requiring the services of second party is hereby described as about twenty-six thousand acres of land and described as fractions A, B, and C, Lot No. 4, of the national lands situated in the municipality of Villa Ahumada, of the district of Bravos, state of Chihuahua, in the republic of Mexico, and being the same land as described in the contract above referred to. That second party is to do all such acts and to perform all such services as may be necessary to a full and complete investigation of the title and possession of said lands with especial reference to the ownership thereof in first party and to do all acts necessary in vesting title and possession thereof in first party.

"Second. That in payment of and satisfaction of services rendered and to be rendered in the premises, first party hereby assigns, and conveys to second party a one-third ( $\frac{1}{3}$ ) undivided interest in and to the lands referred to in the foregoing paragraph, the said one-third undivided interest to vest in second party absolutely: Provided that, if it be found that the lands and premises or any part thereof such as is described in first paragraph be incorporated, or in the name of, or is owned in a corporate name, then first party hereby conveys and assigns to second party a one-third ( $\frac{1}{3}$ ) undivided interest in and to such shares of capital stock or other evidence of holdings therein as first party owns in said corporation: Provided, further, that second party, in the event of a settlement or compromise by and between first party and the said W. L. Wright or other parties growing out of the contract for the purchase of said land above described by first party, then and in that event first party hereby conveys, sets over and assigns to second party a one-third interest in all moneys, or money, or property paid to first party in such settlement.

"Third. First party is to advance the sum of \$50 at such times as it may be necessary to second party to cover such expenses as may be necessary in the investigation of the condition of title and possession of said lands above described; that all other money and expense second party may expend under the terms of this contract over and above the \$50, the same to be borne equally by first party, L. N. Frank, and R. L. Thompson, in proportion of one-third each: Provided, that if under the terms of this contract second party shall receive title and possession to any part of said land above described, or interest therein, or shares of stock or money in lieu thereof, second party shall out of their interest so recovered refund to first party the \$50, together with one-third of such expense as he may be out under the terms of this contract.

"Witness our hands this the 22d day of March, 1916.

"First Party, J. E. Smith,  
"Second Party, L. N. Frank,  
"R. L. Thompson."

That upon the execution of said contract this plaintiff diligently entered upon said matter, and prosecuted the investigation by correspondence and personal trips at his own expense, and that plaintiff wholly failed and refused to pay his one-third of the expenses; that in 1919 another contract was executed whereby appellee was to represent the appellant for a consideration of one-half of the lands, and the parties to share the expense equally; then sets up in detail the things done in compliance with this latter contract, up to about February 1, 1920, when plaintiff, without cause or excuse, discharged this defendant from his said employment, and thus terminated the contract; that by reason of the discharge plaintiff became liable to defendant for the reasonable value of the services; that if plaintiff had not discharged defendant he would have carried out his contract, and would have recovered, and had recognized plaintiff's right to the said lands, and would have realized as his part the sum of \$10,000; and prays judgment therefor.

Plaintiff replied to this cross-action by general demurrer, special exception, and plea of payment and satisfaction. Tried before the court without the aid of a jury, and judgment rendered that Smith take nothing, and in favor of Thompson upon his cross-action for \$2,500. Appealed.

[1] The first assignment complains that the trial court erred in sustaining defendant's demurrer to plaintiff's trial amendment. If the court sustained a demurrer, it was error, because the allegations are sufficient upon general demurrer; but the record does not conclusively show that the demurrer was sustained. Though we find a bill of exceptions to that effect, a subsequent bill of exceptions shows that evidence was admitted and considered by the court in rendering the judgment, so this matter does not present reversible error. However, in view of another trial, we suggest that several of the special exceptions are good, because the allegations of petition in a large measure consist of legal conclusions, and are lacking in that certainty of detail which it should have contained.

[2] The second charges error in overruling plaintiff's demurrer to defendant's answer and cross-action, because same fails to allege facts sufficient to constitute a defense. The general denial was a sufficient answer to all, and the special defense to the prayer for possession of the title papers, that plaintiff failed and refused to pay his portion of the expense therefor, and that they were held by another party because same was not paid, constituted a sufficient defense to that part of plaintiff's cause of action.

[3] The third complains that the court refused to permit certain witnesses to testify to certain items in plaintiff's petition. The record shows that, after the ruling, the wit-

nesses testified fully about the matters. The fourth is that the evidence does not sustain the judgment rendered.

[4] There is neither allegation nor proof of the value of the land sought to be recovered; therefore there is no basis for a true measure of damages to be recovered. He could in no event recover more than the value of a one-third or one-half (as the contract enforceable provides) of the value of the lands to be recovered. 2 Ruling Case Law, vol. 2, § 131; Hill v. Cunningham, 25 Tex. 25; Lynch v. Munson, 61 S. W. 140; Merchants' National Bank v. Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227.

There is another proposition apparent upon the face of the record which we think fatal to the judgment rendered. The appellee pleaded that he performed certain services pursuant to the contract, and that he was discharged from further performance by appellant, before he finished the services contracted to be performed, and that he could have recovered the title to the land if he had been permitted to continue to prosecute the claim. He testified that, in his opinion, the title to the lands was clear in appellant. The evidence discloses that, the land being in Mexico, the title could not vest in an individual not a citizen, but must, under the laws of that republic, be taken in the name of a corporation organized under its laws, for that purpose.

[5] In addition to his testimony that the title had vested in the corporation, he testified that the corporation had been duly organized, charter issued, and that the certificates of stock due to his client had been duly issued and delivered to him, and introduced in evidence the charter, etc. He is bound by his evidence, and, since he has shown that the title was vested, as he had undertaken to accomplish, his interest (shares of stock) likewise vested in him, and he is now confined to recovering that interest instead of suing upon a quantum meruit for the reasonable value of services performed.

The cause must therefore be reversed and remanded.

#### On Motion for Rehearing.

We have again carefully reviewed the record, and are still of the opinion that the rules of law enunciated are the ones which control this case; that is, that appellee can in no event recover more upon quantum meruit than the value of the lands which would have been his compensation for his services had title been perfected. Additional authorities: Weis v. Devlin, 67 Tex. 507, at page 513, 3 S. W. 726, 60 Am. Rep. 38; Hearne v. Garrett, 49 Tex. 619; Devoe v. Stewart, 32 Tex. 717; R. R. v. Shirley, 45 Tex. 355; Lamar v. Hildreth, 209 S. W. 169; Mfg. Co. v. Street et al., 196 S. W. 286; Surety Co. v.

Construction Co., 182 Mo. App. 667, 166 S. W. 333; Shropshire v. Adams, 40 Tex. Civ. App. 339, 89 S. W. 448. And there is no evidence of probative force of the value of the land, or the interest which was to be the compensation for perfecting the title.

The motion is therefore overruled.

#### AMERICAN INDEMNITY CO. v. BOARD OF TRUSTEES OF ROBSTOWN INDEPENDENT SCHOOL DIST. (No. 5914.)

(Court of Civil Appeals of Texas. San Antonio. May 26, 1921.)

1. Schools and School districts §81(2)—Evidence in suit against contractor's surety held not to prove delay in construction of building was within provision of contract extending time.

In an action against contractor's surety for contractor's failure to construct building within the six months period specified in the contract, evidence held insufficient to prove that the period of delay fell within provision of the contract extending time for performance to the extent of delays occasioned by additional work or changes in work, or by causes not under the contractor's control.

2. Schools and school districts §81(2)—When contractor's surety shows absence of required notice of default, trustees must show failure to give notice excusable.

In an action against contractor's surety for failure to construct a building within the period specified, the burden was on the surety to show that written notice of default was not given it within 30 days after notice thereof came to the district trustees as provided by the bond; and, when this was shown, the burden shifted to the trustees to show that by reason of delays of such character as extended time for performance they were excused from giving the notice within the time specifically required.

3. Appeal and error §1010(1)—Finding not disturbed, where there is any evidence to support it.

A finding of fact by trial court must be given the same force and dignity as the finding of a jury on a given issue, and must not be disturbed, where there is any evidence to support it.

Appeal from District Court, Nueces County; B. D. Tarlton, Jr., Special Judge.

Suit by the Board of Trustees of Robstown Independent School District against C. D. Patterson and the American Indemnity Company. Judgment for plaintiff against the last-named defendant, and the latter appeals. Reversed and remanded, in conformity to opinion of Supreme Court in 228 S. W. 105.

Terry, Cavin & Mills, of Galveston, El. P. Scott, of Corpus Christi, and E. H. Cavin, of Brownwood, for appellant.

G. R. Scott and Boone & Pope, all of Corpus Christi, for appellee.

SMITH, J. In an opinion delivered by this court on May 26, 1921, we reversed the judgment of the trial court, and here rendered judgment for appellant, the American Indemnity Company. Upon further consideration, however, we have concluded to withdraw that opinion, set aside the judgment, and substitute in lieu thereof the following:

The trustees of the Robstown Independent School District employed one Patterson to construct a school building at Robstown, to which end the parties entered into a written contract, to which were attached certain plans and specifications, and Patterson gave a bond for the faithful performance of his obligations. The American Indemnity Company became a surety on the bond. Patterson defaulted. The trustees sued him and his surety, and obtained judgment, from which the latter appealed to this court. The judgment of the court below in favor of the trustees was reversed, and here rendered for the surety company. 200 S. W. 592. On writ of error from the Supreme Court, this judgment was reversed by the Commission of Appeals, and remanded to this court for further consideration and disposition. 228 S. W. 105.

The contract in question provided, in effect, that Patterson should complete the building within six months from January 8, 1914, but that this period might be extended under certain conditions to be noted later. It was also provided that, in event Patterson defaulted in this and other specifically mentioned obligations, the trustees should give written notice of such default to the surety company within 30 days after notice thereof had come to the trustees. The 6 months period mentioned ended on July 8, 1914, but written notice was not given the surety company until October 1, 1914, or 84 days after the default.

Provisions were made in both the contract and the specifications for delays which would operate to extend the period within which the building should be completed, and such extension would in turn automatically extend the time within which the notice to the surety company should be given. If the delays contemplated in those provisions, when tacked onto the 6 months period, were sufficient to extend that period to within 30 days of October 1st, then the notice called for in the contract was given in due time; but if these delays were not sufficient for that purpose, then the notice was not given in time. The specifications contained this provision for delays:

"The contractor shall be entitled to one day in addition to said stipulated time, for each day's delay resulting from additional work or changes in work required from time to time, or for specific delays from other causes as may be approved by the architects or owners which additional time must be stated by the contractor in writing within eight days of such delay, giving dates and causes, which if correct, shall be certified by the architect or owner.

Should the contractor neglect to ask for additional time, within the time specified above, it is mutually agreed that no just claim exists, or shall exist, for an extension of time."

Section 9 of the contract contained the following provision for excusable delays:

"It is further agreed and understood by and between the parties hereto that the contractor shall not be held responsible for any delay in the completion of said school building beyond the time as specified in paragraph 1 hereof, by reason of fires, acts of Providence and other acts beyond the control of the said contractor."

The contract provided, as has been shown, that the building should be completed within a period of 6 months from January 8, and ending on July 8, but that this period should be automatically extended so as to embrace delays in the construction due to uncontrollable causes; That is to say, if, for example, the uncontrollable delays aggregated one month's time, then under the terms of the contract the contractor had until August 8 in which to complete the work, and before default occurred. The bond provided that the trustees should in writing give the surety notice of default within 30 days after notice of such default had come to the trustees; or, in other words, this 30-day period, within which the trustees were required to notify the surety, was not set in operation until the trustees themselves had obtained or received notice of the contractor's default. So that, if in the given case the trustees had no notice of the default until 30 days after it occurred, or until September 1, they would have until October 1 in which to give the written notice to the surety.

The record does not show that the trial court found when the default as contemplated in the contract occurred, nor when notice of such default came to the trustees. That court did find, in its twenty-fourth finding of fact, that as soon as the trustees ascertained that the contractor abandoned the building, and within 80 days after such abandonment, they gave written notice thereof to the surety, and the Commission of Appeals have held that the trial court thereby intended to find:

"The time excluded on account of delays brought the 6 months period allowed in which to complete the building to within 30 days of the written notice of abandonment."

The Commission of Appeals have also held that there are no allegations of any delay contemplated in the provisions of the specifications—that is, delays due to the acts of the parties—and that there were no statements in writing of such delays ever made and presented by the contractor to the trustees, as provided in the specifications. We understand the effect of these holdings to be that delays, if any, occasioned by the acts of the parties as contradistinguished from uncontrollable delays must be eliminated from consideration here, and that the only question remaining is: Would the delays due

to uncontrollable causes (such as are provided for in section 9 of the contract), when added to the original 6 months period, project the time allowed for the completion of the building to a date within 30 days of the giving of the written notice to the surety? Or, to reduce the question to its most concrete form: As the original 6 months period expired on July 8, and notice was given on October 1, 84 days later, leaving a hiatus of 54 days, was the aggregate of the time lost on account of uncontrollable delays sufficient to cover a period of 54 days? We take it that this is the principal, the controlling, question which the Commission of Appeals has relegated to this court for determination.

[1-3] We have very carefully considered all the evidence pointed out to us by both parties, and, going beyond that, have searched the record for all evidence bearing upon this question. There is evidence of delays, some of which may, or may not, have been occasioned by providential or other uncontrollable causes, while some of them are properly chargeable to such causes. There does not seem to have been any evidence introduced for the purpose of classifying these delays with reference to controllable or uncontrollable causes. Some were due to rains and inclement weather, but there was no sort of showing as to how much time was lost on account of either such delay, or all of them, and no facts were given by which such time might be computed even by inference. There was evidence, however, of one delay of 6 weeks' duration, due to the lack of certain material; but no effort was made to show whether this was chargeable to the carelessness of the contractor, or otherwise. But, assuming that this delay was unavoidable, it accounted, at the most, for only 42 days. There was no evidence of any other delay covering a specific, or even estimated, period of time. We have very carefully scrutinized the whole record, with the purpose of upholding the finding of the trial court, as construed by the Commission of Appeals, as it is our duty to do, if it can be done lawfully. But we have discovered no evidence upon which to uphold the finding that there were sufficient delays, whether controllable, as provided for in the specifications, or uncontrollable, as provided for in section 9 of the contract, to extend the 6 months period so as to project it to within 30 days of the giving of written notice to the surety.

Much has been said about the burden of proof, and where it rests in this case. We think the burden of proof rested upon the surety to show that the written notice was not given it within 30 days of the expiration of the 6 months period specifically provided for in bond. When this was shown, as was done here, the burden shifted to the trustees to show that by reason of delays of the character provided for in the contract and specifications they were excused from giving

the notice within the period specifically required in the bond. Appellees did not meet this burden, and there was no testimony to support the twenty-fourth finding of fact as construed by the Commission of Appeals, and challenged by appellant's first assignment of error, which must be sustained. We understand, of course, that a finding of fact by a trial court must be given the same force and dignity as the finding of a jury upon a given issue, and must not be disturbed, where there is any evidence to support it. But in either case the finding must have some basis in the evidence.

The evidence here shows that the construction of appellees' building proceeded under many difficulties, and was subjected to many delays. The trustees were provident, and required the contractor to furnish a bond to secure the faithful performance of the obligations imposed upon him in the contract. It is obvious from the record that he failed in his undertaking, and the school funds furnished him for that purpose went for naught, so far as accomplishing that purpose was concerned. The contractor, in short, is in absolute default, and his sponsor, the surety company, ought not to be permitted to escape liability for the default, unless it is clearly entitled to such relief. It is true that, if the trustees disregarded the stipulation requiring them to give written notice to the surety within the period of time contemplated by the parties and expressed in the bond, then, of course, under the law the surety is absolved. The evidence upon this phase of the case is not satisfactory; it shows numerous delays from various causes, which may, or may not, have been of such nature and aggregate duration as to effect a compliance by the trustees with the requirement to put the surety upon the notice contemplated by the parties. It is obvious from the record, too, that the trustees, and the trial court as well, thought this showing sufficient in law, and it may be that this sense of security induced appellees to stop short of the maximum proof at their disposal. Accordingly, while we feel obliged to reverse the judgment of the court below, we feel none the less obliged to remand the cause to that court for another trial, in consonance with the opinions of the Commission of Appeals and of this court.

We think all other material matters in the case have been disposed of in the opinions of this and the Supreme Court, so that it is not necessary to discuss any other assignments of error not specifically mentioned. We ought to add, in view of another trial, that the fact of when notice of the contractor's default was brought home to the trustees should be developed. This fact is as important to the question of notice as the fact of the default itself.

For the reasons stated, the judgment is reversed, and the cause remanded for another trial.

(192 Ky. 404)

## COOPER'S ADM'R v. CLARKE et al.

(Court of Appeals of Kentucky. June 24, 1921. Rehearing Denied Oct. 18, 1921.)

1. Wills  $\S$  733(1) — Devise to children held absolute on testator's death, though division of property postponed.

A devise, "I want all my estate" to be equally divided among the children except as provided, held an absolute devise, and not a conditional one, the proviso relating to a clause for equalizing the shares of the children, and title and constructive possession vested eo instante on testator's death, notwithstanding a further provision that the property should be held intact for 15 years, at which time it might be divided if desired.

2. Wills  $\S$  602, 603(3) — Provision postponing division of property held to create fee defeasible on death of devisee without leaving issue.

Where a will provided that the property should be held intact for 15 years, after which time it might be divided if desired, and also provided that, if either of the devisees died without leaving issue, the portion of such devisee should be equally divided among the others, the estate up to the end of the 15-year period was a fee defeasible upon the death of a devisee without leaving issue; a "defeasible fee" being created when the devise is to one with a proviso that it shall be defeated on the happening of a named contingency.

[Ed. Note.—For other definitions, see Words and Phrases, Defeasible Fee.]

3. Curtesy  $\S$  9(1) — Husband held entitled to curtesy in lands to which wife had defeasible fee.

Where land was devised to a married woman subject to be defeated if she died without leaving issue, held, that the surviving husband was entitled to curtesy in the devised lands upon the wife dying without leaving issue in view of Ky. St.  $\S$  2182, giving the surviving husband or wife an estate for life in one-third of the real estate of the deceased spouse.

Appeal from Circuit Court, McCracken County.

Consolidated actions between Carrie Reike Cooper's administrator and Lillie Reike Clarke and others to construe the will of William H. Reike, deceased. From the judgment, Carrie Reike Cooper's administrator appeals. Reversed and remanded.

J. K. Hendrick, of Paducah, and Joe McCarroll, of Hopkinsville, for appellant.

Wheeler & Hughes, of Paducah, for appellees.

SAMPSON, J. Both the administrator with the will annexed of William H. Reike and his heirs in separate actions now consolidated have sought a construction of the will of said Reike. The will was made in

1904, he died in 1910, a resident of McCracken county, and these suits were brought in the McCracken circuit court in 1919, and later consolidated and heard together. Reike left a considerable estate, consisting in part of improved real estate in the city of Paducah which was leased for long terms at good monthly rentals. Five children, two sons, and three daughters, all married, survived him, but in 1918 Mrs. Cooper, a daughter, and devisee, died testate, leaving a husband, James E. Cooper, but no issue of her body.

By the second paragraph of his will, after directing that his debts and his funeral expenses first be paid, it is provided:

"I want all my estate of whatever kind and wherever situated to be equally divided between my five beloved children, Frank H. Reike, William H. Reike, Lillie M. Burnett, Carrie L. Cooper and Clara A. Burnett, except as hereinafter provided."

Here follows a provision giving the daughters \$5,000 each and some stock in an ice plant to make them equal with the two sons, to whom he had theretofore given valuable stocks. He also acquitted all of his children of all debts owing him.

The fifth paragraph of his will reads:

"I wish that all of the real estate as herein devised to my five children shall remain intact for fifteen years, the income in the meantime, after the payment of taxes, repairs, insurance and other charges thereon, to be received and enjoyed by my said children equally during that time and at the end of the fifteen years said real estate shall be divided equally between them if they so desire."

This litigation would not have arisen except for the seventh paragraph, which says:

"If either of my children shall die without leaving issue, then the portion of the child so dying shall be divided equally between my remaining children or their bodily heirs."

The eighth paragraph provides:

"Within ninety days after my death my executors shall, after paying to my three daughters the fifteen thousand dollars referred to in the second clause of this my last will, divide equally between all my children whatever money there may be remaining of my estate at my death; and commencing ninety days after my death my executors shall divide equally between my children the rents and income of my estate which shall have accrued from that time; and every sixty days thereafter, or sooner, if they can conveniently do so, said executors shall divide equally between my said children the rents and income of my estate as same may accrue."

By the ninth clause of the will all five of the children and beneficiaries were named as executors. They failed to qualify, and appellant, James E. Cooper, was named and

qualified as administrator with the will annexed, and is now so acting.

As husband of one of the deceased beneficiaries of the Reike will, Cooper is claiming an interest in the rents and profits of the real estate belonging to said estate. It is his contention that the real property of William H. Reike passed to and vested in the five children under the will, of whom his wife was one, immediately upon the death of the testator in 1910, and, his wife before her death being seized of a vested estate, he is entitled to a curtesy therein, and to take and convert a fifth of the rents and profits arising from said real estate to his own use and benefit. This claim of Cooper is denied by the heirs of Reike, who insist that under the provisions of the will the share of Mrs. Cooper in the estate passed to the other four children of Reike on her death without issue; that the clause of the will "die without leaving issue" in the seventh paragraph thereof refers to the death of the devisee after the death of the testator, but before the period of distribution, fixed in the fifth clause of the will at fifteen years from the death of the testator. The trial court took this view of the testamentary paper and held Cooper not entitled to any interest whatever in the share of the wife in the Reike estate. From this judgment Cooper appeals.

[1] We think the second paragraph of the will, while expressing only a wish as to how testator's property should go, may be read, "I will all my estate of whatever kind and wherever situated to my five beloved children, Frank H. Reike, William H. Reike, Lilly M. Burnett, Carrie L. Cooper and Clara A. Burnett, in equal portion, except that my said three daughters shall first receive \$5,000.00 each in money and one-third each of my stock in the Paducah Ice Factory." The clause "except as hereinafter provided" has reference to the equalization of the daughters with the sons by giving to each daughter \$5,000 in money and one-third of testator's remaining stock in the ice factory. In other words, the testator gave his entire estate in fee to his five children equally after the three daughters each received from it \$5,000 in cash and one-third of the stock he then owned in the ice factory to make them equal with the two sons, who had theretofore received from the testator a large block of stock in the ice plant. The devise was not by this clause made conditional, but absolute. He devised his entire estate to his five children. The five children became invested jointly with the title to the testator's entire estate immediately upon the death of the deviser. They received the same title the testator had to the portion devised to each subject to the difference expressed in the seventh paragraph, but the fifth clause of the will requires the devisees

to hold the property intact—that is, as the testator had held it—as joint tenants, coparceners, or tenants in common, for a period of 15 years from the effective date of the will, at the end of which time the devisees, or such of them as are living, may have a division of the real estate in kind if they so desire, or, if not, they may continue the joint ownership indefinitely, or sell and divide the proceeds. The vesting of the title and the constructive possession was not postponed, but took effect so instantly on the death of the testator. The five devisees were to all hold the property in common as one person until the end of 15 years next after testator's death, at which time the property itself, not its proceeds, should be divided equally between them, if a division was desired.

[2] Up to the end of the 15-year period of joint ownership fixed by the testator the title to the property was not intended to be and is not absolute in the individual devisees, but only a fee defeasible upon the death of either of said devisees within 15 years without leaving issue as provided in paragraph 7 of the will. Differently stated, each child took a defeasible fee to one-fifth part of the testator's real estate subject to be defeated on the death of the devisee without issue at any time after the death of the testator and before end of the 15-year period of joint ownership.

The question then arises: What interest does the husband take in lands of the deceased wife to which she had only a defeasible fee? A defeasible fee is created when the devise is to one with a proviso that it shall be defeated on the happening of a named contingency, as where the devise is to A., and if he should die without issue then to B. In such case A. takes a fee subject to be defeated on his death without issue. The devise to B. will never take effect if A. die leaving issue, for the estate becomes absolute in A. and his heirs; his issue taking by descent from A., and not under the will. *Ramsey v. Wills*, 85 Ky. 492, 3 S. W. 900, 9 Ky. Law Rep. 76.

By section 2132, Ky. Statutes, the surviving husband or wife has an estate for life in one-third of the real estate of the deceased spouse. In the case of *Rice v. Rice*, 133 Ky. 406, 118 S. W. 270, we held that the wife was entitled to dower in the land to which her deceased husband had only a defeasible fee. This rule has been recognized by this court in a line of cases extending back to 1852, as evidenced by the following opinions: *Norcutt v. Whipp*, 12 B. Mon. 65; *Fry v. Scott*, 41 S. W. 426, 10 Ky. Law Rep. 1013; *Webb v. Baptist Church*, 90 Ky. 117, 13 S. W. 362, 11 Ky. Law Rep. 926.

In every case where the husband or wife dies seized of such an estate in land that the

issue of the body of the surviving spouse would inherit from its deceased parent, if a wife, she will take dower, and if a husband, curtesy, under our statute (section 2132), even though a failure of issue in fact defeats the fee. *Rice v. Rice*, supra; *Landers v. Landers*, 151 Ky. 214, 151 S. W. 386, Ann. Cas. 1915A, 223; *Ferguson v. Ferguson*, 153 Ky. 744, 156 S. W. 413; *Duncan v. Duncan*, 150 Ky. 826, 150 S. W. 980.

[3] We must hold in accordance with the foregoing rule that appellant, Cooper, as the surviving husband of a deceased beneficiary of the Reike will, is entitled to curtesy in the lands which were devised to her by the Reike will, and in which she had at the time of her death a defeasible fee.

As he is entitled to the use of one-third of the real estate to which Mrs. Cooper in her lifetime held a defeasible fee, he will take one-third of the net rents and profits arising from such one-fifth of the Reike estate and will account to the estate for all other income from such property.

Judgment reversed for proceedings consistent herewith.

#### MCGINNIS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 4, 1921.)

**Criminal law** §1088(17)—Affidavits accompanying record on appeal, but not authenticated, cannot be considered.

On appeal from a conviction for violating the prohibition laws, affidavits accompanying the record, relating to alleged unfair treatment of appellant by the commonwealth's attorney, not identified or authenticated by the orders of the trial court or by bill of exceptions, cannot be considered.

#### Appeal from Circuit Court, Boyd County.

Claude McGinnis was convicted under two indictments for violating the Prohibition Law, and he appeals. Affirmed.

J. M. York, of Catlettsburg, for appellant.

Chas. I. Dawson, of Frankfort, and Thos. B. McGregor, Asst. Atty., for the Commonwealth.

**SAMPSON, J.** This appeal presents two judgments against Claude McGinnis, each imposing a fine and a term in jail. One of the indictments charges him with operating a moonshine still, and on this he was fined \$500, and sentenced to a term of 90 days in the county jail; the other indictment charges him with unlawfully transporting intoxicating liquor, on which he was fined \$300 and sentenced to 60 days in the county jail. He appeals.

McGinnis admits that he is guilty of both offenses as well as many other violations of

the Prohibition Laws (Laws 1920, c. 81), but he says that he was treated unfairly by the commonwealth's attorney with reference to an alleged agreement made between them, whereby appellant, McGinnis, was to make a full confession of all his wrongdoing in connection with the manufacture and sale of whisky, for which the attorney for the commonwealth agreed to recommend to the trial court the imposition of a fine of \$50 and 10 days in jail, in one case, and file all other indictments against appellant away, pending appellant's good behavior.

Appellant, McGinnis, resided about 14 miles from the courthouse at Catlettsburg. His cases were set for a day certain, and he was on bond to appear and answer. On the day set for trial of the cases against him, McGinnis says he started from his home in his automobile for Catlettsburg to be present at the trials, but his car broke down, causing delay, which made him too late for the trials. At any rate the cases were tried before appellant arrived at court. It appears, however, that his bondsman delivered him to the jailer some time in the afternoon of the day of his conviction. The attorney for the commonwealth says he did have a proposal from appellant, McGinnis, whereby McGinnis offered to make a full confession of violations of the dry laws, and to deliver his still and apparatus for the manufacture of liquor to the sheriff, and to become a witness for the commonwealth against others illegally engaged in the whisky business, and especially his confederates, but the attorney says, in an affidavit filed and made part of the record, that McGinnis failed to keep his agreement and did not deliver his still nor testify before the grand jury about other violations of the law of which McGinnis knew.

Accompanying the record are three or four affidavits of appellant, McGinnis, setting forth his alleged wrongdoing and agreement with the commonwealth attorney in support of his motion for new trial, but there is no order of the court showing that said affidavits were filed in the court below, nor made a part of the record in any way. Neither is there any indorsement on the affidavits showing them to have been filed before the clerk or any one. There is no bill of exceptions. Under this state of the record we are not at liberty to consider the affidavits of appellant, the only record offered in support of his motion for new trial in the lower court, if it was offered. We cannot consider documents which accompany a record and which are not identified and authenticated by the orders of the trial court or bill of exceptions. With these supposed affidavits stricken from the record there is nothing for the court to consider, except the motion and grounds filed in the lower court for new

trial. That motion being wholly unsupported, the trial court properly refused appellant a new trial in each case, and there is no reason shown why this judgment should not be affirmed.

Judgment affirmed.

### CITY OF NEWPORT v. FRANKEL et al.

(Court of Appeals of Kentucky. Oct. 4, 1921.)

1. Licenses  $\Leftrightarrow$  7(4)—Occupations may be classified and subclassified if reasonable basis for distinction exists.

In the imposition of license taxes, occupations may be classified, and each particular class may be divided into subclasses, where there is a reasonable basis for the distinction, and to this end the tax may be graded according to the volume of business or according to fees charged.

2. Licenses  $\Leftrightarrow$  7(4)—Moving picture show license tax held discriminatory.

A city ordinance imposing on a moving picture theater charging an admission fee of 15 cents a license tax of \$450, and on a theater charging 20 cents a tax of more than \$5,000, held not based on a sound distinction and unjustly discriminatory.

Appeal from Circuit Court, Campbell County.

Action by I. Frankel and others against the City of Newport. From judgment for plaintiffs, defendant appeals. Affirmed.

Brent Spence, of Newport, for appellant. Wm. A. Burkamp, of Newport, and Pogue, Hoffheimer & Pogue, of Cincinnati, Ohio, for appellees.

CLAY, J. The city of Newport appeals from a judgment declaring invalid that portion of its license ordinance imposing an occupational tax on moving picture theaters charging an admission fee of more than 15 cents, and having a seating capacity of not less than 750 nor more than 1,500.

The particular provision involved is subsection 120b of section 9, which is as follows:

"Where the seating capacity exceeds 750 and does not exceed 1,500:

"If an admission fee of not more than 10 cents is charged, \$300.00.

"If an admission fee of more than 10 cents and not more than 15 cents is charged, \$450.00.

"If an admission fee exceeding 15 cents is charged, \$15.00 for each day on which said admission is charged, in addition to yearly license provided for herein."

The action to test the validity of this provision was brought by I. Frankel and others, doing business under the style of "The Temple Theater." The seating capacity of

the theater is 900, and in view of the advance in the rental of films and the increased cost of labor, etc., it proposes to charge an admission fee of 20 cents. The theory that the tax is confiscatory has not been developed. The sole ground of attack is that it is discriminatory.

[1, 2] It is the rule in this state that in the imposition of license taxes, occupations may be classified, and that each particular class may be divided into subclasses, where there is a reasonable basis for the distinction. To this end a license tax may be graded according to the volume of business done, or, as here, according to the amount of admission fee charged. *Hager v. Walker*, 128 Ky. 1, 107 S. W. 254, 15 L. R. A. (N. S.) 195, 129 Am. St. Rep. 238; *Fiscal Court Owen County v. F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N. S.) 83. Under the ordinance in question, a theater charging 15 cents pays a license fee of \$450, while a theater charging 20 cents pays more than \$5,000. It will thus be seen that the increase in the admission fee is 33 1/3 per cent., while the increase in the license fee is more than 1,000 per cent. Manifestly there is no sound basis for this distinction, and it requires no argument to show that the ordinance unjustly discriminates against a theater charging an admission fee of 20 cents. That being true, the provision in question is invalid, and the lower court did not err in so holding. Judgment affirmed.

### JOHNSON v. MITCHELL et al.

(Court of Appeals of Kentucky. Oct. 7, 1921.)

1. Brokers  $\Leftrightarrow$  19—Rule that relation of principal and agent is one of extreme confidence, requiring utmost good faith, applies to broker selling property.

The relation of principal and agent is one of extreme confidence, and requires of the latter the exercise of the utmost good faith, and this applies with all its vigor to a broker who has in his possession or control property of his principal for sale.

2. Brokers  $\Leftrightarrow$  31—Must disclose all facts to principal.

A broker may not deal with the subject-matter of the agency for his own advantage without fully disclosing to his principal all the facts within his knowledge, and if he does so without such disclosure and realizes a profit to himself individually, he may be made to account to his principal therefor.

3. Brokers  $\Leftrightarrow$  31—Must account to principal on buying listed land for immediate resale at an advanced price without disclosing facts.

Where real estate agent, after obtaining one willing to purchase land, purchased listed land from the owner without disclosing



the facts to him, and sold it to the prospective purchaser at an advanced price, he could be made to account by the owner for the difference between the price paid by the purchaser and that paid by the agent, less commissions.

Appeal from Circuit Court, Pulaski County.

Action by R. O. Mitchell and others against R. L. Johnson. Judgment for plaintiffs, and defendant appeals. Affirmed.

Kennedy & Hays, of Somerset, for appellant.

E. T. Wesley, of Somerset, for appellees.

THOMAS, J. The appellees and plaintiffs below, R. O. Mitchell and others, owned a farm containing about 100 acres, located near the city of Somerset, in Pulaski county. The appellant and defendant below, R. L. Johnson, was a real estate broker, and bought and sold land for others. Some time in the autumn of 1917 plaintiffs listed their farm with defendant for sale, which was done by oral contract, and there was no limitation of time within which he might sell it. On November 21, 1917, and while the land was yet in his hands for sale, he agreed to purchase it from plaintiffs for the sum of \$7,500, and three days thereafter they executed to him a deed. Within less than a year plaintiffs filed this action against defendant, seeking to recover judgment against him for the sum of \$1,050, upon the ground that at the time he purchased the land from them he, while he was acting as their agent, had been offered for it the sum of \$8,500, which offer was made by Mrs. Alta C. Johnson, who was not related to defendant, and that shortly after he received his deed from plaintiffs he sold the land to her for the sum of \$9,000; that he was to receive 5 per cent. commission for making the sale, which amounted to \$450, leaving a net sum realized of \$8,550, the difference between which sum and that paid plaintiffs by defendant for the farm was \$1,050, the amount sought to be recovered.

It was alleged that defendant had practiced a fraud upon plaintiffs by taking advantage of the information he received because of the confidential relation of principal and agent, and had concealed from them the fact that he had been offered \$8,500 for the land, or that he had a prospective purchaser for it in the person of Mrs. Johnson, or any one else. It was further alleged that under the agreement between plaintiffs and defendant they were to receive for the farm no less than \$8,000 net, he to receive his agreed commission, provided it did not reduce the net sum below \$8,000. The answer admitted the agency, but denied some of its alleged terms, and denied the alleged fraud, or that he had received any offer for the land before he purchased it.

The action was brought in equity, and was tried by the court as such, there being no mo-

tion made to transfer it to the ordinary docket. Upon submission the court rendered judgment in favor of plaintiffs for the sum of \$708, to reverse which defendant prosecutes this appeal.

[1,2] That the relation of principal and agent is one of extreme confidence, and requires of the latter the exercise of the utmost good faith, is a doctrine universally admitted and enforced, and it applies with all of its vigor to a broker who has in his possession or control property of his principal for sale. 9 Corpus Juris, 538; 4 R. C. L. 276, 277; Sutton & Cummins v. Kiel Cheese & Butter Co., 155 Ky. 465, 159 S. W. 950; Spotswood & Son v. Estes, 165 Ky. 743, 178 S. W. 1082. Within this rule, as will be seen from the authorities referred to, the broker may not deal with the subject-matter of the agency for his own advantage without fully disclosing to his principal all of the facts within his knowledge, and if he does so without such disclosure and realizes a profit to himself individually, he may be made to account to his principal therefor. The latter rule is thus stated in Corpus Juris, referred to on page 537:

"Unless the principal is fully advised of the facts, a broker is not permitted to deal with the subject-matter of his agency for his own advantage, but must give the principal the benefit of any profit which he may make in the transaction."

And in R. C. L., referred to, a portion of the text says:

"In the estimation of the law the duties of buyer and seller are so incompatible that a broker cannot discharge them both; and it has therefore placed its ban upon a broker either purchasing from or selling to his principal, unless the latter, with full knowledge of all the facts and circumstances, acquiesces in such a course; and even then the broker's actions throughout must be characterized by the utmost good faith, and in the event of any litigation between him and his employer the burden is upon him to prove both the permission and the exemplary manner in which he availed himself of it."

Each excerpt is supported by numerous cases cited in the notes, and we take it that there is no authoritative utterance to the contrary.

[3] If then, the testimony heard upon the trial is sufficient to support the finding of the court as to the facts, there can be no doubt of the propriety of the judgment. Defendant admits the agency, and admits offering the land to Mrs. Johnson on the very day he obtained his deed, for the price of \$9,000. He furthermore admits that prior to his purchase she had inspected the land with a view of purchasing it, and that he then offered it to her for the sum of \$10,000, but said to her that it might be bought for less than that sum. She says that at that time she agreed to pay for it the sum of \$8,500, and that she after-

wards, and before defendant made his purchase from plaintiffs, wrote him a letter in which she made the same offer, but he testified that he did not receive it. He told his partner, a Mr. Guinn, to whom he delivered a horse in payment of his part of the commissions, that he believed Mrs. Johnson would purchase the place, and, when asked if she made to him any offer by letter to purchase the land, he answered, "No permanent proposition." There are other facts and circumstances in the case pointing strongly to the conclusion that defendant purchased the farm with a view of reselling it to Mrs. Johnson, and after he had convinced himself that she would pay a considerably advanced price above what he paid for it, and that he did not impart any of that information to either of the plaintiffs. At any rate, the testimony is abundantly sufficient to support the finding of the chancellor to that effect, and hence the case is brought directly within the doctrine above announced, and the court did not err in rendering judgment in favor of plaintiffs.

But it is insisted that the amount recovered is calculated upon an erroneous basis, and is excessive, and for that reason the judgment should be reversed. We are unable to agree with this contention. Eight thousand dollars of the agreed consideration to be paid by Mrs. Johnson for the land was in deferred payments, to be evidenced by notes, but before the sale to her was consummated by the execution of a deed there was a disagreement between her and the defendant as to whether the deferred payments should bear interest from date, or only after their maturity. That disagreement was compromised by dividing equally the interest on the deferred payments from their date till their maturity. The total interest, as thus calculated, was \$720, one-half of which was \$360, which, deducted from the total consideration of \$9,000, left \$8,640 as the net sum that defendant received for the land. Five per cent. commission on that sum was \$432, leaving the net amount which plaintiffs should have received of \$8,208, and being \$708 more than they did receive from defendant. The latter figures represented his profits in the sale to his vendee, and the amount which plaintiffs were entitled to recover.

There being no error in the judgment, it is accordingly affirmed.

# WILLIAMS et al. v. DAVIS et al.

(Court of Appeals of Kentucky. Oct. 7, 1921.)

1. **Wills** §52(1) — Contestants have burden of showing want of testamentary capacity.

The burden of showing want of testamentary capacity is upon the contestants.

2. **Wills** §9 — Testator may dispose of property in accordance with own wishes.

A person of sound and disposing memory may transmit his property by last will and testament in accordance with his own wishes.

3. **Wills** §47 — Mere age and physical infirmities insufficient to destroy testamentary capacity.

Mere age and physical infirmities are not enough to destroy testamentary capacity.

4. **Wills** §55(7) — Evidence held to prove mental capacity of 84 year old testator addicted to morphine habit.

Evidence held to support finding that 84 year old testator afflicted with Bright's disease and serious bladder trouble and addicted to the habit of taking morphine tablets to relieve suffering had mental capacity at time of execution of will.

5. **Wills** §400 — Great weight given verdict of jury or finding of trial judge in will contest.

In a will contest great weight should be given to the verdict of a jury or finding of court sitting as a jury.

6. **Wills** §400 — Admission of testimony by contestees in will contest as to testator's mental capacity held harmless.

In will contest on the ground of mental incapacity, the admission of testimony by contestees as to mental capacity of testator, if error, was not ground for reversal, where such testimony could not have had any controlling effect upon the judgment, and there was ample proof aside therefrom to sustain the judgment for contestees.

Appeal from Circuit Court, Hopkins County.

Suit by Mary Elizabeth Williams and husband against L. M. Davis and others to contest will of Thomas C. Davis, deceased. The will sustained, and contestants appeal. Affirmed.

Laffoon & Waddill, of Madisonville, for appellants.

Cox & Grayot, of Madisonville, for appellees.

QUIN, J. Thomas C. Davis died testate in March, 1918. By his will dated June 18, 1917, he devised his property in equal parts to his four children, except that the devise to his daughter Mary Elizabeth was for life and in the event of her death before that of her husband it was provided that her share of the estate should go to the other three children but if her husband's death preceded hers then her title to this one-fourth of the property became absolute and in fee.

Complaining of this limitation upon the estate devised to her, Mary Elizabeth Williams and her husband filed this suit to contest the will aforesaid. The main ground of contest is mental incapacity due, as alleged, to the excessive use of morphine by

testator. There is no evidence of any undue influence.

Testator was 84 years of age at the time the will was written. He had been afflicted with Bright's disease and a serious bladder trouble for about 12 years. During the last 2 or 3 years of his life he was in the habit of taking morphine tablets to relieve his suffering. Some days he took from one to three tablets.

The case was submitted to the court below without the intervention of a jury, the will was sustained, and this appeal followed.

The substance of the testimony adduced on behalf of contestants is illustrated by that of Mrs. Williams, who testified that her father was old and feeble in mind and body; a victim of the morphine habit; he took two tablets the day the will was written. He always told her he was going to treat the children alike, and the day after the will was written he said he had made a will disposing of his land, but not of his personality. He suffered most all the time from his ailments and was desirous of getting his affairs in order. His memory was bad, and frequently while in conversation with members of the family he would drop off to sleep. He was childish. Because of his physical and mental condition, the latter due to the use of morphine, she did not think he had sufficient mind to know the character and nature of his estate, or to know who were the natural objects of his bounty, or to dispose of his estate according to a fixed purpose of his own. Other witnesses for contestants gave testimony to the same effect.

Witnesses for the propounders testified just to the contrary. It was admitted, however, that testator made frequent use of morphine; some say he was childish at times; that his memory was not as good as in former years; and that he would drop off to sleep at times, take "cat naps," as it were, due doubtless to the effects of morphine, but that altogether his mind was clear; and in their judgment he had sufficient mental capacity to make a will.

The difference of opinion of the various witnesses is easily accounted for. Probably some of them had equal opportunities of knowing the truth, but they saw testator at different times and under varying circumstances and conditions. Some saw him under circumstances that convinced them he was fully capable of making a will; others saw him when conditions were such as satisfied them he was not so qualified.

[1, 2] After the due execution of a will is proven by the propounders the burden of showing the testator lacked testamentary capacity is upon contestants. A person of sound mind and disposing memory may transmit his property by last will and testament in accordance with his own wishes, and jurors are not permitted to make for

him a will in keeping with their ideas of justice or propriety. Manifestly the testator in disposing of his estate as he did acted upon his own judgment and in accordance with a fixed purpose long before formed of dividing his property in equal parts among his four children. This he did as nearly as could have been done in view of his desire that his son-in-law Jackson Williams, should not share in the distribution of his estate.

Though it is testified that testator and this son-in-law were on good terms at the time of the former's death, it is also shown that his daughter Mary Elizabeth married against her father's wishes, and that about four or five years before the will was executed testator and this son-in-law, Williams, had a disagreement over some coal lands. Either of these circumstances may have been of sufficient moment in the mind of testator to have caused him to make the will as he did. It would require stronger proof than is disclosed by the record before us to show that the limitation upon the share of Mrs. Williams was due to the fact that testator's mind was so unbalanced as to destroy his testamentary capacity. Testator experienced no difficulty in giving to the attorney who wrote the will the correct and full names of all his children, and to tell what disposition he wanted to make of his property. Said attorney and others testified that testator was in every respect capable of making an intelligent disposition of his property. After the will was written and read over to testator he expressed satisfaction with the draft, and said it was in the exact terms he desired.

A physician who had known testator since the former was a boy, and who attended him in his last illness, while admitting that taking from one to three tablets of morphine daily would weaken one's mind, says that for a man of his age, and considering his suffering and disease, he had a wonderfully good mind.

[3] Mere age and physical infirmities are not enough to destroy testamentary capacity. This is well illustrated in *Higdon's Will*, 6 J. J. Marsh. 444, 22 Am. Dec. 84, wherein it is said:

"It is true that she was about 85 years old; and that all her faculties were perceptibly decayed, and her memory, especially, very much impaired. But her mind was only somewhat torpid, not unsound; the occasional languor and absence, and even apparent imbecility, of her mind were only the natural and ordinary consequences of her old age, and were, in kind and degree, only such as may be expected to mark such extreme longevity as 85 years. Only benumbed with years, her mind was always rational, and, when it acted, was consistent and intelligent."

As said in *Cecil's Ex'rs v. Anhier*, 176 Ky. 198, 195 S. W. 837:

"The soundness of mind required in the execution of a will does not necessarily reach that strength of mind which will enable a man to fairly contract with another at arm's length or traffic in property and manage it advantageously, but the capacity required to render a man mentally competent to make a will exists when the testator has will, mind, and memory to sufficiently understand that he is selecting the person or persons whom he wishes to have his property, and to know his property and the natural objects of his bounty, and his duty to them, and to the persons upon whom his property is bestowed by the testamentary paper which he signs, and to make such disposition in accordance with a then settled purpose of his own."

[4] That testator's mental capacity fully met the test as established in the foregoing opinion finds abundant support in the evidence.

[5] In cases like this great weight is and should always be given to the verdict of a properly instructed jury, and this is true here, as the judgment of the court (a jury having been waived) will be given the same effect as a jury verdict.

The preponderance of the evidence, if anything, favors the propounders. Certainly the evidence on behalf of contestants is not such as to warrant or justify us in reversing a judgment sustaining the will.

In the following cases will be found facts similar to those presented in this record and which support the conclusion reached herein: *Wise v. Foote*, 81 Ky. 10; *Ohilders' Ex'r v. Cartwright, etc.*, 136 Ky. 498, 124 S. W. 802; *Campbell, etc., v. Adkins, etc.*, 160 Ky. 513, 169 S. W. 996; *Schrodt's Ex'r, etc., v. Schrodt, etc.*, 181 Ky. 174, 203 S. W. 1051; *Bailey, Adm'r, v. Bailey*, 184 Ky. 455, 212 S. W. 595.

[6] Counsel complain of error of the lower court in permitting a husband and wife, both contestees, to testify in behalf of the propounders, but the testimony objected to could not have had any controlling effect upon the judgment; besides, there was ample proof aside from this evidence to sustain the judgment.

The judgment is accordingly affirmed.

## DIALS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 7, 1921.)

1. Criminal law §13—Statute denouncing acts not a crime at common law must be sufficiently certain as to what Legislature intended to prohibit.

A statute denouncing as a crime acts not constituting a crime at common law must be sufficiently certain to show what the Legislature intended to prohibit and punish, or will be void for uncertainty.

2. Criminal law §13 — Statute prohibiting transportation of liquor held not so indefinite as to contravene United States Constitution.

Acts 1920, c. 81, § 1, making it unlawful to manufacture, sell, or "transport" intoxicating liquors except for specified purposes enacted immediately following the adoption of Const. § 226a, held not so indefinite as to contravene Const. U. S. Amenda. 5, 6, in so far as it attempts to prohibit the transportation of intoxicating liquor.

3. Intoxicating liquors §222—Indictment held demurrable for failure to negative exceptions contained in enacting clause of statute.

Indictment charging defendant with unlawfully transporting intoxicating liquors in violation of Acts 1920, c. 81, § 1, prohibiting the transportation of intoxicating liquor except for specified purposes, held demurrable for failure to negative the exceptions; the exceptions being contained in the enacting clause of the statute.

4. Indictment and information §111(3)—Rule as to indictment negating exception stated.

An indictment must negative exception if it is contained in the sentence or paragraph of the statute that creates and describes the offense, but, if it is contained in a separate section of a distinct proviso or paragraph, it is a matter of defense for the accused, and the indictment need not charge that defendant did not come within the exception.

5. Criminal law §406(3)—Voluntary admission by defendant while in custody admissible.

Admissions made by defendant while in custody, made voluntarily and without threats or promises, and not obtained by plying him with questions or other wrongful means, held admissible under Anti-Sweating Act.

Appeal from Circuit Court, Lawrence County.

A. R. Dials was convicted of unlawfully transporting intoxicating liquors, and he appeals. Reversed and remanded.

Clyde L. Miller and Fred M. Vinson, both of Louisa, for appellant.

Chas. I. Dawson, Atty. Gen., and John M. Waugh, of Ashland, for the Commonwealth.

CLARKE, J. Appellant was tried and convicted under indictment, charging him with unlawfully transporting intoxicating liquors in Lawrence county, Ky., which is in violation of the first section of chapter 81 of the Acts of the 1920 Session of the Kentucky Legislature. For reversal he insists: (1) That the law under which he was convicted, in so far as it attempts to prohibit the transportation of intoxicating liquor, for which only he was tried, is so indefinite as to contravene the Fifth and Sixth Amendments of the Constitution of the United States; (2) that the court erred in overruling his demurrer to the indictment; and (3) that the evi-

dence upon which he was convicted was a confession obtained from him in violation of section 1649b, Ky. Statutes, known as the "Anti-Sweating Act," and therefore incompetent.

[1, 2] 1. Section 1 of chapter 81 of the 1920 Acts provides:

"That it shall be unlawful to manufacture, sell, barter, give away, or keep for sale, or transport, spirituous, vinous, malt or intoxicating liquors except for sacramental, medicinal, scientific or mechanical purposes in the commonwealth of Kentucky."

None of the several acts made unlawful by this section was a crime at common law, and, under such circumstances, a statute making them so must be sufficiently certain to show what the Legislature intended to prohibit and punish, otherwise it will be void for uncertainty, "but reasonable certainty in view of the conditions is all that is required and liberal effect is always to be given to the legislative intent when possible," and it is only where "the Legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal," that the statute will be declared void for uncertainty. 16 C. J. 67. The purpose of the Legislature in the enactment of this chapter, as indicated by its title and terms, and in view of the fact that it was enacted immediately after the adoption of an amendment to the state Constitution, now section 226a thereof, prohibiting the manufacture, sale, or transportation of intoxicating liquors in the commonwealth, except for certain named purposes, was to provide penalties for violations of the constitutional amendment; and to regulate the manufacture, sale, and transportation of same for such excepted purposes. That this act was not hastily enacted, but is rather the culmination of the most intense and widespread public agitation, is a matter of common knowledge.

Except, therefore, as permitted by the terms of the constitutional amendment and this act, it seems to us that we must assume the Legislature meant, as it has stated clearly, that all other transportations of intoxicating liquors should be unlawful and any presumption to the contrary would be wholly unwarranted. The word "transport," while general, is not indefinite, but, on the contrary, has a commonly understood "determinate signification." That the Legislature fully realized the general character and wide scope of the words "manufacture, sale and transport" is attested by the fact such limitations were placed thereon as the Legislature intended they should have by specifying the desired exemptions therefrom. Are we not therefore under such circumstances bound to assume

that the Legislature meant to include every possible application of the general terms used except as clearly stated or necessarily implied from what is stated? We think so.

It is argued that it cannot be presumed that Legislature by section 1 of the act meant to prohibit the transportation of liquors for personal use even though the language of this section is broad enough for that purpose, since by a later section of the act possession of liquors for such use is permitted. This, however, is but an argument on the proper construction of the act as a whole, and is entirely inconsistent with the contention the act is void for uncertainty for the reason its language embraces acts which it is unreasonable to presume were intended to be made criminal, since the argument is based upon the fact the Legislature has dealt in past at least with the very subject we are asked to presume it would not have intentionally included. We are of the opinion the act is not void for uncertainty, and it is not suggested that it is otherwise violative of the Fifth or Sixth Amendments to the federal Constitution. The only case cited by appellant in support of his contention, *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 300, is not in point, since there is no analogy whatever between this act and the Lever Act of Congress by that case declared to be void for uncertainty.

[3, 4] 2. The objection to the sufficiency of the indictment is much more serious, since it does not negative the exceptions which are contained in the enacting clause of the statute. The rule thoroughly established in this state is thus stated in *Commonwealth v. L. & N. R. R. Co.*, 140 Ky. 21, 130 S. W. 798:

"If the exception is contained in the sentence or paragraph of the statute that creates and describes the offense, then it must be negated in the indictment; but if the exception is not found in the sentence or paragraph that creates and defines the offense, but is contained in a separate section or in a distinct proviso or paragraph, it is a matter of defense for the accused, and it is not necessary that the indictment should charge that he did not come within the exception."

See, also, *Commonwealth v. Kenner*, 11 B. Mon. 1; *Commonwealth v. McClanahan*, 2 Metc. 8; *Commonwealth v. Bierman*, 13 Bush, 345; *Commonwealth v. Hagan*, 187 Ky. 619, 181 S. W. 184; *Grisson v. Commonwealth*, 181 Ky. 189, 203 S. W. 1075; *Commonwealth v. L. & N. R. R. Co.*, 138 Ky. 1, 215 S. W. 938.

The section involved here contains but one paragraph, in fact but one sentence, which not only creates and defines the offense but names certain exceptions thereto. It is therefore clear that the court erred in overruling the demurrer to the indictment.

[5] 3. This court in construing section 1649b of the Statutes, known as the Anti-

Sweating Act, uniformly has held that voluntary statements of persons in custody may be used against them. *Commonwealth v. McClanahan*, 153 Ky. 412, 155 S. W. 1131, Ann. Cas. 1915C, 132; *Wellington v. Commonwealth*, 158 Ky. 161, 164 S. W. 333; *Dorsey v. Commonwealth*, 158 Ky. 447, 165 S. W. 405; *Garrison v. Commonwealth*, 169 Ky. 188, 183 S. W. 473; *Commonwealth v. Long*, 171 Ky. 132, 188 S. W. 334. It was shown here that appellant's admissions, made while in custody and introduced against him on the trial, were made voluntarily and without threats or promises and not by plying him with questions or other wrongful means as denounced by the statute, and we are of the opinion that this evidence was competent.

For the reason indicated, the judgment is reversed, and the cause remanded for proceedings not inconsistent herewith.

### WHITEHEAD v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 4, 1921.)

1. Criminal law  $\S$  1036(1), 1045, 1054—Admissibility of evidence cannot be reviewed in absence of objections, rulings, and exceptions below.

On appeal from a conviction for keeping spirituous liquors for sale, admission of incompetent evidence cannot be considered where defendant made no objections, and there were no rulings nor exceptions to the evidence in the trial court.

2. Intoxicating liquors  $\S$  226—Evidence as to acquisition immaterial in prosecution for keeping for sale.

In a prosecution for keeping spirituous liquors for sale, brought under Acts 1920, c. 81,  $\S$  1, evidence as to the manner of its acquisition is immaterial unless it will shed light upon the intent with which the liquor was acquired and kept.

3. Criminal law  $\S$  763, 764(13)—Instruction in prosecution for keeping for sale erroneous as invading province of jury.

In a prosecution for keeping spirituous liquors for sale, an instruction that it was within the power of the jury to convict upon the circumstances in evidence, and reminding them that they were not confined to the testimony of accused alone in determining his intent, held erroneous as invading the province of the jury.

4. Intoxicating liquors  $\S$  239(7)—Failure to instruct as to keeping for personal use error in prosecution for keeping for sale.

In a prosecution for keeping spirituous liquors for sale, where defendant claimed that the liquor found in his possession was for his personal use as allowed by Laws 1920, c. 81,  $\S$  8, failure to instruct as to such defense held reversible error.

Appeal from Circuit Court, Boyd County.

William Whitehead was convicted of keeping spirituous liquors for sale, and he appeals. Reversed and remanded.

R. S. Dinkle, of Catlettsburg, for appellant.

C. I. Dawson, Atty. Gen., and T. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

HURT, C. J. The appellant, William Whitehead, jointly with his brother, Harry Whitehead, was indicted for the offense of keeping for sale spirituous liquors, other than for sacramental, medicinal, scientific, or mechanical purposes. The offense is denounced by the provisions of section 1, c. 81, Session Acts of the 1920 General Assembly, and the section provides as follows:

"That it shall be unlawful to manufacture, sell, barter, give away, or keep for sale, or transport, spirituous, vinous, malt or intoxicating liquors except for sacramental, medicinal, scientific or mechanical purposes in the commonwealth of Kentucky."

The appellant, upon a separate trial, was found to be guilty by the jury of the offense charged in the indictment, and his punishment fixed at a fine of \$300 and costs, and 60 days' imprisonment, and the court adjudged accordingly, and from the judgment the appellant has appealed.

The grounds upon which he relies for a reversal of the judgment are: (1) Incompetent evidence was permitted to be introduced against him. (2) The court erred to his prejudice in instructing the jury. (3) The court erred to his prejudice in failing and refusing to instruct the jury concerning the entire law of the case.

The facts, as developed by the evidence, were that the appellant was a keeper of a place at which he sold lunches, near beer, cigarettes, cigars, tobacco, and buttermilk to his customers. He lived with his family in five upstairs rooms over a separate building from that in which he conducted his business. His brother Harry and Harry's wife either lived in the same house which appellant and his family occupied or were visitors at his dwelling, and occupied one of the five rooms. Harry assisted in conducting the business of appellant. Upon a day when appellant was absent upon a trip to Cincinnati, one Charles Lester was seen to get down from a train carrying a heavy suit case, and was seen thereafter near the stairway which led up into appellant's dwelling, in conversation with Harry Whitehead, and thereafter he and Harry ascended into appellant's dwelling, and within three or four minutes descended the stairway therefrom. The police procured a search warrant and ascended into appellant's dwelling and made a search of it for liquors. In a bedroom, which ap-

pellant claims to have been the one occupied by him, underneath a bed, they found two and one-half gallons of "moonshine" whisky in several glass jugs. Harry Whitehead testified that he had no knowledge of or connection with the whisky, and the transaction which took place between him and Lester was that he purchased from Lester about two gallons of buttermilk, to be sold in appellant's trade, and, the container in the lunch stand being full, he received the buttermilk in his brother's dwelling where a portion of it was poured into a bucket, and the other half left in a jug, which he directly took and sold to appellant's customers, and that the buttermilk was carried by Lester in the suit case in certain glass jars. Appellant deposed that the whisky which was found was his property; that he purchased it some time theretofore from two "bootleggers" and kept it in his dwelling for his own personal consumption, and not for sale; that he was afflicted with a heart ailment for which the physician had advised the use of spirituous liquors, and since it was taken by the police he had procured a prescription and purchased a quantity every 10 days. No evidence was offered to the effect that appellant, or any one for him, had ever sold or offered to sell any of the liquor.

[1, 2] (a) The complaint that appellant now makes of the introduction of incompetent evidence against him upon the trial is not before us, and cannot now be considered, as he made no objection to any of the evidence; and, there being no rulings of the trial court upon its competency there is necessarily an absence of any exceptions to such rulings. It may however, be properly said that the offense charged against the appellant is not with having acquired the liquor unlawfully, but keeping it with the intent to sell it is the sole offense. It will also be observed that the statute in no place makes it unlawful on the part of the purchaser to acquire liquor by purchase. Hence, it would be wholly immaterial in any case where one is accused of the offense of keeping spirituous liquor for sale to offer evidence as to the manner of the acquisition of the liquor, unless the manner, circumstances or facts, with relation to the acquisition of the liquor will shed light upon the intent with which it was acquired and kept.

(b) A portion of the first instruction is complained of, and this complaint seems to be well founded. After the court had properly instructed the jury in substance that, if it believed from the evidence, beyond a reasonable doubt, that the appellant, before the finding of the indictment and since the enactment of the statute, kept for sale two and one-half gallons, or any quantity, of whisky, to find him guilty as charged in the indictment and to fix his punishment within the limits prescribed by the statute, there was added a definition of the word "keep" which

the jury was instructed was the meaning of it as used in the statute. While the definition was abstractly correct as applied to some conditions, the term "keep for sale" is a simple term, in common use, and generally understood and to attempt a definition of it is more calculated to confuse than otherwise.

[3] There was also added to the instruction a comment upon the evidence and a declaration that it was within the power of the jury to convict the accused upon the circumstances in evidence and a reminder that the jury was not confined to the testimony of appellant alone in determining the intent of the accused in having the liquor in possession. These directions were probably true, but were calculated to have been received by the jury as intimations, in the opinion of the court, that the evidence justified a conviction, and that the testimony of the appellant should be scrutinized severely if not rejected. Under our system, in a criminal or penal cause, the jurors are the sole judges of the weight and potency to be given to the evidence in determining the existence of facts, and the court should not invade their province.

(c) The appellant offered an instruction to the effect that, if the jury believed from the evidence that the liquor was kept by appellant in his private dwelling for his personal consumption, and that of his family and guests, and not for sale, it should find him not guilty. This instruction was based upon section 8 of chapter 81 *supra*, where it is declared as follows:

"But nothing in this act shall be construed so as to make it unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquors need not be reported, provided such liquors are for the use only for the personal consumption of the owner thereof and his family residing in such dwelling, and for his bona fide guests when entertained by him herein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used."

The court rejected and failed to give any instruction giving effect to the above-quoted statute although the facts, as the evidence for appellant tended to prove, presented a state of case which justified such an instruction, and which would have embodied the entire defense of appellant. It will be observed that proof of the bare possession of spirituous liquors casts the burden of proving that it is being kept for a lawful purpose upon the possessor. The statute does not preclude a defense to the offense charged in this indictment, from the fact that the liquor was unlawfully acquired, because however acquired, if it was not kept for sale, the defendant cannot be convicted. The above-quoted portion of the statute seems designed to

remove from one indicted for keeping liquor for sale any imputation of guilt from having acquired it from a person having no right to sell or to dispose of liquors and to make him guilty only of an offense in the event he should keep the liquors for sale. The statute having cast upon the possessor of liquor the burden of proving that he has it for a lawful purpose, it is important to a possessor to have the law given to the jury which justifies him in having it in possession for a purpose which is lawful.

[4] We think that the court should have given an instruction embodying the whole defense of the appellant, as his own testimony tended to prove that the liquor was kept solely for his own personal consumption. For these reasons the judgment is reversed, and upon another trial, if the evidence tends to prove a similar state of facts, the jury should be instructed as follows:

(1) If the jury believes from the evidence beyond a reasonable doubt, that the defendant, William Whitehead, or he and Harry Whitehead, acting together, in Boyd county, since June 30, 1920, and before the finding of the indictment did keep for sale two and one-half gallons or some other quantity of whisky, it will find him guilty as charged in the indictment, and fix his punishment therefor at a fine of not less than \$50 and not more than \$300, and imprisonment in the county jail for a period of not less than 30 days and not more than 60 days, in its discretion.

(2) Although the jury may believe from the evidence that defendant did keep the whisky mentioned in the evidence in his possession or control, but if it believes from the evidence that he kept same in his private dwelling, while the same was occupied by him as a dwelling only, and that he further kept same solely for his own personal consumption and not for sale, it should find him not guilty.

(3) If the jury have a reasonable doubt of the defendant having been proven to be guilty as set out in instruction No. 1, it should find him not guilty.

The cause is remanded for proceedings not inconsistent with this opinion.

### KENTUCKY CONSUMERS' OIL CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 7, 1921.)

#### 1. Hawkers and peddlers § 3(1)—Oil company held not "peddler."

An oil company which agreed to furnish fuel oil to a lighting plant, and delivered the same in tank wagons holding from 500 to 600 gallons, in no instance delivering less than

500 gallons, was not a "peddler" within the meaning of Ky. St. § 4215, prohibiting peddling without a license.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Peddler.]

#### 2. Licenses § 16(9)—Oil company delivering 500 gallons of oil not selling at "retail," but at "wholesale."

An oil company delivering oil in quantities of not less than 500 gallons to a lighting plant was not selling at "retail" within the meaning of Ky. St. § 4224, imposing license tax, the words "retail" and "wholesale" being opposed one to the other, one being a sale in small quantities, and the other in large quantities.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Retail; Wholesale.]

#### 3. Statutes § 188—Words in common use to be taken in natural signification.

The words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification.

Appeal from Circuit Court, Spencer County.

The Kentucky Consumers' Oil Company was convicted of a violation of statute pertaining to license taxes, and appeals. Reversed.

Edwards, Ogden & Peak, of Louisville, for appellant.

Charles I. Dawson, Atty. Gen., Thomas B. McGregor, Asst. Atty. Gen., and Charles H. Sanford, of Newcastle, for the Commonwealth.

QUIN, J. Appellant was indicted, and upon trial found guilty of a violation of that part of Kentucky Statutes, § 4224, pertaining to license taxes, reading as follows:

"To selling by retail, petroleum, lubricating or other oil, for each wagon used in transporting or retailing such oils, fifteen dollars for each county in which each wagon is so used."

Appellant is a refiner of and dealer in lubricating and other oils. Its chief office is in Louisville. Under a contract made at its Louisville office with M. F. Cheek, of Spencer county, appellant agreed to furnish to the latter all the fuel oil needed by him in the operation of his lighting plant in Taylorsville. Delivery of the oil was made in tank wagons holding from 500 to 600 gallons. In no instance did the quantity delivered amount to less than 500 gallons. Until the destruction of his lighting plant by fire, Cheek purchased from 600 to 700 gallons of oil each month; similar deliveries of oil were made to Clint Henry, of Spencer county, for use at his flour mill.

The indictment in the instant case was not for the offense of peddling without a license,



as required by Ky. Stats. § 4215. In *Standard Oil Co. v. Commonwealth*, 107 Ky. 606, 55 S. W. 8, 21 Ky. Law Rep. 1339, and *Hays v. Commonwealth*, 107 Ky. 655, 55 S. W. 425, 21 Ky. Law Rep. 1418, it was held that sales from tank wagons to merchants for resale were not peddling, while sales from similar wagons to consumers, not merchants for resale, were held in *Standard Oil Co. v. Commonwealth*, 80 S. W. 1150, 26 Ky. Law Rep. 142, to be peddling. However, the mere delivery of goods to a customer is not peddling. It was so held in *Commonwealth v. Standard Oil Co.*, 129 Ky. 744, 112 S. W. 902, where the customer, a manufacturer, had a tank which was filled by the Standard Oil Company once a week, under a standing arrangement, without any specific orders being given in advance. The company had similar arrangements with other customers. The present indictment is for an alleged violation of section 4224, to wit, for retailing oils without a license.

In *Standard Oil Co. v. Commonwealth*, 119 Ky. 1, 82 S. W. 970, 26 Ky. Law Rep. 927, decided subsequent to the enactment of section 4224, supra, it was held that sales to merchants for resale, though commercially wholesale transactions, constituted retailing within the contemplation of the statute. The court was of the opinion that, as the law in force had been construed to mean sales to consumers, it was evident the new act was intended to include those classes of sales held not to have been embraced by the former statute, viz. sales to merchants for resale.

[1] Appellant was not a peddler within the meaning of section 4215, nor was it selling to merchants for resale; it was merely making deliveries of oil in wholesale quantities to a customer, pursuant to a contract theretofore entered into at its chief office. Appellant furnished all the fuel oil used in the operation of the lighting plant, delivering same as needed, but never in quantities less than 500 gallons.

[2] "Retail," according to the *Century Dictionary*, means to sell in small quantities, a little at a time, a definition cited with approval in *Standard Oil Co. v. Commonwealth*, 119 Ky. 1, 82 S. W. 970, 26 Ky. Law Rep. 927, supra. As defined by Webster, it is a sale of commodities in small quantities or parcels. See *Katzman v. Commonwealth*, 140 Ky. 124, 130 S. W. 990, 30 L. R. A. (N. S.) 519, 140 Am. St. Rep. 359.

Bouvier defines "wholesale" as being a sale by large parcels, generally in original pack-

ages, and not by retail. Or, as defined in the *International Dictionary*, it is a sale of goods by the piece or in large quantity; it is thus distinguishable from those made in small quantities, which are regarded as sales at retail. See *Commonwealth v. Poulin*, 187 Mass. 568, 73 N. E. 655; *Commonwealth v. Greenwood*, 205 Mass. 124, 91 N. E. 141, 18 Ann. Cas. 185; *Texas Co. v. Stephens*, 100 Tex. 628, 103 S. W. 481.

There is a well-defined and clearly understood distinction between the words "retail" and "wholesale"; they are used in opposition one to the other, one being a sale in large quantities, the other in small quantities. Whether the sale is one by retail or wholesale will depend upon the facts of the particular transaction. We experience no difficulty in deciding that the sale of oil in quantities of not less than 500 gallons at a time to one customer is not a sale at retail.

It is true that in *Standard Oil Co. v. Commonwealth*, 119 Ky. 1, 82 S. W. 970, 26 Ky. Law Rep. 927, supra, sales of oil in quantities of not less than 25 gallons were held to be within the purview of the statute, but the facts of that case are quite different from those here. There appellant made a number of sales in comparatively small quantities to several customers from one tank wagon; here there was a single sale to one customer in an amount so large as to almost tax the capacity of the delivery tank. Indeed, the quantity sold on each delivery was such that it would have been impossible to serve two customers a like quantity from one wagon, and it is not shown that any sales other than those mentioned were made.

[3] Clearly the Legislature did not intend that the expression "selling by retail" should include sales such as were made by appellant in the instances cited. The language used is not susceptible of such construction, and it is a well-recognized rule of statutory construction that the words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification. *Lewis Sutherland on Statutory Construction*, § 358.

So taken, the words referred to could not be said to apply to sales such as were made by appellant, and under the circumstances appellant was not required to take out the license required by the section of the statute aforesaid.

The judgment is accordingly reversed, for further proceedings not inconsistent herewith.

**MARTIN v. MARTIN.**

(Court of Appeals of Kentucky. Oct. 4, 1921.)

**1. Costs**  $\S$  110(2)—Plaintiff in divorce held nonresident, required to execute cost bond.

A husband suing for divorce held, under the evidence, a nonresident, of whom a cost bond could be required under Civ. Code Prac.  $\S$  616, or the suit dismissed under section 617.

**2. Domicile**  $\S$  4(2) — Conduct controls expressed intention as to residence.

On the issue of temporary residence and intention to return, if there is a conflict between the expressed intention and the acts and conduct of the party, the latter must control.

Appeal from Circuit Court, Wayne County.

Suit by J. W. Martin against Vadie Martin for divorce. From a dismissal, plaintiff appeals. Affirmed.

Bertram & Bertram, of Monticello, for appellant.

J. C. Davis, of Monticello, for appellee.

**TURNER, C.** Prior to February, 1919, appellant and appellee were each residents of Wayne county, Ky., and had been all their lives.

At that time they were married there and shortly afterwards went to the state of Texas, where they both remained until October of that year, when differences arose between them, and appellee left appellant there and returned to Kentucky and has since lived with some of her family in Wayne county.

Shortly after her departure from Texas appellant joined the United States army, and has never, since his departure in March, 1919, been in the state of Kentucky.

In April, 1920, this suit was filed by him in the Wayne circuit court, seeking a divorce from his wife, in which he alleges that they were each residents of Wayne county, Ky., and had continuously been such for more than one year, except a few months when they were temporarily in the state of Texas.

However, in June, 1920, the deposition of appellant's mother was taken, and she stated that appellant had never been in Kentucky since he left in the spring of 1919, and that neither he nor his wife had any property except their clothes, which were taken with them to Texas; that the appellee came back to Kentucky about October, 1919, and that her son (appellant) joined the army in November of that year. She, however, stated in her deposition that her son and his wife while they lived in Texas were not permanently located, but were merely boarding there to

work awhile, and that her son claimed Kentucky as his home.

After this evidence was taken appellee's counsel entered a motion to require the plaintiff to execute a bond for costs, upon the ground that he was a nonresident, and the court, under the evidence, required such a bond to be executed; whereupon appellant's counsel declined in open court to execute such bond and the action was dismissed and this appeal results.

Under section 616, Civil Code, a nonresident is required to execute a bond, with surety, to be approved by the clerk, for the payment of all costs which may accrue in his action, and, under section 617, unless such bond is given, it is provided that his action shall be dismissed upon motion of the defendant.

[1] So the only question is, under the evidence, the substance of which we have quoted: Was the defendant a nonresident of this state or was he merely temporarily absent?

The mere statement by his mother that he was only temporarily in the state of Texas, and that he claimed Kentucky as his home, cannot prevail over the admitted facts and circumstances as shown by the conduct of the parties.

Here we have a young couple marrying, and as is so often customary, going immediately thereafter to the West, and evidently to make a home, and taking with them all their belongings. They remained there until differences arose between them, and then the wife returned to Kentucky to live with her people, and the husband for a short time remained in Texas, and, without ever returning to Kentucky, joined the United States army and has continuously been outside the state ever since he first left.

This conduct of appellant is wholly inconsistent with any purpose upon his part when he left Kentucky to return and make it his home. He may have had a vague intention of returning to Kentucky at some indefinite time in the future and making it his home, but that their purpose was to make their home in Texas when they left Kentucky is apparent from all the circumstances.

[2] This evidence of his intention cannot prevail over the admitted facts; for, on the issue of temporary residence and intention to return, if there is a conflict between the expressed intention and the acts and conduct of the party, the latter must control. *Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109, L. R. A. 1917C, 171.

Our conclusion is that the action of the lower court under the evidence was proper. Judgment affirmed.

## TAYLOR v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 4, 1921.)

1. Obstructing justice  $\Leftrightarrow$  4—Hiring witness not to appear against an accused constitutes offense.

To hire a witness in a criminal action not to appear against an accused is an obstruction of public justice.

2. Attorney and client  $\Leftrightarrow$  42—Hiring witness not to appear ground for disbarment.

Hiring of witness not to appear in a criminal action against his client is gross professional misconduct on the part of an attorney, and is ground for disbarment.

3. Attorney and client  $\Leftrightarrow$  53(2)—Evidence held sufficient to sustain charge of obstructing justice.

Evidence that defendant, an attorney, hired a witness against his client in a criminal action not to appear, held sufficient to sustain a charge of obstructing justice.

## Appeal from Circuit Court, Harlan County.

Disbarment proceedings by the Commonwealth against J. H. Taylor, an attorney. From a judgment of disbarment, defendant appeals. Affirmed.

J. H. Taylor and W. A. Brock, both of Harlan, for appellant.

Chas. I. Dawson, Atty. Gen., and W. F. Fowler, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. J. H. Taylor appeals from a judgment of disbarment, and asks a reversal on the ground that one of the charges was insufficient in law and the other was not sustained by the evidence.

We deem it necessary to consider only the charge of obstructing justice. It appears that J. H. Taylor and his brother, Floyd Taylor, were partners in the practice of law. They had been employed to defend Joe Keller, who was under indictment in the Harlan circuit court for the offense of carnally knowing a female under 16 years of age. Shortly before the day set for the trial, Nannie Smith, the prosecuting witness, left Harlan county and went to the home of Taylor's mother, in Pulaski county. After being there for awhile, she left, and was then taken to the poorhouse. J. H. Taylor's affidavit, filed for a continuance, contains the following statement:

"The affiant and defendant, J. H. Taylor, says that if the witness, Floyd Taylor, was present in court in obedience to the said subpoena, he would truthfully testify on oath that he did contract and agree with one J. R. Fritz, a witness in the case, to take the witness against Joe Keller to Pulaski county, Kentucky, to the home of his mother, for the

purpose of finding out from the said witness, through his mother and her neighbor women, if the said Joe Keller was not guilty of the charge she had preferred against him, and that this was his only purpose in taking the said witness to the home of his mother, and that he instructed his mother and her neighbor women to find out from the said witness if Joe Keller was not guilty, and whatever the result of the inquiry of the mother of the said Floyd Taylor and her neighbor women was, the said witness was to be returned to Harlan county, Kentucky."

J. R. Fritz testified that Taylor proposed and agreed to pay Nannie Smith the sum of \$200 if she would leave Harlan county and not appear against Joe Keller. Of this sum, \$100 was paid. It was the intention to take the girl to Louisville, but when Fritz and she arrived at Corbin, they were met by Taylor. Nannie Smith swears that Taylor met her on the train and took her to his mother's home. On the other hand, Taylor denied making the agreement, and swears that he did not meet the witness on the train, or take her to his mother's home, and that he had nothing to do with the arrangement. His father and mother and one or two other witnesses swear that it was Floyd Taylor, and not J. H. Taylor, who brought Nannie Smith to the Taylor home in Somerset.

[1, 2] It is an obstruction of public justice for one to hire a witness not to appear against the accused. *Commonwealth v. Berry*, 141 Ky. 477, 133 S. W. 212, 33 L. R. A. (N. S.) 976. And where the offender is a member of the bar, and therefore an officer of the court sworn to support the Constitution and the laws of the commonwealth, he is guilty of gross professional misconduct, for which he may be and ought to be disbarred. 2 R. C. L. § 183, p. 1091; *In re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558; *Stephens v. Hill*, 10 Mees. N. W. 28.

[3] In our opinion the evidence was sufficient to prove the charge. Fritz swears that he made the agreement with J. H. Taylor; that Taylor paid the money, and met him on the train, and took charge of the girl. The girl swears that J. H. Taylor took her to his mother's home. Taylor's defense is that his brother, and not he, made the arrangement, and that the sole purpose of the arrangement was to enable his mother, or some of the neighborhood women, to inquire of the prosecuting witness as to the guilt of Joe Keller. If the matter was of such delicacy that only women could inquire of the prosecuting witness as to the guilt of the defendant, it is not perceived why it was necessary to take the girl many miles away, when doubtless there could have been found in Harlan county many good women ready and willing to perform the

task. It is true that several witnesses testified that appellant's brother, and not he, took the girl to his mother's home. It is immaterial which one of the brothers took her there. The positive testimony and all the circumstances tend to show that appellant was a party to the arrangement, and that the sole purpose of taking the girl away was to prevent her from testifying against his client. It follows that the judgment was proper.

Judgment affirmed.

### COLLINS et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 4, 1921.)

1. Homicide  $\Leftrightarrow$ 305—Instruction authorizing conviction as abettor, without requiring principal to have acted feloniously, erroneous.

In a manslaughter prosecution against a town marshal and a police judge for the killing of deceased while attempting to arrest him, an instruction authorizing the conviction of the marshal as an aider and abettor, although it did not require that the principal should have done the killing either willfully, unlawfully, feloniously, or with malice aforethought, *held* erroneous.

2. Homicide  $\Leftrightarrow$ 300(5)—Instruction confusing right of self-defense with officer's duty to arrest, erroneous.

In a manslaughter prosecution against two peace officers for killing deceased while attempting to arrest him for offenses committed in their presence, an instruction confusing the right of self-defense with the duty and authority of an officer in whose presence a felony has been committed, and making his right to kill dependent wholly on self-defense, *held* erroneous.

3. Arrest  $\Leftrightarrow$ 63(3), 68 — Officer may arrest without warrant for felony committed in his presence, and may kill to effect arrest.

Where an officer is attempting to arrest one charged with a misdemeanor, and the person charged shoots at the officer, there is a felony committed in the officer's presence, who is then authorized, and it is his duty, to arrest without a warrant, and may use force even to the taking of life, although the officer may be in no danger.

4. Homicide  $\Leftrightarrow$ 193—Evidence held too vague to be admissible.

In a prosecution of two peace officers for killing one attempting to resist arrest, evidence by a witness as to how many shells were in the gun which he had loaned deceased, and as to his custom of keeping a certain number in it, *held* too vague and uncertain to be admissible.

Appeal from Circuit Court, Floyd County.

S. A. Collins and Jerry Hager were convicted of manslaughter, and they appeal. Reversed, with directions to grant a new trial.

A. F. Byrd, of Lexington, and A. J. May, W. W. Williams, and B. M. James, all of Prestonsburg, for appellants.

Chas. I. Dawson, of Frankfort, J. D. Smith, of Prestonsburg, John M. Waugh, of Ashland, and Thos. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

TURNER, C. Appellants, Collins and Hager, together with Frank Addis and Russell Lee, were jointly indicted in the Floyd circuit court charged with the murder of Gerard Richmond as the result of a conspiracy charged to have been theretofore entered into by them. Addis and Lee demanded and were granted a separate trial, and the appellants, Collins and Hager, being placed on their joint trial, were each found guilty of manslaughter and each sentenced to 21 years' imprisonment, from which judgment they have appealed. As the judgment must be reversed because of erroneous instructions it will be necessary to state only so much of the evidence leading up to and resulting in the homicide as will illustrate the errors.

The killing occurred in the mining town of Weeksbury, in Floyd county, which is an incorporated town. On and prior to the 9th of October, 1920, Collins was the town marshal of Weeksbury and Hager was the police judge. Prior to that time there had been much complaint of the illicit traffic in liquor by persons in and around the town, and we gather from the evidence that the officials of the town, together with many residents thereof, were very active in breaking up and bringing about a cessation of this traffic. Saturday, the 9th of October, 1920, was pay day at the mines in Weeksbury, and at such times the bringing into the town of liquor was obviously more prevalent than upon ordinary occasions. On pay days particularly, and the nights following, the officers and citizens were especially alert in preventing the transportation of liquor into the town.

In the earlier part of that night the two appellants, one city marshal and the other police judge, together with some others, were out in different parts of the town seeking to suppress this traffic, but later returned to the central part of the town where the two appellants engaged in a game of pool. While so engaged they were notified that a man was going down the street drunk, and with a package containing liquor. They thereupon ceased playing pool, and followed the alleged offender, who turned out to be the decedent, Richmond, and overtook him when he was near his home. They had been informed that the man was drunk and had a package containing whisky and had offered their informant a drink, and as they approached the decedent from the rear the evi-

dence is that he was going from one side of the street to the other, and was apparently drunk.

The evidence of the two defendants, who were the only eyewitnesses, is to the effect that as they came nearer to Richmond he stopped and got over next to a fence, presenting his side to them and having in his hand at the time they approached him a pistol; that then, for the first time, Collins recognized him and said to him, "Gerard, I will have to arrest you; take down that gun," and that thereupon Richmond immediately fired at and struck Collins in the leg, and in the firing which followed Richmond was shot several times in the side and back.

The evidence for the commonwealth, however, tended to show, by one or more occupants of a nearby house, that after the shooting first began they saw two men shooting as if shooting into the ground; the theory of the commonwealth evidently being that the two officers shot Richmond after he had fallen.

The evidence tended to show that the two officers undertook to arrest Richmond, in the first place, for two misdemeanors said to have been committed in their presence, namely, the transportation of whisky and the offense of being drunk; and the evidence of the two defendants, which is corroborated by other evidence not necessary to mention, shows that as soon as they undertook to arrest him he resisted, and fired at Collins, thereby committing in the presence of the officers a felony. In addition to all this, the evidence of the defendants shows that when they came up with him and he placed himself near the fence he not only had under his arm a package containing whisky, but also had in his hand a pistol, held and presented in such manner as to indicate his purpose to resist arrest; so that up to the time appellants undertook to arrest Richmond he had been guilty, in their presence, according to the evidence of the defendants, of three misdemeanors—transporting whisky, drunkenness, and carrying a concealed weapon—and, according to the same evidence, upon their attempt to arrest him he immediately fired upon one of the officers and wounded him, thereby committing a felony in the presence of the officers.

The first instruction authorized the conviction of both defendants if the jury should believe beyond a reasonable doubt that either of them shot Richmond, as a result of which he died; and there was no reference in it to the conviction of either of them as aider or abettor; but this error might be deemed to have been cured by instruction No. 4 if that instruction had properly submitted the aiding and abetting theory.

That instruction authorized the conviction of Hager as an aider and abettor if the jury

should believe beyond a reasonable doubt that Collins willfully, feloniously, and with malice aforethought, and not in the necessary, or to him, apparently necessary, defense of himself or Hager, shot and killed Richmond, if Hager was then and there present for the purpose of, and feloniously and with malice aforethought, and not in the necessary or apparently necessary defense of himself or Collins, did aid, assist, counsel, abet, advise, and encourage Collins to do the shooting. And the conviction of Collins as an aider or abettor was authorized if the jury should believe beyond a reasonable doubt that Hager, not in the necessary or apparently necessary defense of himself or Collins, shot and wounded Richmond, from which he died, and that Collins was present for the purpose and did willfully and feloniously and with malice aforethought, aid, assist, advise, abet, or encourage Hager in doing such shooting.

[1] This instruction authorizes the conviction of Collins as an aider and abettor, although it does not require that Hager (the principal) should have done the shooting and killing either willfully, unlawfully, feloniously, or with malice aforethought. In other words, the instruction does not require that the principal (Hager) should have willfully, unlawfully, feloniously, or with malice aforethought shot and killed Richmond before it authorized the conviction of the aider or abettor (Collins), thereby authorizing the conviction of Collins as an abettor although Hager had shot and killed Richmond in a manner neither willful, unlawful, felonious, or malicious.

[2] But the glaring error is in instruction No. 6, wherein the court instructed the jury that if Richmond was drunk or disorderly or transporting liquor in the presence of Collins, Collins had a right to arrest him with or without a warrant, and that it was his duty to demand his arrest, and the duty of Richmond to peaceably submit; but if they believed Richmond refused to be arrested, that Collins had the right to make the arrest, and that if he in good faith attempted to do so, and while so engaged Richmond, with intent to prevent by force such arrest, shot at and wounded Collins, or shot at Hager, or either of them, and there appeared to the defendants in the exercise of a reasonable judgment under the circumstances no other safe way to save their lives or the lives of either of them, or to protect themselves or either of them from great bodily harm, or to make such arrest, than to shoot and kill the deceased, the jury would then acquit the defendants on the grounds of self-defense and apparent necessity.

[3] Instruction No. 3 was the self-defense instruction, and had already been given in the usual form, and yet the court in this instruction (No. 6) confused the right of self-

defense with the duty and authority of an officer in whose presence a felony had been committed, and in the concluding clause of that instruction the right of the officer to shoot and kill the deceased is made to depend wholly upon the question of self-defense of himself or the other officer present. The correct rule is that, where an officer is attempting to arrest one charged with a misdemeanor, and the one so charged resists arrest, and either shoots or shoots at the officer, there is a felony committed in the presence of the officer, and he is then authorized to arrest the accused upon the felony charge without a warrant, and in making such arrest is given all the protection provided by law to officers in making felony arrests; and it is the duty of the officer in making such arrest for felony to use such force as may be necessary to overcome such resistance, even to the taking of the life of the accused, and it matters not that the officer may not, at the time, be in danger of losing his life or limb at the hands of the accused. The instruction (No. 6) should have embraced this idea under the evidence in this case, and should not have confused or intermingled it with the instruction on self-defense.

In this case, as we have seen, the only two eyewitnesses testified that the decedent had committed at least two misdemeanors in the presence of the officers, and one felony, and if neither of the officers had been in danger from Richmond still the law exacted from them the duty, under their oaths, to use such force as was necessary to arrest the accused on a charge of felony committed in their presence. *Hickey v. Commonwealth*, 185 Ky. 570, 215 S. W. 431; *Rawlings and Spivey v. Commonwealth*, 191 Ky. 401, 230 S. W. 529.

It appears from the evidence that the pistol which Richmond had on the occasion in question had been borrowed or taken from the residence of one John Kitchen; and facts and circumstances were introduced in evidence by the commonwealth seeking to show that Richmond never did fire the pistol which he had. The evidence showed that the pistol which Richmond had was a six-shooter, and when found had five cartridges in it and one empty shell. Apparently in order to avert the force of this, the commonwealth introduced Kitchen, who testified in substance that he did not remember how many loaded cartridges were in the chamber of the pistol when Richmond took it from his home, but that it had some loads in it, and that his custom was to keep five shells in it as a general thing, and that he sometimes left one empty shell in it and the other five loaded, and that this had been his custom for about two weeks before the shooting.

[4] This evidence, when analyzed, only

means that the witness did not remember how many shells were in it when Richmond got it from his home that afternoon, but, by stating what his custom had been, it was sought in this vague and uncertain way to contradict the testimony of the two defendants who stated that Richmond did fire at least one shot. Manifestly the question was how many loads were in it when Richmond got it, and Kitchen's custom upon previous occasions was too vague and uncertain to be admitted in evidence, and upon another trial this part of his evidence will be rejected.

The judgment is reversed, with directions to grant the appellants a new trial, and for further proceedings consistent herewith.

#### KASH et al. v. UNITED STAR OIL CO. et al.

(Court of Appeals of Kentucky. Oct. 4, 1921.)

##### 1. Frauds, statute of §115(4)—Vendor is party to be charged.

Under the statute, the vendor in a real estate transaction is the party to be charged.

##### 2. Frauds, statute of §63(2)—Oil or gas lease must be made and assigned in writing.

An oil or gas lease is an interest in land, and must be in writing, and no valid assignment thereof can be made except in writing.

##### 3. Frauds, statute of §115(4)—Sales contract binding on both parties if memorandum signed by vendor and accepted by purchaser.

If an assignment of an oil lease is executed by the owner and delivered to the purchaser after making a contract of sale, the whole contract is enforceable, and the owner can recover the purchase price even though no writing be signed by the purchaser promising to pay the purchase price.

##### 4. Pleading §34(4)—On demurrer construed most strongly against pleader.

On demurrer a pleading is to be construed most strongly against the pleader.

##### 5. Frauds, statute of §148(2)—Agreements presumed oral unless otherwise alleged.

Unless a contract, assignment or other agreement be alleged to be in writing, the presumption prevails that it was oral.

##### 6. Frauds, statute of §118(1)—Writings alleged held insufficient as a memorandum take assignment of oil lease out of statute.

An alleged printed advertisement as to the purchase of an oil lease in connection with alleged correspondence between the parties held on demurrer to a petition by the alleged vendor to recover the price insufficient as a memorandum to take the assignment out of the statute.

Appeal from Circuit Court, Kenton County.

Action by Kelley Kash and another against the United Star Oil Company and another. From a judgment of dismissal on demurrer, plaintiffs appeal. Affirmed.

Kelley Kash, of Lexington, and Jackson & Woodward, of Cincinnati, Ohio, for appellants.

Myers & Howard, of Covington, and Wm. Mix, of Louisville, for appellees.

SAMPSON, J. Appellants, Kash and West, became the owners of an oil and gas lease on the Elias Chaney 70-acre tract on Buck creek, in Estill county, in February, 1919. In the following April Kash entered into negotiations with appellee M. Gordon and the United Star Oil Company, Incorporated, whereby he proposed and attempted to sell and assign the lease to them in consideration of \$6,000, \$1,000 to be paid in the stock of the United Star Oil Company, and the balance in money, the latter to be paid \$2,000 in hand and the remainder in installments at stated times. The lease was not assigned or transferred at the time, nor was there any payment on the purchase price. Immediately following the deal which was made in the offices of the company in Louisville, Ky., Kash returned to his home in Irvine and began by telegrams and letters to urge Gordon, who was president and managing officer of the corporation, to come on to Irvine and close up the deal for the lease. About the same time the corporation ran a display advertisement in the Sunday Louisville Herald, in which advertisement was a paragraph in part reading:

"WE'VE BOUGHT ONE LEASE. This lease, on which we have exercised our option, is on a tract of seventy acres on Buck creek in Estill county, immediately adjoining production. We have arranged to have a rig go on this property immediately."

The description in the advertisement would indicate that the lease in question was the one intended. The advertisement was over the corporation's printed signature. No written assignment of the lease was delivered to or accepted by the company or Gordon, and no payments were ever made on the lease, although Kash often importuned Gordon and the company to do so. Failing to collect the sale price of the lease, Kash and West, the joint owners and would-be vendors, began this action in the Kenton circuit court against the United Star Oil Company and M. Gordon, to recover \$6,000, the alleged agreed price. A general demurrer being filed, the petition was amended more than once, but the demurrer was finally sustained, and the plaintiffs declining to further plead, and announcing a purpose to stand by their pleadings, which had been held insufficient on demurrer, the court dismissed their cause, from

which judgment they appeal to this court. The demurrer was sustained because the trial court was of the opinion that the contract declared upon was within the statute of frauds, there being no sufficient writing signed by the parties to be charged to take the contract out of the operation of the statute.

[1] Does the petition as amended state facts sufficient to constitute a cause of action against the defendants or either of them? This court has frequently held that the vendor in a real estate transfer is the party to be charged. *City of Murray v. Crawford*, 138 Ky. 25, 127 S. W. 494, 28 L. R. A. (N. S.) 680; *Wren v. Cooksey*, 147 Ky. 825, 145 S. W. 1116; *Henry v. Reeser et al.*, 153 Ky. 8, 154 S. W. 371; *Childers v. Little, etc.*, 96 Ky. 376, 29 S. W. 319, 16 Ky. Law Rep. 521.

[2] It is also well settled that an oil or gas lease is an interest in land, and must be in writing, and no valid assignment thereof can be made except in writing. *Beckett-Iseman Oil Co. v. Backer*, 165 Ky. 818, 178 S. W. 1084.

The original petition sets forth no writing whatever signed by the "party to be charged," with the execution of the assignment of the lease or any note or obligation signed by the appellees, or either of them, as vendees, and was of course bad on demurrer. The first amendment related merely to a garnishment which the plaintiffs desired to obtain. The second amended petition averred that—

"Plaintiffs and defendants confirmed, ratified and recognized the contract so alleged by letters, by telegrams, by telephone conversations, and in personal conversations between plaintiffs and defendants."

It then avers that the defendants caused the advertisement set out above to be inserted in the Sunday Louisville Herald, and that the 70 acres referred to in that advertisement are the same 70 acres sold by plaintiffs to defendants, as set forth in the original petition. It is also alleged in said amended petition that one of the plaintiffs, Kelley Kash, sent a telegram from Irvine, Ky., April 17, 1919, to M. Gordon, room No. 607, Republic Bldg., Louisville, Ky., which reads:

"Important you reach here tonight, leaving there two o'clock today."

On the same date Kelley Kash wrote and posted a letter to M. Gordon, Louisville, Ky., in which he said:

"I regard it as very necessary that you come down here at once and look over these properties, the two on which Mr. Lothier gave you option, and the 70-acre lease you are taking from me. You have advertised these options and it is necessary that steps be taken at once to complete the purchase. As to the 70-acre

lease, a well is being drilled within less than 400 feet of it and it is important that this deal be closed this week.

"I suggest you make an effort to come here so as to reach here Saturday morning, or in fact you can leave Louisville at 2 o'clock Friday afternoon and reach here via Frankfort at 8:35 tomorrow night. You should arrange to come then."

Again on May 5, 1919, Kash wired Gordon:

"When can I expect you here to close deal? Important."

No answer or response is alleged to have been received by Kash to any of the foregoing telegrams and letter, unless the following telegram, dated May 7, 1919, can be so considered:

"Just arrived I am working on my deal to be closed shortly. The United Star Oil Company has no money at all they did not sell any stock and are not trying to sell any. It is up to me to raise my personal money to buy productions.  
M. Gordon."

Thereupon Kash wrote Gordon May 12, 1919, as follows:

"I inclose you two notes for \$1,000 each which you can sign as the first payment on the 70-acre Chaney lease on Buck creek. The other owner with me is very impatient about our delay in this matter and it is necessary for us to do something. Sign these notes by United Star Oil Company and you indorse the notes on the back individually. Do this at once. You can see from the inclosed clipping that things are active on Buck creek. We can take care of the later payments when I see you."

These notes were not signed or returned by Gordon or the company. On May 24th Kash again telegraphed Gordon:

"Can you arrange for Buck creek seventy acre lease Monday?"

It is also averred that on May 28th a letter was forwarded from the office of Kash in his absence to Gordon in Louisville, telling him about the bringing in of a 40-barrel well on an adjoining lease, but this letter is not signed by any one, and cannot therefore be considered sufficient to take the contract out of the operation of the statute. The only other letter or writing relied upon in the amended petition is the following, written by Kash to Gordon October 20, 1919:

"Jackson, Ky., October 20, 1919.

"Mr. M. Gordon, Covington, Kentucky—Dear Mr. Gordon: I intended to send you statement of claim against you for the lease known as the Elias Chaney lease of seventy acres situated on Buck creek in Estill county. You will recall this lease was sold to you while you had offices in Louisville, Ky., at the agreed price of \$6,000. I had certain maps before me when you and I closed the deal for this lease, and it was definitely agreed upon as to price and terms. I agreed to take the sum of \$1,000, as I recall, in the stock of this corporation, and

the sum of \$2,000 in cash payments for the balance of this \$6,000. After I sold you this lease, and in order to preserve the lease, I paid two monthly rentals of \$70 each.

"There have been some developments in the vicinity of this property since we first made the deal for this lease and it is not quite so valuable now as it was then. It was an altogether valuable and attractive lease at that time, with development and production on the adjoining lease and within only a few hundred feet. Now, in order to adjust this matter and get a settlement, and by way of compromise I am suggesting here that upon the payment of \$3,000 in cash and the payment of the additional sum of \$140, to cover rentals paid, I will accept same in full settlement of claim against you for this lease. This is quite a concession as I held this lease for you and lost the opportunity to make sale of it to many other parties.

"Please let me hear from you at once in settlement of this matter, as I am not in position to delay the matter for any time.

"Respectfully,  
Kelley Kash."

Only one of the communications set forth above—a telegram—is signed by Gordon (the company did not sign), and this telegram indicates no purpose whatever on the part of defendants or either of them to buy the oil lease in issue, but on the contrary clearly evidences a good reason, as well as an intention, not to do so. This telegram does not, therefore, aid the petition, and need not be further considered. Altogether the letters and telegrams set forth do not contain a sufficient description of the property to be sold to identify it, although it is referred to as an oil lease on Buck creek—the Chaney lease—a 70-acre lease adjoining production. There may have been, and doubtless were, a number of 70-acre oil leases on Buck creek, and there may have been several Chaney 70-acre oil leases on Buck creek, but even more indefinite is the location of Buck creek, for almost every county in Kentucky has a stream bearing that name, and Estill county is not mentioned in any of those letters or telegrams except the last letter, dated October 20, 1919, which was, as shown by its terms, written after all hope of a transfer of the lease was gone, and litigation was anticipated. This letter does not aid the plaintiff's petition or take the contract out of the statute of frauds.

A careful reading of the several writings set forth in the amended petition gives the impression that the sale of the lease by Kash to Gordon and his company was tentative, or rather in the nature of an option to sell the property in case it was satisfactory to Gordon when inspected by him, and this idea is clearly manifested by the Kash letter, dated at Irvine, Ky., April 17, 1919, wherein he said to Gordon (when the contract was fresh in his mind):

"You have advertised these options and it is necessary that steps be taken at once to complete the purchase."



In this statement the writer appears to have contemplated the two Lothier leases, as well as the Kash lease. In the next sentence he singled out the Kash lease, saying:

"As to the 70-acre lease, a well is being drilled within less than 400 feet of it, and it is important that this deal be closed this week."

In other words, those options should be closed, and especially the one on the Kash lease because a well was being drilled very near it, and in case of a big producer coming in the deal might not be easily closed. The letter indicates that the deal amounted to nothing more than an option which had not been closed.

[3] All the other telegrams and letters copied in the pleading and averred to have been sent by Kash to Gordon were intended to excite the speculative propensities of the prospective purchaser and cause him to act quickly, and buy and pay for the Kash lease, and do not in any way aid the petition as amended to state a cause of action. If Kash had executed and delivered an assignment of the oil lease to Gordon or to the company at the time or soon after the making of the contract of sale, the whole contract would have been enforceable and plaintiffs could have recovered the purchase price, even though no writing was signed by defendants, or either of them, promising to pay the purchase price; for we have held that a contract respecting the sale of real property is binding on both parties if the necessary memorandum or writing be signed by the vendor and delivered to and accepted by the vendee. 153 Ky. 8, 154 S. W. 371, supra. But the weakness of plaintiff's cause of action as set forth in the assailed pleading is the want of a sufficient averment that the assignment of the lease by Kash and West to Gordon and the company was actually prepared, executed, and delivered to the vendee, or offered to be so delivered. We are not overlooking the averment in the original petition:

"Plaintiffs state that thereupon they offered and tendered a transfer of assignment of said oil and gas lease, and have at all times since the date been ready and willing to transfer and assign same, and they here tender said assignment."

To whom was this tender made, and in what way or manner? Was such an assignment reduced to writing and signed by the vendors, or either of them, or any one for them? If not, then it was not such an agreement or writing as was required to take the contract out of the operation of the statute of frauds.

[4, 5] On demurrer a pleading is construed strongest against the pleader. Applying this rule, no assignment was reduced to writing or signed or tendered to defendants Gordon

and the United Star Oil Company, or either of them. Unless a contract, assignment, or other agreement be alleged to be in writing, the presumption prevails that it was oral. This alleged assignment, if such there was, was oral if the averment be subjected to the test of this rule.

[6] As an assignment of an oil and gas lease, to be enforceable, must be in writing and signed by the assignor or vendor, and no action can be maintained on a verbal assignment or on any contract respecting the sale of real estate, including oil leases, unless the contract, or some memorandum in writing, signed by the party to be charged, evidence the same, we conclude that the contract sued on was within the statute of frauds, and perjury, and the demurrer to the petition as amended was properly sustained by the trial court.

Judgment affirmed.

# CITIZENS' TELEPHONE CO. v. CINCINNATI, N. O. & T. P. R. CO. et al.

(Court of Appeals of Kentucky. June 7, 1921.  
Rehearing Denied Oct. 18, 1921.)

1. Telegraphs and telephones ¶11—Franchise held to confer no right in railroad right of way.

A county franchise, granted a telephone company to maintain lines on all roads and highways of the county, held not to confer a right to maintain lines upon or over a railroad right of way, or on roads not under the jurisdiction of the county fiscal court.

2. Eminent domain ¶100(1)—Owner of servient estate not entitled to damage for telephone lines along highway under public grant.

With respect to rights of way for a public highway, the owner of the servient estate has no right to interfere with or claim damages for the maintenance of telephone lines along the highway, where the grant is made by public authority, the grant being for a public use and the use of the way for telephone lines being also one for a public purpose, and not an additional servitude.

3. Railroads ¶69—Company owning fee has exclusive right of occupancy indefinitely upward.

If a railroad company owns the fee it has the exclusive right of occupancy of the right of way indefinitely upward, and may enjoin the stringing of wires or erection of any structure over it, otherwise if it has a mere easement.

4. Easements ¶40—Height depends on facts in each case.

To what height an easement extends where there is no dimension fixed depends upon the facts of each case.

**5. Railroads ¶69—Height of easement for "right of way" stated.**

For an easement for a railroad right of way, which is an estate in land limited as to dimension, width, height, depth, and length, the height must be sufficient for the safe and convenient passage of all trains and their burden of whatever nature, and this is usually fixed at about 25 to 30 feet above the top of the rails.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right of Way.]

**6. Telegraphs and telephones ¶11—Railroad not owning fee cannot enjoin telephone wires across right of way.**

A railroad company not owning the fee has no property in the right of way as will enable it to enjoin a telephone company from maintaining at a reasonable height across it a properly constructed and managed telephone line even without grant from the railroad company or other authority, as against all but the owner of the fee.

Appeal from Circuit Court, Grant County.

Suit by the Cincinnati, New Orleans & Texas Pacific Railroad Company against the Citizens' Telephone Company and another. Judgment for plaintiff, and defendant named appeals. Reversed.

Myers & Howard, of Covington, for appellant.

De Jarnette & Harrison, of Williamstown, for appellee.

SAMPSON, J. Some time before January, 1915, appellant Citizens' Telephone Company, Incorporated, erected over and across the right of way of appellee, Cincinnati New Orleans & Texas Pacific Railroad Company, in Grant county, a line of telephone wires without first obtaining from said railroad company in any manner a right to do so. About two years later this action was brought by the railroad company against the telephone company and C. J. Daly to enjoin and restrain them from maintaining said wires across the railroad right of way, and from erecting other lines.

The answer of the telephone company admits the erection and maintenance of the telephone wires over and across the right of way of the railroad company, but denies the right of the railroad company to require it to remove them. The telephone company further says that the wires were and are erected in a substantial and permanent manner at a height which does not and will not interfere with the operation of the trains of the railroad company and the free and unobstructed use of the right of way. The evidence taken on both sides related only to the manner, nature, durability, strength, and height above the rails of the telephone wires. The chancellor found the defendant telephone company previous to the filing of this action set telephone poles on each side

of plaintiff's right of way and strung two telephone wires over and across said right of way at or near the residence of defendant Daly; "that said defendant did not before stringing said wires on said right of way procure by contract plaintiff's consent so to do or undertake any condemnation proceedings to procure such right; that each of said lines of telephone so constructed is a private, not a commercial, line and serves only the residences of Daly and Foree." A judgment was entered, enjoining the telephone company from maintaining the said wires over and across the railroad right of way until the telephone company acquired in one of the ways allowed by law the right to do so, and the telephone company appeals. Daly, who was made a defendant, did not answer below, nor is he a party to this appeal.

The sole question is, may a telephone company without obtaining in one of the ways allowed by law a right to do so, erect and maintain over and across a railroad right of way, not at a highway crossing, a line of wires to be used by it in connecting one or more of its patrons with its telephone exchange? This question has never been passed upon by this court, nor do we find but few cases in point from other jurisdictions, and these are not entirely harmonious.

[1] The telephone company in this case claims no right in or across the railroad right of way which is not common to all persons and companies. If the appellant Citizens' Telephone Company may without grant from the railroad company or condemnation erect and maintain a line of wires over the railroad right of way, surely any one may do so. Its franchise granted it by Grant county to "maintain and operate its telephone lines for the accommodation of the public, on and along all the roads and highways of said county," gave no right to erect and maintain its lines upon or over the railroad right of way or on any road or highway except such as were under the jurisdiction of the Grant fiscal court which gave the franchise.

It is the contention of the telephone company that, as the railroad company only has an easement in its right of way, and does not own the fee thereto, it has no right to have its right of way open to the sky, but only to such height as to insure free and unobstructed passage for its trains and employes in the conduct of its business, for which the right of way was granted in the first place. This is undoubtedly true, as the owner of the fee in the servient estate over which the right of way extends; but what right has a stranger, as against the first and dominant easement holder, to cross or use the right of way of a railroad company?

[2] Our rule with respect to rights of way for a public highway is to hold that the

owner of the servient estate has no right or power to interfere with or claim damages for the erection and maintenance of telephone lines along the highway where the grant is made by public authority. This is on the theory that a grant for a public use and purpose is not violated by the employment of the right of way for telephone lines, which is also a public purpose. We have held that this is not an additional servitude. Street Railroads, interurban lines, and telegraph lines are embraced in this exception. *Cumberland Tel. & Tel. Co. v. Avritt*, 120 Ky. 34, 85 S. W. 204, 27 Ky. Law Rep. 394, 8 Ann. Cas. 955; *Georgetown & Lexington Traction Co. v. Mulholland*, 76 S. W. 148, 25 Ky. Law Rep. 578; *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358; *Cater v. Northwestern Tel. Ex.*, 60 Minn. 539, 63 N. W. 111, 51 Am. St. Rep. 543, 28 L. R. A. 310.

This rule rests upon the theory that the grant for a public purpose includes every public use and purpose to and for which the grant may reasonably be employed, and that telephone, telegraph, and interurban lines are and were such public facilities as were actually contemplated by the grant of the right of way, and therefore do not constitute an additional servitude for which the owner of the servient estate may demand and have compensation. The grant in such case is to the public, and the public makes use of it. But the telephone company, a private corporation, claims no grant whatever in this case to erect and maintain its lines at any place except over and above the public highways of Grant county. Its trunk line is along the Covington and Lexington pike, a highway of Grant county, which parallels but is located some distance from the right of way of appellee railroad company. To reach the home of Daly, one of its patrons, with a wire, it set two poles, one on either side of the right of way 170 feet apart, and stretched the wire over the right of way between the two poles. The evidence shows that after the commencement of this litigation the telephone company reconstructed and brought up to standard its line over the railroad by putting in taller, larger, and more substantial posts, and stringing copper instead of steel wire thereon. Since its reconstruction it is admitted by the railroad company that the line complies with its specifications for such work.

[3] The petition does not aver that the railroad company owns the fee to the right of way, and in the absence of such averment we must presume that it had merely an easement which allows the operation of the railroad in its regular business, and reverts to the owner of the fee when that use ceases. If it owns the fee it has the exclusive right of occupancy of the right of way indefinitely upward, and can enjoin the stringing of

wires or the erection of any structure whatsoever over the same. But if the railroad company owns merely the easement or right of use of the land on which its road is constructed, it cannot complain that another, even a stranger, as is the telephone company in this case, has entered over the easement at an elevation so high as to give no obstruction to the full enjoyment of the easement for the purpose for which it was granted, and there maintains a wire or wires in connection with its telephone business.

[4, 5] To what height an easement extends where there are no dimensions fixed depends upon the facts of each case. For a railroad the height must be sufficient for the safe and convenient passage of all trains and their burden of whatever nature. This is usually fixed at about 25 to 30 feet above the top of the steel rails of the track. So long as the structure above the track does not interfere with the full enjoyment of the right of way and is of such permanent and substantial nature as not to be a menace to those who have to pass under it, the owner of the easement has no right to require its removal, nor can such owner maintain an action for such purpose, for its domain has not been invaded, nor has it suffered a wrong, although the fee owner may maintain such action.

The ownership of an easement extends only to such height as reasonably to permit the full and free enjoyment thereof for the purpose for which it was granted or acquired, and no further. The easement holder would be as much a trespasser if he ascended and occupied the realm above the right of way for some purpose not contemplated by the grant as would be a stranger. One who has a lease or easement to enjoy the first floor of a building cannot prevent a stranger from occupying the second floor if in so doing the stranger does not invade the realm of the holder of the first floor. In other words a right of way is a limited estate in land, limited as to dimension, width, height, depth, and length, and the grantee must keep within such limitations or he at once becomes a trespasser. Whatever may happen to the estate outside these limitations is of no concern to the holder of the right of way unless it directly or indirectly affects such right of way. But he can protect from wrongful invasion the whole of the right of way. Beyond this he has no legal concern.

In the case of *Stevenson v. Stewart*, 7 Phil. (Pa.) 293, where a foot passway was involved, it was held that a grantee of an easement had no right to have the right open to the sky or any other height except, so far as necessary and convenient for the footway reserved, sufficient in height and breadth for the purpose expressed in the grant. *Baker v. Willard*, 171 Mass. 220,

50 N. E. 620, 40 L. R. A. 754, 68 Am. St. Rep. 445.

The owner of the soil may make any use of the land which does not interfere with a reasonable use of the right of way granted for the purposes intended, even to erecting bridges, roofs, and other structures over the same. *Flaherty v. Fleming*, 58 W. Va. 669, 52 S. E. 857, 3 L. R. A. (N. S.) 461.

In *Cook on Telegraph Law* (1920) page 64, the text is:

"A railroad company owning only a right of way and not the fee cannot object to telegraph or telephone wires crossing such right of way, even though not on the highway, inasmuch as 'the railroad company is not entitled to have its way kept open to the sky.'"

A case almost exactly like the one under consideration was decided by the Supreme Court of Tennessee in 1916, styled *Illinois Central R. R. Co. v. Centerville Telephone Co.*, reported in 135 Tenn. 198, 186 S. W. 90. In that case the telephone company had erected its wires over the railroad's right of way without leave or license, as in this case, and the railroad sought to have them removed, but the court said:

"Having only an easement, the railroad company is not entitled to have its way kept open to the sky, and the grant to it is not interfered with by constructing overhead telephone wires, so long as the reasonable and safe use of the easement is not impaired. 9 R. C. L. p. 799. In notes under *Flaherty v. Fleming* (W. Va.) 3 L. R. A. (N. S.) 461, and *Bitello v. Bipson* (Conn.) 16 L. R. A. (N. S.) 193, numerous cases sustaining the foregoing statement are collected. In these cases it is shown that the owner of the fee may build a bridge for his convenience over the easement or passageway, and the owner of the easement has no ground of complaint, provided the use of his easement is not seriously obstructed.

"There is no question of light and air in this case. Neither is it alleged that the wires of defendant telephone companies interfere with the telegraph or telephone lines of the railroad company maintained along the right of way. The only interference with the railroad company's use of its easement suggested is the possibility that wires crossing the track may fall and injure a passenger or employé on a train beneath."

[8] Both upon reason and authority we are of the opinion that appellee railroad company had no such property in the right of way as would enable it to maintain this action to enjoin the telephone company from maintaining at a reasonable height a properly constructed and managed line or lines of telephone wires, even without grant from the railroad company or other authority, as against all but the owner of the fee.

It follows that the judgment of the lower court must be reversed for proceedings consistent with this opinion.

Judgment reversed.

## CHARLES v. FLANARY.

(Court of Appeals of Kentucky. Oct. 21, 1921.)

1. Elections  $\S$  154(10)—Evidence taken more than five days after issues made up in contest properly admitted.

Ky. St. § 1550, subsec. 28, does not prohibit the taking of testimony after five days from making up of issues in a primary election contest.

2. Elections  $\S$  154(10)—Corrupt use of money shown by circumstantial evidence.

Corrupt use of money under Corrupt Practice Act (Ky. St. Supp. 1918, §§ 1565b1-1565b21) in a primary election may be shown by circumstantial evidence.

3. Elections  $\S$  154(10)—Evidence sustaining finding of corrupt use of money.

On contest for nomination for office under Ky. St. § 1550, subsec. 28, where there was a corrupt expenditure of money by friends of contestee in his behalf, under Corrupt Practice Act (Ky. St. Supp. 1918, §§ 1565b1 to 1565b21), evidence held sufficient to sustain a finding that contestee had knowledge thereof and took part therein.

4. Elections  $\S$  126(6) — Candidate violating Corrupt Practice Act not excused under unsubstantial technicalities.

A candidate violating Corrupt Practice Act (Ky. St. Supp. 1918, §§ 1565b1-1565b21) by corruptly expending money in a primary election, should not be excused under unsubstantial technicalities.

5. Elections  $\S$  120—Competent for Legislature to provide for nomination by less than majority or plurality; "election."

It was competent for the Legislature, as it did under Corrupt Practice Act (Ky. St. Supp. 1918, § 1565b11), to provide for the nomination of a candidate in a primary election who receives less than a majority or plurality of the legal votes cast, the candidate receiving the majority or plurality having violated such act, a primary election not being an "election" within the meaning of the Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Election.]

6. Statutes  $\S$  125(5)—Provision in Corrupt Practice Act within title.

The provision in the Corrupt Practice Act (Ky. St. Supp. 1918, § 1565b11), providing that the one having the next highest number of votes shall be declared nominated where the candidate receiving the highest number has violated the Corrupt Practice Act, is within the title to such act, and such act conforms to Const. § 51.

7. Statutes  $\S$  109—Anything germane to general purpose properly included.

Anything which is germane to the general purpose of a legislative act as stated in the

title is not inimicable to the requirements of Const. § 51.

**8. Elections ¶120—Corrupt Practice Act held not to violate constitutional provision.**

The Corrupt Practice Act (Ky. St. Supp. 1918, § 1565b11) does not conflict with Const. § 151, which relates exclusively to provisions for "depriving of office" any person who procures his nomination or election by corrupt practice.

**9. Elections ¶156—Limit for filing certificates of nomination inapplicable in case of contest.**

The limit of time for filing certificates of nomination before the general election does not apply in case of a contest of a primary election.

**Appeal from Circuit Court, Pike County.**

Contest of primary election by W. E. Flanary against W. W. Charles. Judgment for contestant, and defendant appeals. Affirmed.

J. J. Moore and Willis Staton, both of Pikeville, for appellant.

John D. Carroll and Hazelrigg & Hazelrigg, all of Frankfort, and Stratton & Stephenson, of Pikeville, for appellee.

**THOMAS, J.** This is a contest proceeding for the Republican nomination for the office of county judge of Pike county, and was instituted under the provisions of subsection 28 of section 1550, Kentucky Statutes, by the appellee, W. E. Flanary, against the appellant, W. W. Charles, both of whom were candidates for the nomination in the primary election on August 6, 1921. The regular judge of the Pike circuit court, where the proceedings were pending, declined to sit and hear the case, and the special judge, who was appointed by the Governor to try it, dismissed it upon the ground that the notice of contest was not served in time, but at the present term of this court that judgment was reversed (*Flanary v. Charles*, 192 Ky. 355, 233 S. W. 748), and upon a second hearing, when the case was heard upon its merits, it was adjudged that appellant and contestee, Charles, who received 360 votes more than the contestant, Flanary, was not entitled to the nomination because he had violated some of the provisions of what is known as the Corrupt Practice Act, which is sections 1565b1-1565b21, vol. 3 Kentucky Statutes, both inclusive, and being chapter 13, p. 53, Session Acts 1916, and the nomination was awarded to Flanary, he having received the next highest number of votes, and had not violated any of the provisions of the statute.

From that judgment the contestee prosecutes this appeal and for a reversal his counsel urge three grounds: (1) That the court erred in admitting any evidence for the contestant because it was not taken within five days after the issues were made up; (2) that the evidence is not sufficient to sustain the

judgment; and (3) that section 1565b11, is unconstitutional in so far as it authorizes the awarding of the nomination to any candidate not receiving a majority or a plurality of all the legal votes cast in the election. These grounds will be disposed of as briefly as possible in the order named.

[1] 1. The notice of contest was served on appellant on the 16th day of August, 1921, and warned him to appear and answer on the 22d day of that month, when he appeared at the place stated in the notice and filed his answer and grounds of counter contest, and on the next day (August 23) the reply of contestant was filed and an amended reply was filed on the day following, when the issues were completed. On the 24th of August the regular judge of the district notified counsel for contestant that he would be in Pikeville to try the case on the 27th of that month, which was on Saturday. On the next day he notified the same counsel that, for reasons which he deemed satisfactory, he declined to sit in the case, and on the Monday following entered an order to that effect. On Tuesday, the 30th, the Governor designated a special judge to preside and try the case, and on the next day he notified the clerk of the court that he would hear the case on September 5 on oral proof. Contestant began the taking of his proof by depositions on August 29, and continued to do so on August 30 and 31, when his counsel learned of the appointment of the special judge to try the case, and of his intention to hear it on September 5 on oral proof. Thereupon counsel adjourned the taking of depositions and subpoenaed the witnesses to appear for the trial on September 5 to testify orally.

The position of counsel concerning this ground, as we understand it, is that the statute providing for the contest of a primary election (subsection 28, § 1550), coupled with some statements in the opinion in the case of *Lay v. Rose*, 177 Ky. 303, 197 S. W. 921, required appellant to immediately commence the taking of his testimony after the issues were made up on August 24, and to complete it five days thereafter, which would not be later than August 30. It is therefore insisted that no evidence taken after that date, and no oral evidence introduced after that date could be legally heard at the trial, which occurred more than a month afterwards, and the court erred in the admission of any of it at the trial, although it composed the great bulk of contestant's testimony. We cannot agree with this contention. If the language of the opinion of the *Lay Case* upon this point, which is so much relied on by counsel, was pertinent and necessary to the determination of the only question involved therein, and possessed no elements of dictum, it would not necessarily follow that counsel's position was correct, for in that case no judge was obtained to try the

case until more than a month after the issues were made and the statements of the opinion, upon which counsel rely, were made in the light of the peculiar facts presented. But, as indicated, the question of practice involved was not before this court for the purpose of determination in that case, since it was held that the contest notice was not filed within the requisite five days after the ascertaining of the result of the election by the election commissioners, from which date, the opinion held, the time for instituting the contest commenced.

We have read the statute providing for this character of contest with great care, and fail to find any provision in it which expressly or by implication fixes the time within which either party may take or complete his testimony. The time is prescribed in which the pleadings shall be made up, and it says: "The judge shall proceed to a trial of said cause within five days after issue is joined as herein provided"—which latter requirement is necessarily directory. Power is conferred upon the court or judge trying the case to hear the witnesses orally, or require the parties to take the proof by deposition, neither of which requirements can be made until a judge is found who is willing to preside at the trial, and, of course, the oral proof cannot be heard except during the trial. It is further provided that—

"The court may require the contestant, or the person who has the burden of proof under the issues joined, to complete his proof in not less than five days, and the contestee, or the person not having the burden, to complete his proof in not less than five days thereafter, and each party may be given one day additional for producing evidence in rebuttal, and no greater time shall be extended, unless the court be satisfied that the ends of justice demand it."

This provision clearly refers and applies to the hearing of evidence and the introduction of testimony at and during the trial of the case; i. e., the court may limit the time within which the one having the burden may introduce his testimony upon the hearing to five days, and the same limitation may be imposed upon the other party, and each of them may be confined to one day for the introduction of rebuttal testimony "unless the court is satisfied that the ends of justice demand" an extension of time. The purpose of the Legislature evidently was to limit the time consumed in the trial to 12 days, if possible, and thereby further the central idea of speed in disposing of the contest. It is easy to imagine many contests, covering large districts or territories, where many grounds and collateral issues are involved, that 12 days would be an exceedingly short time in which to try the case, and under the statute, if the ends of justice demand it, that time may be extended by the court. On the other hand, the judge is not forbidden by the statute to limit the time for the introduction of testimony to a less

number of days than the statute specifies, if no injustice will be done, and in that case it would be his duty to do so. So interpreting the statute, it follows that this ground is without merit.

2. As heretofore stated, the sole grounds of contest and counter contest, tried below and involved on this appeal, are violations of the Corrupt Practice Act by the respective parties. As against the contestee it is alleged that he spent in the election, or others spent for him, with his knowledge and consent, more than \$1,000, which is the maximum amount for purely legitimate purposes allowed by the statute for a county office, and that he failed to include any part of it in either his ante or post election expense accounts, which the act requires to be sworn to and filed by the candidate. Furthermore, it is alleged that he, with candidates for other nominations, formed a slate and pooled their money in a "jack pot" to be used in the election, and especially on the election day, to bribe and otherwise corrupt voters to support the candidates who were members of the pool, and that he contributed to that fund as much as \$4,000, which was used by his friends and "strikers" at the various precincts of the county on election day in carrying out the purpose for which it was contributed, with his knowledge and consent, all of which was in direct violation of the provisions of the Corrupt Practice Act.

On the day of the election appellant was at the Knox precinct in Pike county, which contains some 300 or 400 Republican voters. As many as three unimpeached witnesses testified that they saw him at that precinct during the election day with a large amount of money, composed of small bills, and that he, on a number of occasions, gave some of it to the witnesses for the purpose of paying for votes cast for him, and that the money was so paid with his knowledge and consent; furthermore, that he himself paid a number of voters the amount they demanded for casting their vote for him, which payments were done sometimes behind the house in which the election was held, and at other times he dropped the money on the ground and the voter picked it up. Appellant denies all of that guilty testimony, but admits being at the precinct on election day with a considerable amount of money, and that he may have dropped some of it during the day, but that the only money which he remembers to have spent was for some gingerbread, although he was active in seeing that his name got upon the slips which "strikers" for himself and other candidates were making out and giving to the voters, who were paid their price when the name on the slips was voted for.

On Tuesday preceding the primary election appellant went to the office of J. M. Bolling, who was and is the commonwealth's attorney of that judicial district, and with him was a man by the name of Whitt, and

the two went into a room back of the office, in which there was a bed, and sitting upon it was Anse May, around whom were scattered on the bed a great number of \$1 and \$2 bills, which he was placing in envelopes. May was a candidate for the Republican nomination for county court clerk of the county, and was on the slate with appellant. A short time thereafter W. W. Barrett, the county attorney of the county, whom appellant acknowledged was his chief campaign manager, came into the room and brought with him a large bundle of money wrapped in a newspaper, which he threw upon the bed and mixed it with that which was already there. The envelopes soon ran out, and Whitt was given 50 cents by appellant, and instructed to buy more, which he did. Barrett seems to have taken charge of as many of the envelopes as were to be handled by appellant as a member of the pool or slate to which he belonged, and gave one of them, containing \$150, to Whitt, with directions for him to use the money contained in it at the latter's precinct on election day, and the directions, according to the witness, were carried out. Barrett gave envelopes containing different amounts of money to other "strikers" or "workers" for appellant, to be used at other precincts in the county, and the circumstances testified to leave no doubt but that all of the money in that back room was not only provided, but was actually used on the election day, for appellant and those associated with him on his slate.

On the same morning of the meeting in Bolling's office Barrett applied to the People's Bank of Pikeville and inquired if he could draw a draft on the Bank of Freeburn, W. Va., of which appellant was president. He was informed that he could, and some officer of the bank filled in a blank draft, drawn on the Bank of Freeburn and payable to the People's Bank of Pikeville, for the sum of \$2,500, and delivered it unsigned to Barrett. He was gone a little while and returned with the signature, "W. W. Charles," written thereon, and he procured the \$2,500 called for by it and carried it to Bolling's office where it was handled in the manner hereinbefore stated. That draft was paid by the Freeburn bank on August 5, three days after it was drawn, and was charged to the account of appellant, and the cashier testified that the signature to it was the handwriting of appellant, and the teller of the People's Bank of Pikeville testified substantially the same. At the beginning of his testimony, and when the draft was not present, appellant denied having signed it or any knowledge concerning it, but when he was confronted with the draft later in the trial he said, "If it is not my signature it is a fine imitation." He could not be induced by the most rigid cross-examination to state whether the signature to the draft was made by him, and the answer given above was as

responsive as he could be induced to make to the most direct questions. Barrett, who, as we have seen, was the general manager of the appellant's campaign, was subpoenaed by contestant to appear at the trial and testify orally, but he disobeyed the subpoena and was absent throughout the trial, although he conversed with appellant on the last day he was seen in Pikeville before his departure. It is true appellant served Barrett with a subpoena for the purpose of taking his deposition on September 30, 1921, but no effort was made by him to procure the presence of Barrett to testify orally on the trial of the case.

[2, 3] It is seriously insisted that the testimony as above briefly stated was insufficient under the ruling in the case of *Hardin v. Horn*, 184 Ky. 548, 212 S. W. 573, and cases referred to therein, to sustain the charges upon which the judgment was based, and for that reason it was the duty of the court to dismiss the contest. In those cases, particularly the one named, the proof of alleged violation of the statute consisted in the wrongful expenditure of money by friends of the candidates whose nominations were contested, there being no evidence to show that it was done under their directions or with their knowledge, and the court said:

"In the absence of some affirmative evidence connecting the contestees with a knowledge of it, it is insufficient to bring home to them any violation of the law."

Evidently the court in that case, by the use of the words "affirmative evidence," meant that there must be something more than bare suspicion, and did not intend to say that properly proven circumstances from which the principal fact might be logically and unerringly deduced would not constitute affirmative evidence, since facts necessary to support the grounds for election contest proceedings may be proven by circumstantial evidence, as well as in other cases, even in criminal prosecutions. We not only have in this case extreme evasiveness and want of candor on the part of appellant in giving his testimony, but he exhibits a most extreme lack of memory, and the innocence with which he looked upon the money on the bed in Bolling's office, without the slightest suspicion of what it meant, or the remotest idea of the use which May and his representative Barrett intended to make of it, is most remarkable, and would easily stamp him as a dupe were it not for the fact that he is president of a bank and possesses the legal qualifications for the office of county judge. But we are not relegated in this case to circumstantial evidence for the affirmative proof necessary to convict appellant of the violations with which he is charged. He knew that Barrett had the money in Bolling's office, and he knew that he had furnished that money. He then and there saw that it was

being prepared for use on election day, and some of it was given to Whitt in his presence to be used on that day, and which was so used. There is no doubt but that he knew that Barrett had given to others sums of money to be used for the same purpose and that it was so used, and, finally, he is shown himself to have used money corruptly at the Knox precinct on the day of the election.

[4] The purpose of the enactment of the statute was to prevent the unlawful practice of using money corruptly in elections, and courts should lend a willing hand in its enforcement where the facts and circumstances justify it. No reluctance should be exhibited, nor should the court indulge in any unsubstantial technicalities whereby the offending candidate may be excused; for it is doubtful if there is any practice which strikes more deeply at the root of civilization and our Republican form of government, than the corruption of elections with money or other unlawful influence. If the practice is allowed to continue unchecked, elections will become mere matters of barter and sale, and the perpetuity of our institutions will be utterly destroyed, and decay and revolution will be the ultimate and inevitable result, since pollution of the electorate invites certain political demise.

The evidence in this case convinces us beyond doubt that appellant was guilty of the acts alleged against him, and the court properly declared his nomination void and properly awarded it to appellee, since we are clearly of the opinion that the evidence did convict him of a violation of the statute, provided section 1565b11, which is section 11 of the Corrupt Practice Act, is valid, a question which we will determine in disposing of ground (3) relied on.

3. The section last referred to says:

"In any contest over the nomination or election of any officer mentioned in this act, it may be alleged in the pleadings that the provisions of this act have been violated by the candidate or by others in his behalf with his knowledge, and if it so appears upon the trial of said contest, then said nomination or election shall be declared void, and it is hereby provided that the candidate who has received the next highest number of votes, and who has not violated the provisions of this act, shall be declared nominated or elected, unless it also appears that one of the parties to the contest received a plurality of the votes cast and did not violate the provisions of this act."

Counsel for appellant vigorously contend that the portion of the section saying, "It is hereby provided that the candidate who has received the next highest number of votes and who has not violated the provisions of this act shall be declared nominated or elected," is unconstitutional, because: (a) It is incompetent for the Legislature to provide for the nomination of a candidate in the primary election who received less than a

majority or plurality of the legal votes cast; (b) that the title to the Corrupt Practice Act is not sufficient to include the proviso under consideration, and it is therefore unconstitutional as not conforming to section 51 of the Constitution, which in part provides that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title;" and because (c) under the provisions of section 151 of the Constitution the Legislature was not authorized to go farther in legislating against corrupt practices in elections than to penalize the guilty candidate by depriving him of office, and that it had no right in such legislation to say that his opponent who received less than a plurality or majority of the legal votes cast in the election should become the nominee, though innocent or any corrupt practice.

[5] In support of reason (a), the doctrine announced in the case of McKinney v. Barker, 180 Ky. 526, 203 S. W. 303, L. R. A. 1918F, 581, is relied on, and if the principles announced in that opinion, to which we still adhere, are applicable in this case, the point is well taken. On the contrary, if they are to apply only to general elections, at which the office is to be filled, and not to a primary election, at which only a candidate is to be selected or nominated, then this reason will have to be denied.

The McKinney Case was a contest over a general election, and it was expressly stated in that opinion that—

"In this case we are not concerned about the effect of such a provision [the one under consideration] in a contest over a nomination at a primary election, for the one here involved is a general election to fill the office."

The underlying reason for the McKinney opinion was that the word "elected," as used in the Constitution, should be given its common-law and generally understood definition, which was that the person or proposition, to be "elected" or carried, as the case might be, should receive either a majority or a plurality of the legal votes cast at the election, and that nothing short of such majority or plurality would constitute an election to office or the adoption of a public measure.

Statutory primary elections for the purpose of nominating candidates for office are but substitutes for party machinery for the accomplishment of the same purpose with the adoption of such regulatory measures as the Legislature may deem proper to safeguard purity, honesty and fairness in the selection of candidates. It was thought that with such safeguards the chicanery of the politicians would be circumvented, and more efficient and better qualified candidates would be selected. The scheme was unknown at the time of the adoption of our present Constitution, nor was it in use at any time prior to that, so far as we are aware. Nowhere in



the Constitution is reference made to a primary election, either statutory or otherwise. If party organizations, through and by which nominations were made prior to the enactment of the primary election law, could regulate the nomination of candidates, including provisions for determining who was entitled to the nomination, we fail to see why the Legislature could not adopt the same or similar rules and regulations in providing for nominations in primary elections. There neither was, nor could be, any legal reason, so far as we are informed, why a political party, through its duly constituted authorities, might not provide for the nomination of its candidates by a vote less than a majority or plurality of the nominating body. And, that being true, it is difficult to perceive why the statutory method, which took the place of the party method, may not make similar provisions, especially as against a candidate who has proven himself unworthy to receive the nomination.

But, the question is not an open one in this state, for in a number of cases it has been held that a primary election is not included in the term "election" as used in the Constitution. *Montgomery v. Chelf*, 118 Ky. 766, 82 S. W. 388, 28 Ky. Law Rep. 638; *Hodge v. Bryan*, 149 Ky. 110, 148 S. W. 21; *Marshall v. Dillon*, 149 Ky. 115, 148 S. W. 28; and *Hager v. Robinson*, 154 Ky. 489, 157 S. W. 1138. See, also, 20 *Corpus Juris*, 114, 9 R. C. L. 1074, and *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S. W. 1036. There are also a number of cases from other states cited in note 5 to the text of *Corpus Juris* referred to. Without further elaboration, since the exigencies of this case will not admit of it, we conclude that the doctrine announced in the *McKinney Case* is not applicable to primary elections under our statute.

[8, 7] In disposing of reason (b), but little need be said. The title to the Corrupt Practice Act says:

"An act to promote pure elections, primaries and conventions, and to prevent corrupt practice in the same; to limit the expenses of candidates; to prescribe the duties of candidates and providing penalties and remedies for violations, and declaring void, under certain conditions, elections in which these provisions or any of them have been violated."

Anything which is germane to the general purpose of the act as stated in the title, as frequently held by this court, is not inimicable to the requirements of section 51 of the Constitution. The central purpose of the act, as stated in its title, was "to promote pure elections, primaries and conventions, and to prevent corrupt practice in the same." That purpose could be promoted by elevating the candidate receiving the highest number of votes, and who had not been guilty of corrupt practice, to the nomination, as well as by withholding the nomination or election from a candidate who received a majority or a

plurality of the legal votes cast, but who was guilty of such practice. The statute, as enacted, holds out an incentive to all candidates for the same office to desist from any corrupt practice so that he might in a possible event be awarded the nomination, although he did not receive a majority or a plurality of the votes cast in the primary election. We therefore conclude that the provision under consideration is not only germane to, but is essentially promotive of, the expressed purpose for the enactment of the statute.

[8] Section 151 of the Constitution, upon which is based reason (c), says:

"The General Assembly shall provide suitable means for depriving of office any person who, to procure his nomination or election, has, in his canvass or election, been guilty of any unlawful use of money, or other thing of value, or has been guilty of fraud, intimidation, bribery, or any other corrupt practice, and he shall be held responsible for acts done by others with his authority, or ratified by him."

A careful reading of that section will disclose that the authority conferred on the Legislature by it is one relating exclusively to the "depriving of office any person who, to procure his nomination or election, has, in his canvass or election," been guilty of any of the acts denounced therein, or of any corrupt practice which the Legislature might incorporate in any statute enacted under the authority conferred by the section. It nowhere, expressly or by implication, refers to the right of the Legislature to deprive one of his nomination for office by primary election or otherwise, but leaves that question untouched. It is true that the Legislature was authorized under it to deprive one of his office who was proven guilty of the forbidden practice, whether it was employed in securing the person's nomination or in securing his election after his nomination. In other words, the Legislature was empowered by the section to prescribe as a ground for depriving one of office, whether by contest proceedings or otherwise, that he was guilty of corrupt practice in procuring his nomination, though his conduct after that time was unimpeachable. However, no statute has yet been enacted permitting one to be deprived of his office, by contest or otherwise, for corrupt practice in securing his nomination, though it may be done under the Corrupt Practice Act, where the violations occurred in the general election. The section, then, dealing exclusively with the right of the Legislature to deprive one of office after his final election for violating any provision which might be enacted against corrupt practice, and by implication confining it to penalizing the violator of any statute which it might enact thereunder, it follows that the power of the Legislature with reference to the regulation of nominations, by primary elections or otherwise, was unmolested by the section. This interpretation of section 151 renders reason (c) unavailable.

[9] In view of the fact that there is but little time intervening till the general election, it might not be amiss to say, though the question is not presented, that it is the opinion of the court that the limit for filing certificates of nomination to 45 days before the general election should not apply in cases like this, and the clerk of the Pike circuit court will cause to be printed the name of appellee as the Republican candidate for county judge on the ballot to be voted at the general election on November 8, 1921, as certified by the judgment below, and by this opinion.

There being no other ground attacking the judgment it results that it should be and is affirmed, and an immediate mandate issue.

### DAMRON v. JOHNSON.

(Court of Appeals of Kentucky. Oct. 21, 1921.)

#### 1. Elections $\S$ 126(6)—Unexecuted intention to unlawfully expend money does not deprive candidate of nomination.

An unexecuted intention of a candidate to unlawfully expend money to secure a nomination in a primary, in the absence of affirmative evidence that he did so expend at least a part of it, will not deprive him of the nomination.

#### 2. Elections $\S$ 154(10)—Evidence insufficient to show corrupt use of money in primary election.

In a contest of a primary election, evidence held insufficient to warrant the court in holding that defendant was guilty of corruptly expending money.

Appeal from Circuit Court, Pike County.

Contest of primary election by Luther Damron against J. M. Johnson. Judgment for defendant, and plaintiff appeals. Affirmed.

Hazelrigg & Hazelrigg and John D. Carroll, all of Frankfort, and Joseph D. Harkins, of Prestonsburg, for appellant.

J. J. Moore and Willis Staton, both of Pikeville, for appellee.

TURNER, C. On the former appeal of this case (192 Ky. 350, 233 S. W. 745) only certain questions of practice and pleading in primary election contest cases were involved, and the court in that opinion reversed the judgment for a trial on the merits. Upon the return of the case such trial was had and the contest of appellant was dismissed, and the appellee adjudged to be the Republican nominee for sheriff of Pike county. There is pending in this court an appeal from the Pike circuit court of Charles v. Flanary,

this day decided (233 S. W. 904), wherein all the questions made and discussed on this appeal are disposed of except the single question whether the evidence herein sufficiently connects the appellee with the corrupt use of money in the primary election to justify the court in declaring that, although he received a majority of the votes, he is not entitled to the nomination for that reason, and that appellant, who received the next highest number, should be declared the nominee.

It may be safely stated that the evidence unmistakably shows the use of an enormous corruption fund at the primary, and that it satisfactorily shows appellee to have been to a great extent a beneficiary of the expenditure of that fund. In fact, the record furnishes astonishing evidence of the amount of funds which certain candidates in the primary and their friends had raised or intended to raise for election purposes. It is hardly believable that a candidate for a nomination for sheriff would contemplate the spending of or arrange for the raising of a \$20,000 fund to be expended in one county to secure only a nomination of a party for the office of sheriff; and yet it stands admitted by the appellee himself that he and his family and friends had arranged for such a fund and had contemplated its expenditure in the primary up to the Tuesday before, when his chief opponent withdrew. He says, however, that after such withdrawal he regarded his nomination as practically assured, and therefore the fund was not expended, and that, on the contrary, he only expended the sums shown by his election report, which were within the statutory limit.

The evidence discloses that in the primary certain candidates for different offices pooled their interests in certain precincts or parts of the county, and the workers were directed to and did work for this slate as represented by the pool, and that when a vote would be procured certain slips, already prepared, would be handed to the voter, with an indication thereon of the persons for whom he was to vote, and the worker would, either before or after the voting, reward the voter to the extent of the agreed amount, or, as some of them have said, "make him a present."

That appellee was the beneficiary to a great extent of this pooling arrangement is sufficiently shown, but whether the evidence shows that he actually put up any money in the pool, or that the same was expended by the workers for his use and benefit, with his knowledge, is the thing we must determine under the evidence. In this case, as in the case of Hardin v. Horn, 184 Ky. 548, 212 S. W. 573, it may be said that the evidence furnishes grounds for a strong suspicion that

appellee furnished some of the money that went into the pool, and there is plenty of evidence that the pooled money was used in his behalf for corrupt purposes, but there is only an inference that it was so used with his knowledge, and the only evidence relied on by appellant as affirmative evidence of its use with his knowledge is that of three witnesses whose evidence we will discuss.

J. B. Polley states that he had a brother who was a candidate for county clerk in the primary, and that on the Wednesday before the primary he had a meeting with appellee and others wherein he said to appellee that there was an understanding between them that at the proper time appellee and his brother were to put up their money together, and make the fight together, and that the time had come for something to be done along that line; that in response to this appellee said: "My money is done out. I put my money in with May in the other side of the county. \* \* \* I couldn't do you any good with that part of it, it is on the Tug side of the county. \* \* \* What I have on this side, I will give you the names of the men who have it, and you can put yours with it;" that appellee indicated that he had put in with May on the Tug side of the county \$4,000, and that May was a candidate against witness' brother for county clerk; and that appellee said he could not tell who had that money on the Tug side, but if he would wait until tomorrow he would give him in writing the names of the persons who had the money on the other side of the county, but that he never had done so; that he supposed the money referred to by Johnson was put up by him for the purpose of influencing voters; that Johnson did not in fact put up any money with him or his brother, to his knowledge, but said that because of Scott's withdrawal he had been saved \$8,000 and that before such withdrawal he had expected to put in something like \$16,000. On cross-examination he said that he did not know whether Johnson had spent a dollar in the campaign, and never saw a dollar of his money, and never saw a dollar spent for him, although he was interested in the primary all the way through on behalf of his brother.

This evidence is wholly denied by the appellee in so far as it relates to the putting up of money by him with May or anybody else to be used in the primary, but he admits that he probably told Polley that the withdrawal of Scott had saved him his money, and that he would have had to put up a lot of money to defeat Scott, and admitted that he probably said that there would have been as much as \$15,000 in the race if Scott had continued in it, but that after Scott's withdrawal he considered himself virtually without opposition, and there was no longer any

necessity for his expending a large sum of money, and that thereafter he only kept up his organization sufficiently to get out his vote, and that he did not in fact give out any campaign funds to any part of the county.

None of the other persons present at that meeting are introduced as witnesses, but it is stipulated that one of them would state that he heard no such conversation, but that during a part of the time he was present he was engaged in a private conversation with other participants in that conference. Under this qualification in the stipulation, the evidence of the other witness, being purely negative, is of no value whatsoever.

The evidence of Polley, accepted at its full value, is only that the Wednesday before the primary Johnson stated that he already had his money out, which means only that at that time Johnson had placed money in certain precincts of the county to be expended, but cannot be accepted as a statement that he had actually expended any of it for corrupt purposes. We not only have the evidence to the contrary of Johnson himself, specifically denying that he made any such statements to Polley, but we have his further evidence to the effect that in fact he did not expend any money for corrupt purposes in the election or for other purposes, except as shown by his election statements.

So that if we accept fully the statement of Polley we only have the expressed intention of Johnson on the Wednesday before the primary to expend therein certain sums of money, but we have as opposed to that the explicit statement of Johnson himself, made under oath since the primary, that he did not expend that money, and we have Polley's statement that he does not know that he did.

[1] The declared purpose of a candidate in advance of a primary to expend therein certain sums unlawfully cannot be accepted as conclusive evidence of the fact that he did expend such sums; and especially when the direct evidence shows that he did not.

The witness Charles Ratliff states that on the primary election day he was at one of the Pond Creek precincts, and that appellee, Johnson, was there, and on that afternoon Johnson pulled out of his pocket \$25 in small bills, and gave to him, and said to him at the time that it was not his (Johnson's) money, but that it was either May's or Flannery's and the witness could not remember which; that he used that \$25 in the election, and procured a number of votes with it for a certain pool or combination, the names being indicated on a slip made out by others, and handed to the voters, and that Johnson's name was on each of these slips. This evidence of Ratliff's is specifically denied by the appellee, and without going into detail it may be said that other evidence in the record so far tends to discredit Ratliff as that

we cannot accept his statement over that of appellee.

In addition to the above evidence, the appellee himself stated that on the day of the primary he went to the Pond Creek precincts; that there were five precincts on Pond creek, where there was a very heavy vote, and that the voters were scattered up and down that stream for about ten miles, and many of them would not go to the polls unless automobiles were sent for them, and that he accordingly took with him there on election day between \$900 and \$1,000 for the purpose of hiring, if necessary, all automobiles that might be needed in those five precincts to get his friends to the polls; but that when he got over there he found that it was not necessary to expend any considerable portion of that money, and that he expended very little of it for that or any other purpose, and brought it back with him to Pikeville, or a large portion of it; that when he reached Pikeville he took it to his vault in the county clerk's office, and placed it there, and a day or two later took it out and left it in his office for a while, and then deposited it in the bank. That he did have a considerable sum of money in his office a day or two after the primary is shown by two other witnesses.

If it may be assumed from this statement of appellee's that he took this large sum of money with him to Pond creek for the purpose of corrupting voters, it seems to be satisfactorily shown that as a matter of fact he

did not carry out that purpose, for the evidence is convincing that he spent only a small proportion of it, and returned to Pikeville with nearly all of it.

While there is shown upon the part of appellee the admitted purpose to raise and expend a large corruption fund in the primary up to the time of Scott's withdrawal, and while there is an admission by him that he took approximately \$1,000 to Pond creek, which we may fairly assume was not altogether intended for legitimate use, the essential fact remains that there is a failure of affirmative evidence to show that he actually expended any money for corrupt purposes, or expended any sum in excess of the statutory limit. An unexecuted intention by a candidate to unlawfully expend money to secure a nomination in a primary, in the absence of affirmative evidence that he did so expend at least a part of it, will not deprive him of the nomination.

[2] We have therefore reached the conclusion—not without hesitation in the light of all these suspicious circumstances—that there is no such satisfactory evidence as will justify the court in holding that appellee was guilty of such corrupt practices as will deprive him of this nomination.

It is the judgment of the court that appellee is the nominee of the Republican party for sheriff of Pike county, and this fact the clerk of this court will certify to the proper officials, and issue the mandate at once.

Judgment affirmed.

## HUCKABY v. HOLLAND. (No. 144.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

## 1. Alteration of Instruments ¶29—Sufficiency of evidence to support a finding by jury.

In an action on a note given for an automobile, defendant testified that a clause retaining title in payee had been in the note at the time of its execution, and plaintiff testified positively and unequivocally that the clause was not a part of the note at the time it was signed. *Held* sufficient to support verdict for plaintiff.

## 2. Trial ¶278—Instruction, though ambiguous, held good on general objection, intent of the court being manifest.

In an action on a note given for an automobile, the defense being an erasure of the clause retaining title in plaintiff, an instruction, "If you should find from the evidence that the note had the clause retaining title to the car in the plaintiff *erasure*, then you should find for the defendant," while ambiguous, objection thereto should have been specific, so as to point out to the court the defect in the language used; it being the manifest meaning that, if the retention of title clause had been erased after execution the verdict should be for defendant, and the word "erasure" doubtless being a clerical error.

## 3. Alteration of Instruments ¶20—Erasure of clause in sale note retaining title vitiates whole instrument.

A note for an automobile containing a retention of title clause in the payee is destroyed by the erasure of that clause after execution, and payee cannot recover.

## 4. New trial ¶104(3)—Newly discovered evidence, if cumulative, not ground.

In an action on a note given for the price of an automobile, in which the sole defense was an erasure of the title retention clause, newly discovered evidence after the verdict as to the facts of erasure, being merely cumulative, was not ground for new trial.

Appeal from Circuit Court, Crawford County; James Cochran, Judge.

Action by J. F. Holland against D. C. Holland and T. R. Huckaby. Judgment for plaintiff, and defendant Huckaby appeals. Affirmed.

J. E. London, of Van Buren, and Robt. J. White, of Paris, for appellant.

E. L. Matlock, of Van Buren, for appellee.

MCCULLOCH, C. J. D. C. Holland and appellant, T. R. Huckaby, executed a promissory note to appellee, J. F. Holland, for the sum of \$1,100, the price of an automobile sold by appellee to D. C. Holland. Appellant's name appears signed to the note as one of the joint makers, but according to the undisputed evidence he signed merely as surety for D. C. Holland. The note con-

cludes with the following clause: "The above note was given for Dodge car." This is a suit on the note, and the only defense is that the note, when signed, contained a clause retaining title to the automobile in appellee as the seller thereof, and that this clause had, without the consent of appellant, been erased.

[1] There is a conflict in the testimony, and we think there was testimony adduced legally sufficient to justify the submission of the issue whether the clause mentioned was a part of the note when signed by appellant. It appears from the testimony that, after the parties had agreed upon the execution of the note, they repaired to a certain mercantile establishment, and there obtained a printed form of note containing a clause for the retention of title. That clause appeared at the time of the trial to have been erased, but appellant's testimony was to the effect that the clause was in the note at the time of its execution. Appellee testified positively and unequivocally that the clause retaining title to the car was not a part of the note at the time it was signed. We cannot, therefore, sustain the contention of counsel that the verdict in appellee's favor on this issue was altogether without testimony to support it.

[2, 3] It is insisted that the court erred in giving the following instruction:

"If you find that the note in suit has been changed in a material matter since it was signed, by erasure or otherwise, then it will be your duty to find for the defendant Huckaby against the plaintiff, but if you should find from the evidence that the note had the clause retaining title to the car in the plaintiff *erasure*, then you should find for defendant Huckaby. That is all of the law there is in the case."

It is contended that this instruction is so vague that it is misleading. There was, however, no specific objection made to it, and the only objection was a general one. We think that, while the instruction is ambiguous, and therefore uncertain to some extent, it is not inherently incorrect, and that the objection to it should have been specific, so as to point out to the court the defect in the language used. It is manifest that the court meant to tell the jury that, if the clause retaining title to the car in the plaintiff had been erased after execution of the note, the verdict should be for appellant, and the error in the instruction is doubtless a clerical one in copying.

[4] The assignment of error most earnestly insisted upon here relates to the ruling of the court in refusing to grant a new trial on account of evidence alleged to have been newly discovered. Appellant filed with his motion for a new trial several affidavits one being from W. T. Crawford, who was assistant cashier of a bank at Alma, who tes-

tified that the note was sent to that bank for collection, and that it then had in it the clause retaining title to the car. Affidavits of other witnesses tended to show admissions on the part of appellee that the note had originally contained the clause in question, but that the same had been erased. This testimony was cumulative, and for that reason the court was justified in refusing to grant a new trial on that ground. Moreover, there was a lack of diligence which justified the court in granting the motion.

Appellee further contends, in defense of the judgment, that, since he had the right to make an election not to enforce the clause retaining title, an alteration of the note in that regard was not material. It is unnecessary, however, to discuss that question, for the reason that we find that the case was submitted to the jury upon the sole issue joined by the parties themselves, whether the erasure was made before or after the note was signed, and that that issue was properly submitted to the jury, and there is no error in the proceedings.

The judgment is therefore affirmed.

#### WESTERN RANDOLPH COUNTY ROAD IMPROVEMENT DIST. v. CLIFFORD. (No. 146.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

##### 1. Highways $\S$ 90—Amendment to road act held to terminate district's contract with purchaser of bonds.

Contract to purchase the entire anticipated bond issue of road improvement district created by Road Acts 1919, vol. 1, p. 356, estimated to be a stated sum, "or as much more as the district may require," for the improvement, held terminated by amendment of 1920, removing certain limitations as to the cost of the improvement, providing for the improvement of additional roads and for the surfacing only of roads designated by the commissioner, instead of all roads, since such amendment effected a change in the contract by the Legislature on behalf of the district without purchaser's consent, thereby discharging purchaser from his obligation.

##### 2. Highways $\S$ 90 — District not bound by contract made prior to completed assessment of benefits.

Road district was not bound by its contract to sell contemplated bond issue entered into in advance of a completed assessment of benefits, demonstrating that the cost of improvement would not exceed the benefits.

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by John F. Clifford, administrator, against the Western Randolph County Road

Improvement District. Decree for plaintiff, and defendant appeals. Affirmed.

Pace, Campbell & Davis, of Little Rock, for appellant.

Jno. F. Clifford, of Little Rock, for appellee.

McCULLOCH, C. J. Appellant is a road improvement district in Randolph county created by a special act of the Legislature, approved February 27, 1919 (Road Acts 1919, vol. 1, p. 356), and on June 17, 1919, the district entered into a written contract with appellee's intestate, E. J. Hahn, for the sale of bonds to be issued for the purpose of raising funds to be used in the construction of the improvement. It was stipulated in the contract that the purchaser should accept the "entire anticipated bond issue in the sum of \$100,000, or so much as the district may require, the bonds to be serial and run from 1 to 25 or 30 years, as the district may elect, to be dated October 1, 1919, and to bear interest at the rate of 6 per cent. per annum, payable semiannually." It was further agreed in the contract that the purchaser should, within 10 days, deliver to the secretary of the board a certified check in the sum of \$10,000 "to guarantee compliance with the terms of the contract," the check not to be cashed, but to be held in trust until the bonds were tendered in compliance with the contract. Still another stipulation in the contract was that the commissioners agreed "to use their best efforts to have the assessment of benefits confirmed and the bonds issued with the least possible delay." Hahn delivered to the secretary of the board of commissioners a certified check for the sum of \$10,000 on a bank in Little Rock, in compliance with the terms of the contract, and, shortly thereafter, before anything else had been done under the contract, Hahn died. The subsequent dealings with the district were conducted by Hahn's personal representative and those associated with him in the business. The bonds were never accepted by Hahn's representative, and this is an action instituted by the administrator to restrain appellant district from collecting the check and to restrain the bank from paying the same. The chancellor granted the relief prayed for in the complaint, and the district has appealed.

There was a clause in the contract to the effect that the purchaser of the bonds should make advances to cover the preliminary expenses of the district, which advances were to be paid out of the first issue of bonds. Sums of money were furnished from time to time, aggregating about \$15,000, and negotiable promissory notes were executed by the district to cover the same, but it does not appear in this record what became of those notes, and they are not involved in the pres-

ent litigation; the sole subject-matter of the suit being the check deposited by Hahn as a guaranty for the performance of the contract.

The district covered a large area in Randolph county, said to constitute about four-fifths of the county, and the original statute creating the district provided for surfacing the specified roads with crushed rock and constructing necessary bridges along certain roads in the district. There were 11 roads mentioned, which were to be improved. The statute also contained a provision that the average cost of the road should not exceed \$3,000 per mile, and it was estimated by the engineer during the progress of the preliminary work that the improvement could not be constructed within the limits thus specified as to cost. An amendatory statute was enacted at the extraordinary session of the Legislature in January, 1920, providing that the limitation of \$3,000 per mile upon the cost of the improvement was to be exclusive of the cost of bridges and culverts. The amendatory statute provided also for the improvement of 3 additional roads, making 14 in all, instead of 11, as originally provided for, and it also provided that the roads described should be graded and drained, and that such parts of them as the commissioners deemed advisable should be surfaced with gravel or crushed rock. The new act also provided for repairing and strengthening the bridge across Black river. The final estimates and plans of the engineers were filed with the commissioners April 28, 1920, and were approved by the commissioners on that day. The lists of assessments of benefits were filed with the county clerk on May 21, 1920, and, after publication of notice, the same were completed on June 8, 1920. In a letter dated March 25, 1920, the personal representative of Hahn's estate indicated to the commissioners a refusal to accept the bonds, it appearing that at that time there had been very considerable depreciation in the market price of bonds of this character. Further correspondence took place between the parties, but those representing the Hahn estate persisted in the refusal to accept the bonds, formal tender of which was made after the approval of the final plans and specifications and the completion of the assessment of benefits.

[1] It is contended by counsel for appellee that the Hahn estate was absolved from liability under the contract on two grounds: First, that the contract itself was altered by the amendatory act of February 4, 1920; and, second, that the district committed the first breach by delaying an unreasonable length of time before putting itself in an attitude to make delivery of the bonds. We are of the opinion that the first contention of counsel is correct, and it is therefore unnecessary to discuss the second. Nor is it necessary to discuss the question how far the

parties were bound by the executory features of the contract, as we are dealing now with the sole question of the right of Hahn's estate to prevent the collection of the check which had been deposited with the district as a guaranty of the performance of the contract. It is to be remembered that the purchaser obligated himself to accept the entire anticipated bond issue of the district, estimated to be the sum of \$400,000, "or as much more as the district may require." The obligation was to accept the entire bond issue, whatever it might be, under the law and the necessities of the district as then existing. The changes wrought by the new statute were very material, and constituted a substantial alteration of the contract itself. It removed certain limitations as to the cost of the improvement, and enlarged the scope of the improvement by providing for the improvement of three additional roads. It also changed the purpose from one to surface all of the roads with crushed rock to the surfacing only of such roads as the commissioners might decide upon. This is not a case, as argued by counsel for appellants, where the law has merely imposed additional obstacles or burdens on the performance of contract. Therefore the cases cited in the brief of counsel are not applicable. It is a case where the contract itself has been changed by authority of law, and it is unimportant that this change was not a voluntary one on the part of the district itself, but was compelled by the lawmakers. The district is a creature of the law, and any changes made by the lawmakers were tantamount to changes made by the district itself. The original statute, creating the district and the powers and duties conferred and imposed thereby, entered into the contract and became a part thereof, and a change in the law necessarily constituted a change in the contract, in so far as it altered the obligations of the parties. In this respect, the case presents merely the familiar question of one party attempting to change the contract without the consent of the other. The difference is this, however, that in the case of individuals a change cannot be made by one without the consent of the other who has a right to insist upon the performance of the contract as made; whereas, in this instance, the change is made by the sovereign power of the law which controls the action of the improvement district.

[2] Nor is there any question involved of the impairment of the obligation of the contract, for it was merely tentative, and was not binding on the district in advance of a completed assessment of benefits demonstrating that the cost of the improvement would not exceed the benefits. *Cherry v. Bowman*, 106 Ark. 39, 152 S. W. 133; *Thibault v. McHaney*, Receiver, 119 Ark. 188, 177 S. W. 877.

It follows that the decree of the chancery court was correct, and the same is affirmed.

**FORREST v. BENSON. (No. 145.)**

(Supreme Court of Arkansas. Oct. 10, 1921.)

**1. Replevin ¶88—Ownership by plaintiff held for jury.**

In action for possession of automobile, in which plaintiff claimed that defendant's predecessor in interest had sold plaintiff the automobile, and that plaintiff had permitted defendant's predecessor to use the car at the time of the sale to third party, who in turn sold to defendant, the question of plaintiff's ownership of automobile held for the jury.

**2. Estoppel ¶76—Issuance of license in another's name held not to warrant submission of whether owner permitted sale by such other under circumstances misleading buyer.**

That owner of automobile permitted license to be issued in name of one to whom he lent the car did not warrant the court, in owner's action against purchaser of the automobile from one to whom borrower had sold it, in submitting question of whether owner had permitted the automobile to be disposed of under circumstances such as would lead an ordinarily prudent person to believe that it was being rightfully sold, where neither defendant nor person who sold automobile to him knew that license had been issued in borrower's name.

**3. Property ¶9 — Sales ¶234(2) — Possession only prima facie evidence of title; doctrine of caveat emptor applicable.**

Possession of personal property is only prima facie evidence of title, and the doctrine of caveat emptor prevails notwithstanding possession.

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by John P. Forrest against G. O. Benson. Judgment for defendant, and plaintiff appeals. Reversed, and remanded.

W. Floyd Terral and J. O. Marshall, both of Little Rock, for appellant.

Troy W. Lewis, of Little Rock, for appellee.

**MCCULLOCH, C. J.** This is an action instituted in the Pulaski circuit court by appellant against appellee to recover possession of a Ford automobile, the ownership of which is asserted by appellant. Upon a trial of the issues before a jury it resulted in a verdict in appellee's favor.

Appellant resides in the city of San Antonio, Tex., and claimed that he was the owner of the automobile there, and lent it to one Green, who brought it to Little Rock, and, without appellant's knowledge or consent, sold it to R. L. Bibb, who, in turn, sold it to appellee. It is undisputed that Bibb purchased the car from Green in good faith and without any information concerning appellant's claim of ownership, and that Benson

likewise was innocent of any information concerning an adverse claim when he purchased the car from Bibb. The car was originally purchased by Green from a factory agency in San Antonio, and Green executed a mortgage on the car to secure the purchase price. According to appellant's testimony he made payments on the car for Green, and finally paid off the mortgage and caused the same to be assigned to him, and that Green thereupon sold and delivered the car to him. This occurred in the summer of 1918. In February or March, 1919, Green left San Antonio with the car in company with one Staehle, and made a tour of several states, engaged in some kind of an advertising business. They went to New Orleans and spent a few days, and thence to Baton Rouge, Natchez, Vicksburg, Monroe, Shreveport, and Texas, and on August 17, 1919, they arrived in Little Rock, and placed the car in a garage with which Bibb was connected in some capacity. Green stopped at one of the hotels in Little Rock, and became indebted in a considerable amount for a board bill, and pledged the garage claim check or ticket to the hotel management as security for the board bill. On August 23d appellant came to Little Rock in response to a telegram from Staehle, stating that Green had been injured in a fight, and after appellant's arrival here he advanced money to Green with which to pay his board bill. Appellant immediately returned to Texas, and on September 4th Green sold the car to Bibb, and about a week later Bibb sold it to appellee. Appellant testified that he owned the car, that he acquired it in the manner stated above, and that he merely lent the car to Green without giving the latter any interest in it or any authority to sell it. He testified that when he left Little Rock his agreement with Green was that the latter should immediately drive the car back to Texas. According to the testimony the Texas license for the operation of the car was taken out in Green's name on February 8, 1918, and was renewed in his name on February 8, 1919.

The court refused to give any of the instructions requested by appellant, but submitted the issues to the jury on the following instruction:

"The owner of property which he had not transferred title to may be replevied by him wherever found, unless by his own actions he has permitted the property to be disposed of to an innocent purchaser under such circumstances as would lead an ordinarily prudent person to believe that the property was rightfully sold. Therefore, if you find from the evidence in this case that Forrest was the owner of the automobile in question at the time of the institution of this suit, and was entitled to the immediate possession of same, plaintiff would



be entitled to recover, unless you find from the evidence that by his own voluntary acts and conduct he permitted Green to so use and exercise ownership over it as to cause defendant to honestly believe that Green had a right to dispose of it, in which even your verdict will be for the defendant."

The principal contention of counsel for appellant as ground for reversal is that the evidence is not sufficient to support the verdict. We are of the opinion, however, that the burden being upon appellant as the plaintiff in the case to establish his right to recover the property, there was evidence legally sufficient to justify the submission of the question as to whether or not he was the owner. The only direct testimony as to appellant's ownership of the car was that given by himself, and all of the other testimony adduced by him was merely in corroboration of his statements.

[1] In view of the circumstances in the case which have already been narrated, we think it was a question for the jury to determine whether or not appellant was stating the truth when he testified that he acquired the title and possession from Green, and that in returning the car to Green he merely lent it to him.

[2, 3] But we have reached the conclusion that if appellant was really the owner of the car, there was no testimony that he "permitted the property to be disposed of to an innocent purchaser under such circumstances as would lead an ordinarily prudent person to believe that the property was rightfully sold," and that the court erred in submitting that question to the jury. It has long been ruled by this court that possession of a chattel is not conclusive evidence of ownership and of the right of disposal. In *McIntosh v. Hill*, 47 Ark. 364, 1 S. W. 680, Chief Justice Cockrill, speaking for the court, said:

"Possession of personal property is only prima facie evidence of title, and the doctrine of caveat emptor prevails notwithstanding the possession. The prima facie title must yield to the actual title when it is asserted, and the buyer who trusts to appearances must suffer the loss if they prove delusive."

All of the circumstances proved in the case, except the one that appellant, after he claimed to have purchased the car, permitted the Texas license to be issued in the name of Green, merely tend to establish the fact that appellant voluntarily intrusted the possession of the car to Green; but, as we have already said, the law on this subject is that this does not amount to indicia of absolute ownership so as to protect an innocent purchaser. There is no evidence that either Bibb or appellee was apprised of the fact that the Texas license had been issued in the name of

Green, or that they acted on the faith of apparent ownership of Green on account of the license issued to him. Unless they knew of this fact and purchased the car on the faith of this fact as an evidence of ownership, it does not afford a ground for submitting the question whether or not appellant held out Green as the owner of the car. In the present state of the proof there is therefore no issue to submit to a trial jury except the single one as to appellant's asserted ownership of the car.

For the error in giving the instruction referred to the judgment is reversed, and the cause remanded for a new trial.

### SIMON v. STATE. (No. 118.)

(Supreme Court of Arkansas. Sept. 26, 1921.  
Rehearing Denied Oct. 24, 1921.)

**Criminal law** — 507(8)—Person who pays keeper of gambling house for privilege of gambling not an "accomplice" of keeper.

Persons who paid keeper of gambling house a certain sum for privilege of gambling therein, without receiving therefor any right to participate in the management of the place, held not an "accomplice" of such keeper within the rule as to corroboration of testimony of an accomplice in prosecution of keeper for operation of gambling house in violation of Crawford & Moses' Dig. § 2632; such persons being guilty of gaming under Crawford & Moses' Dig. § 2639, and not of aiding or abetting in the operation of the gambling house.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

M. Simon was convicted of operating a gambling house, and he appeals. Affirmed.

Martin, Wootton & Martin and C. Floyd Huff, all of Hot Springs, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

WOOD, J. The appellant was convicted under an indictment which charged that—

He "unlawfully and feloniously did keep, conduct and operate, and was interested directly and indirectly in keeping, conducting and operating a gambling house or place where gambling was carried on in a certain building on Central avenue in the city of Hot Springs, Ark., and known as the Arkansas Cigar Store, and was interested directly and indirectly in keeping, conducting and operating said gambling house by furnishing money and other articles for the purpose of carrying on said gambling house, against the peace and dignity of the state of Arkansas."

The facts are substantially as follows: The appellant rented a building in the city of Hot Springs from A. B. Gaines, paying as rent therefor the sum of \$200 per month. The first floor was occupied as a cigar store and its rental value was estimated at \$125 per month. The proportion of the rental value of the upper rooms was estimated at \$75 per month. The upper rooms had in them 60 or 70 chairs, pool tables, billiard tables, two or three round tables, desk, lounge, a kitchenette, and a place with periodicals where one could sit down and read.

Among the witnesses who testified for the state were L. D. Cooper, Leon Dinkelspiel, Matt Picchi, Mose Klyman, and E. N. Roth. Their testimony does not differ in essential particulars and is to the effect that they had frequently been in appellant's place of business and had participated in card games played there for money. Each participant in the game of cards paid the sum of \$6 for his seat at the table. Players did not pay for their checks when received. It was the custom of the place to have a settlement at periods more or less indefinite. No one was permitted to the rooms except invited guests. The company was select and the participants high-class business men. The \$6 paid for the seat and the privilege of participating in the game also entitled the participant to refreshments such as sandwiches, soft drinks, and other things to eat and drink. Usually the players would buy \$100 worth of checks from which the appellant would deduct \$6, which was the charge for the privilege of participating in the games, and there was no additional charge for the other accessories mentioned above. These were furnished by the appellant free of charge. There was a charge of \$1 a deck for the cards to those who participated in the game of poker. No charges were made for the cards used in bridge or whist. There were sometimes as many as 8 people seated at a table participating in the game of poker and at different tables as many as 20 people playing poker at one time in separate games. The poker games were played for money. The largest loss that the witnesses had ever known any of the participants to sustain was from \$100 to \$150. The witnesses participating in the poker games testified that the \$6 paid for the "seats" was for the purpose of enabling appellant to conduct the business there and to "keep it open and going."

The appellant requested the court to instruct the jury as follows:

"You are instructed that an 'accessory' is one who stands by, aids, abets, assists, or who not being present, hath advised and encouraged the perpetration of the crime. And if you find from the evidence in the case that the witnesses L. D. Cooper, Leon Dinkelspiel, Matt Picchi, Mose Klyman, and E. N. Roth, who have testified, contributed money to the

defendant, in order to induce or enable him to conduct a gambling house, then each of them so contributing thereby became and was an accessory. And if you find that they are accessories or accomplices as above defined, then you are further instructed that the defendant cannot be convicted on their testimony alone. Before one can be convicted on the testimony of an accomplice, there must be corroboration by other evidence, tending to connect the defendant with the commission of the offense. Nor can one accomplice corroborate another; but before the testimony of an accomplice can be considered by you at all as evidence of guilt, there must be other evidence before you, not given by an accomplice, which tends to connect the defendant with the commission of the offense charged. And unless there be other evidence independent and apart from any given by one or more accomplices, tending independently of any matters testified to by such accomplices, one or more, to connect the defendant with the offense charged, you should find him not guilty."

The court refused the appellant's prayer, to which ruling the appellant duly excepted.

The only error of which the appellant complains here is predicated upon the ruling of the court in refusing the above prayer. There was no error in the ruling of the court. Section 2632, C. & M. Digest, provides as follows:

"Every person who shall keep, conduct or operate, or who shall be interested directly or indirectly, in keeping, conducting or operating any gambling house or place, or place where gambling is carried on \* \* \* or who shall be interested, directly or indirectly, in running any gambling house \* \* \* either by furnishing money or other articles for the purpose of carrying on any gambling house, shall be deemed guilty of a felony, and on conviction thereof, shall be confined in the state penitentiary for not less than one year nor more than three years." Act March 11, 1913.

There is no testimony tending to prove that the witnesses for the state, named in the prayer for instruction, supra, were interested directly or indirectly in the gambling house kept, conducted, or operated by the appellant; nor is there any testimony tending to prove that they furnished any money or other articles for the purpose of carrying on any gambling house. It occurs to us that the penalty of this statute is leveled only at the person who "keeps" or "operates," or is "interested in the keeping or operating of a gambling house or place where gambling is carried on," and not against the mere patrons of such an establishment, or the persons who paid for the privilege of gambling therein and who were participants in any card games that were played therein for money. Giving the testimony of all or any of the witnesses for the state named in the above instruction its strongest probative force in favor of the appellant, it does not warrant the inference that any of these witnesses had any control

over, or management of or interest in, the house or place where the gambling was carried on. In the sense of the statute they had no interest directly or indirectly in the running of the gambling house. While some of the witnesses say that the \$6 paid by the participants in the poker games was for the purpose of enabling the appellant to "keep the place and run it," yet when this language of the witness is taken in connection with their previous language, it is manifest that the meaning of the witnesses, and the only meaning of which their testimony is susceptible, is that they were paying \$6 a seat whenever they desired to sit at the card tables and participate in the game of poker carried on in the gambling house or place maintained by the appellant; that this sum was paid for the privilege of indulging in the poker games and for the refreshments and other accessories mentioned by them incident thereto which the appellant furnished them in consideration of the charge specified.

"The test, generally applied to determine whether or not one is an accomplice, is: Could the person so charged be convicted as a principal, or an accessory before the fact, or an aider and abetter upon the evidence? If a judgment of conviction could be sustained, then the person may be said to be an accomplice; but, unless a judgment of conviction could be had, he is not an accomplice." *Levering v. Commonwealth*, 132 Ky. 668, 678, 117 S. W. 253, 257 (136 Am. St. Rep. 192, 19 Ann. Cas. 140), and other cases there cited; *State v. Gordon*, 105 Minn. 217-219, 117 N. W. 483, 15 Ann. Cas. 897; *State v. Durnam*, 73 Minn. 150-165, 75 N. W. 1127; 1 R. C. L. 157 and cases cited in note; 12 Cyc. 445-446.

"In order for a witness to be an accomplice he must not only be implicated in the crime itself, but the evidence must tend to show that he acted in concert with the party on trial and against whom he testified." 16 *Corpus Juris*, 671.

Now, when we lay the uncontroverted facts as set forth above alongside these legal tests for determining who is an accomplice, the conclusion is irresistible that the witnesses for the state named in appellant's prayer for instruction were not the accomplices of the appellant in the crime of which he was convicted. If these witnesses had been indicted jointly or separately for maintaining a gambling house under the above statute, could they have been convicted under the undisputed evidence in this record? Certainly not. They had no control either directly or indirectly over the house or place which the appellant maintained as a gambling house. They did not furnish him any money with which to run this house and only paid the fee

or tax which he charged for the privilege of gambling and the services incident thereto, which appellant furnished them in consideration of such charge or fee. Appellant was not the agent or partner of these witnesses in the conduct or operation of the gambling house, and there was no concert of action among themselves or between any of them and appellant with reference to this matter.

As we view the record, the testimony is uncontroverted and susceptible to only one conclusion. Therefore there was no room for the submission of the issue to the jury as to whether or not the witnesses named were accomplices of the appellant. These witnesses, of course, under their own testimony, were guilty of the separate and independent offense of gaming under section 2639 of C. & M. Digest, and, as their testimony shows, they paid the appellant for the privilege of participating in games of cards at the gambling house kept and maintained by appellant. These witnesses were no more accomplices of the appellant in the crime of keeping and operating a gambling house than was the appellant their accomplice in the games of poker which they played when he was not a participant.

"The term 'accomplice' cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge, or is morally delinquent, or who was even an admitted participant in a related, but distinct offense. To constitute one an accomplice he must take some part, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice. Nor can the concealment of knowledge, or the mere failure to inform the officers of the law when one has learned of the commission of a crime." 1 R. C. L. § 3, pp. 157, 158.

"Under the rule that an accomplice must unite in the commission of the crime and must be an associate therein, one participating in a gambling game operated by another in violation of" a statute "punishing one operating gambling games is not an accomplice." *State v. Wakely*, 43 Mont. 427, 438, 117 Pac. 95, 99.

"In a prosecution for conducting a gambling game or place of business, persons who merely play in the game or at such place are not regarded as accomplices of the defendant." 16 *Cor. Jur.* 680.

The above excerpts from the texts are supported by the cases cited in the notes thereto.

It follows that there is no error in the record, and the judgment must therefore be affirmed.

**BUSHMAIER et al. v. J. R. WATKINS CO.**  
(No. 153.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

**Appeal and error** ⇨907(3)—**Finding of trial court on evidence not brought into record presumed to be on sufficient testimony.**

Where the testimony on which the trial court found that there were no fraudulent representations to get sureties to execute a bond sued on, and that the bond was the entire agreement between the parties, has not been brought into the record by bill of exceptions or otherwise, it is presumed that it supported the finding.

**Appeal from Crawford Chancery Court; J. V. Bourland, Chancellor.**

**Action by the J. R. Watkins Company against W. A. Bushmaier and others. From a judgment for plaintiff, defendants appeal. Affirmed.**

**J. E. London, of Van Buren, for appellants.**

**L. H. Southmayd, of Van Buren, for appellee.**

**SMITH, J.** This is an appeal from a judgment rendered against the appellants as sureties of J. H. Tuggle, a salesman of the appellee company, who was engaged in retailing appellee's merchandise. Tuggle had been thus employed for some months when his sureties—these appellants—took over the goods he was selling for appellee.

Appellants allege the fact to be that, while thus in possession of Tuggle's goods (the same being of sufficient value to discharge the debts for which they were sureties), a representative of the appellee company induced them to execute a new bond to appellee—this bond being the instrument on which the present suit is predicated. They further allege the fact to be that they were induced to execute the bond by certain representations of appellee's agent which were false and fraudulent.

The court expressly found that there was no fraud or misrepresentation in the procurement of the execution of the bond sued on, and that the bond was the entire agreement between the parties. This instrument is silent as to the agreements which appellants say exonerate them from liability thereon.

The testimony upon which this finding was made in the court below has not been brought into the record by bill of exceptions or otherwise, and we must therefore indulge the presumption that the testimony upon which the case was heard supported the finding made, and the decree of the court below will therefore be affirmed.

**KING v. BANK OF PANGBURN.** (No. 152.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

**1 Trial** ⇨177—**Verdict not directed against party who asks for peremptory instruction and in addition other instructions.**

Though both parties asked for a peremptory instruction, the court should not have directed a verdict against one of the parties, who in addition thereto asked for other instructions, if the testimony in his behalf, viewed in the light most favorable to him, would support a verdict in his favor.

**2. Principal and surety** ⇨89—**Payee cannot recover against surety after discharging surety pursuant to agreement.**

Where payee agreed with surety that, if a certain amount was paid on the note, the time for payment would be extended and the surety would be released from further liability, and on payment of such amount struck surety's name from note and made note payable on demand, he could not recover on note against the surety on the theory that the agreement to release him was without consideration and that surety was not discharged, in that the transaction constituted merely a renewal of the note; the agreement to release surety having been fully performed.

**3. Contracts** ⇨78—**Consideration immaterial after full performance on both sides.**

If a contract is fully performed on both sides, the question of consideration becomes immaterial.

**Appeal from Circuit Court, White County; J. M. Jackson, Judge.**

**Action by the Bank of Pangburn against L. King. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.**

**Jno. E. Miller, C. E. Yingling, and W. D. Davenport, all of Searcy, for appellant.**

**Brundidge & Neely, of Searcy, for appellee.**

**SMITH, J.** [1] This cause comes here on appeal from a judgment rendered on a verdict returned by a jury under the directions of the court. Appellee insists this judgment must be sustained if there was any testimony legally sufficient to support it, inasmuch as both parties asked the court to give a peremptory instruction in the trial below. It is true both parties asked a peremptory instruction; but, in addition thereto, appellant asked other instructions, and the court should not, therefore, have directed a verdict against him, if the testimony in his behalf, viewed in the light most favorable to him, would support a verdict in his favor. *Webber v. Rodgers*, 128 Ark. 25, 193 S. W. 87. Thus viewing the testimony, the facts may be stated as follows:

The suit is upon a promissory note for the sum of \$1,500, which, as executed, reads as follows:

"\$1,500.00. Pangburn, Ark., June 28, 19.

"Thirty days after date, for value received, we or either of us promise to pay to the order of Bank of Pangburn fifteen hundred no/100 dollars at the Bank of Pangburn, Pangburn, Arkansas, with interest at the rate of ten per cent. per annum from date until paid. The makers and indorsers of this note hereby severally waive presentment for payment, notice of nonpayment, and protest, and authorize extension of time without notice thereof. Interest unpaid when due to become as principal and draw the same rate of interest.

"Due—Demand. J. W. Pierce.

"P. O.—City. J. Morrow.

"No. 150. R. T. King.

"Witness: L. E. Morrow.

"R. H. Dickenhorst. L. King,"

J. W. Pierce, J. Morrow, and R. T. King were principals, and L. E. Morrow and appellant, L. King, were sureties. Appellant, King, is the only signer who made defense, and this appeal involves only the question of his liability.

At or about the time the note fell due King was about to change his residence on account of his health, and he went to the bank to ascertain whether the note had been paid. Finding that it had not been paid, King demanded that the cashier give all parties notice to come to the bank and pay the note; King stating at the time that he did not want to leave any unfinished business behind. The cashier, on his own initiative, suggested that he did not care to press the makers of the note for payment, but that if he (King) would cause \$400 to be paid on the note the time for the payment of the balance would be extended, and King released from further liability. Acting upon this suggestion, King saw the makers of the note and had them to pay the sum of \$400 on the note. About two days later King called at the bank to see if this payment had been made. Only the assistant cashier was present in the bank at that time, but that officer, who was familiar with all the facts, promised to call the matter to the attention of the cashier. Relying on this promise, appellant, King, gave the matter no further attention until this suit was brought.

Thereafter the following notations were made on the note by the cashier of the bank: The payment of the \$400, with the date of payment, was indorsed on the back of the note. Above the date of the note there was written with pen and ink the words: "Renewal date 7-29-19." The words, "Thirty days," appearing in the original note, were

obliterated by drawing a line through them with pen and ink, and the word "Demand" written above them. The name of "L. King"—this appellant—was canceled by drawing a line through it, and immediately following the name the words "Not on renewal" were written above with pen and ink. The words "Ten days," in the lower left hand corner of the note, were obliterated by a line drawn through them, and the word "Demand" written above them.

[2] Appellee defends the action of the court below in directing a verdict in its favor upon the ground that the agreement to release appellant was without consideration and says the transaction between the parties constituted, in effect, a mere renewal of the note and, being only a renewal, King was not discharged, and in support of this position cites and relies upon the case of Hamiter v. State National Bank of Texarkana, 106 Ark. 157, 153 S. W. 94. We have here, however, the converse with the case of Hamiter v. Bank, supra. There the note was renewed under an agreement to accept the new note of Hamiter in payment of the note sued on—the original note—the agreement being made after the original note had fallen due, and without a surrender of the original note or any change therein. Here we have an executed agreement to release King. The signature of King was obliterated. Other material alterations were evidenced by other mutilations. These mutilations were made in the execution of the agreement to release King, and to further conclusively evidence the execution of the agreement to release King there was written opposite his name the notation, "Not on renewal." King thus ceased to be a maker of the note sued on.

[3] The agreement to release King having been fully performed, it becomes immaterial to determine whether it was enforceable prior to its performance. The agreement has been executed. It became an accomplished fact. Kerr v. Birnie, 25 Ark. 225, 234. If a contract is fully performed on both sides, the question of consideration becomes immaterial. 1 Page on the Law of Contracts, § 540; 1 Elliott on Contracts, § 202, p. 330. The note is now, in effect, a new note, to which King is not a party, and he cannot, therefore, be now sued as if he were a maker thereof.

The judgment of the court below must therefore be reversed, and, as there is no dispute about the controlling facts, the cause will be dismissed.

**ARKANSAS FOUNDRY CO. v. STANLEY**  
et al. (No. 151.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

1. Bridges  $\S$ 5—Act, providing for construction of two bridges between the cities of Little Rock and North Little Rock, four blocks apart, and created but a single improvement district, valid.

That Sp. Acts 1919, p. 74, provided for the construction of two bridges between the cities of Little Rock and North Little Rock, four blocks apart, and created but a single improvement district, did not affect its validity, in view of topography of proposed district and density of its population.

2. Constitutional law  $\S$ 70(3)—Court not concerned with expediency of improvement ordered by Legislature.

The court, in action to enjoin construction of bridges under Sp. Acts 1919, p. 74, will not concern itself with the expediency of the improvement.

3. Bridges  $\S$ 8—When commissioners' sale of bonds will be declared void.

Whenever the facts show that the commissioners of a bridge improvement district are selling bonds at less than par by means of a subterfuge, or that the charges are grossly unreasonable, or that the transaction is attended by bad faith, the court will declare the transaction fraudulent and void.

4. Bridges  $\S$ 8 — Commissioners of district held authorized to employ broker to sell bonds.

Commissioners of improvement district created by Sp. Acts 1919, p. 74, given the power under such act to issue and sell bonds at not less than their par value and to pay interest thereon at not more than 6 per cent. per annum, may employ a broker to sell bonds or assist commissioners in so doing if the employment of the broker is reasonably necessary.

5. Bridges  $\S$ 8—Commissioners held authorized to borrow money from banks.

Commissioners of bridge improvement district, authorized by Sp. Acts 1919, p. 74, to issue and sell bonds at not less than their par value and to pay interest thereon at not more than 6% per annum, had power to borrow money from banks and to pledge the assessments for the security of the loans, where interest paid thereon did not exceed 6 per cent.

Appeal from Pulaski Chancery Court; J. E. Martineau, Chancellor.

Suit by the Arkansas Foundry Company against J. H. Stanley and others. From judgment rendered, both parties appeal. Affirmed in part and reversed in part and remanded, with directions.

The Arkansas Foundry Company, an owner of real property lying within the limits of the Broadway-Main Street Bridge district of Pulaski county, brought this suit in equity against the commissioners of said district to restrain them from employing agents in selling and disposing of the bonds of the dis-

trict, and from proceeding further with the construction of the bridges contemplated by the passage of the act. The complaint, amongst other things, alleges the following:

"Par. 2. Said commissioners, in order to raise money to construct said bridges, are now threatening to borrow money from the banks in the city of Little Rock by issuing, or executing, ordinary evidences of indebtedness, and are threatening to pledge and mortgage the assessments for the security of said loans. That the commissioners are not authorized to so borrow money, the only method being pointed out by section 9 of the act, which method is by the issuance of negotiable bonds at a rate of interest not to exceed 6 per cent.

"Par. 3. Said commissioners, having offered and failed to dispose of the bonds of the district, are also threatening and arranging to employ agents to dispose of said bonds, and to pay such agents a commission therefor; that said bonds bear interest at the rate of 6 per cent. per annum, and if the commissioners are permitted to pay to said agents a commission for disposing of said bonds, the commissioners will receive from the sale thereof less than the par value of the bonds. Plaintiff avers that under the limitations of the power and authority of the commissioners, contained in said act, said commissioners have no power or authority to employ such agents, and pay the commission for such purposes.

"Par. 4. That the board has no power or authority to construct the two bridges under a single improvement district. The General Assembly had no power to pass an act creating a district to make two separate improvements and the act is void for want of power.

"That the construction of two bridges as proposed by the commissioners would entail a large and unnecessary expense upon the taxpayers in the district, one bridge being sufficient to accommodate the traffic between the cities of Little Rock and North Little Rock."

The bridge commissioners filed a demurrer to the paragraphs of the complaint above set forth, and the court sustained the demurrer to the second and fourth paragraphs of the complaint, and overruled it as to the third paragraph of the complaint. The defendants elected to stand upon their demurrer to the third paragraph, and refused to plead further. Accordingly it was decreed that the defendants be enjoined from employing agents or brokers to sell the bonds of said district, or to pay any commissions for services in that behalf. And, plaintiff declining to plead further, it was decreed that the prayer of the complaint for an injunction against defendants, restraining them from borrowing money and issuing evidence of indebtedness in the form of notes and from proceeding with the construction of the proposed bridges across the Arkansas river, be denied, and paragraphs 2 and 4 of the complaint be dismissed for want of equity. Both parties have duly prosecuted an appeal to this court.

Geo. A. McConnell, of Little Rock, for appellant.

Vaughan & Rector and Moore, Smith, Moore & Trieber, all of Little Rock, for appellees.

HART, J. (after stating the facts as above). On the part of the plaintiff it is contended that the two bridges contemplated in the act are four blocks apart, and that the construction of one has no relation to the other. Therefore counsel insists that the construction of the two bridges constitutes independent improvements, and that the act of the Legislature in creating the district as a single improvement district was arbitrary, and the act is consequently void. The act is entitled, "An act to create a Broadway-Main street bridge district of Pulaaki county," and was approved February 5, 1919. Act 49 of the Special Acts of 1919, p. 74.

Section 1 of the act creates the district, defines its territory, and names the commissioners. It authorizes the commissioners to build a bridge across the Arkansas river from a point on Broadway street, in the city of Little Rock, to a point across the river in the city of North Little Rock to be selected by the commissioners. It also authorizes the construction of a bridge from a point on Main street in the city of Little Rock to a point on the opposite side of the Arkansas river in the city of North Little Rock. The proposed bridges are four blocks apart, and the court will take judicial notice that there are connecting streets between Broadway and Main streets in the city of Little Rock and between the corresponding streets on the opposite side of the river in the city of North Little Rock.

[1, 2] Under our former decisions bearing on the question, the statute cannot be assailed on the ground that it embraces more than one improvement. The Legislature in passing the statute creating the district must have found, as a matter of fact, that two bridges were necessary to carry the traffic between the two cities, and that the business centers of the proposed district were so situated, with respect to the contemplated improvement, as to justify treating them as parts of a common enterprise and as a single improvement. With the expediency of the proposed improvement in its present form we have no judicial concern. It is sufficient for us to say that the Legislature must have found that the construction of the two bridges was necessary to secure a convenient and useful means of approach between the two cities, and that by uniting them in a single improvement they could best promote the improvement of the property within the district. When the topography of the proposed district is considered in connection with the density of population, it cannot be said that the action of the Legislature, providing that the construction of both

bridges should be undertaken and prosecuted as one improvement, is arbitrary and void. We consider the question no longer an open one in this state, and that it has been settled by the decisions cited below, as well as many other decisions of this court. *Bennett v. Johnson*, 130 Ark. 507, 197 S. W. 1148; *Easley v. Patterson*, 142 Ark. 52, 218 S. W. 381; *Johns v. Road Imp. Dist.*, 142 Ark. 73, 218 S. W. 389; *Tarvin v. Road Imp. Dist. No. 1*, 137 Ark. 355, 209 S. W. 81; *White v. Ark. & Mo. Highway Dist.*, 227 S. W. 261. It follows that the chancery court did not err in holding that the construction of the two bridges constituted, under the circumstances, a single improvement.

In the third paragraph of the complaint it is alleged that the commissioners are arranging to employ agents or brokers to dispose of the bonds to be issued under the provisions of the act for the construction of the improvement, and that this action is in violation of the terms of the act. Section 9 of the original act reads as follows:

"In order to do the work the board may borrow money at a rate of interest not exceeding six per cent. per annum, may issue negotiable bonds therefor, signed by the chairman and secretary of the board, and pledge and mortgage all assessments for the repayment thereof. Said bonds shall not be disposed of at less than par on the basis of interest at the rate of six per cent. per annum. But if they should bear a less rate they may be disposed of at less than par provided that the district shall receive therefor and pay thereon the equivalent of not more than six per cent. per annum at par.

"No bonds issued under the terms of this act shall run for more than thirty years; and all issues of bonds may be divided so that a portion thereof may mature each year as the assessments are collected."

Act 49, Acts of Arkansas 1919, Special, p. 74.

The evident object of the Legislature by the enactment of this section was to prevent speculation in the bonds to be issued by the commissioners for the construction of the proposed improvement, and to insure to those who must pay the bonds a dollar in currency for every dollar of bonds issued. Par means equal, and par value means a value equal to the face of the bonds. So it is generally said that a sale of bonds at par is a sale at the rate of a dollar in currency for a dollar in bonds. Under the statute, the commissioners were not authorized to sell the bonds at a discount by reason of any commissions or attorney's fees paid to the purchasers, or to their agents or attorneys or by reason of issuing bonds drawing interest from a certain date and allowing the purchaser the use of the money loaned for a period of time thereafter.

Counsel for the plaintiff insists that under the statute the commissioners could not employ a broker to sell the bonds regardless of the fact of whether he was the agent of

the commissioners or the purchasers of the bonds. To support his contention counsel cites the following: *Uhler v. City of Olympia*, 87 Wash. 1, 151 Pac. 117; *Davis v. City of San Antonio* (Tex. Civ. App.) 160 S. W. 1161; and *Whelen's Appeal*, 108 Pa. 162, 1 Atl. 88. In each of these cases the purchaser was allowed a discount by way of compensation paid it, or its agents, for commission, interest, or attorney's fees, and the court properly held, as a matter of law, that this constituted an evasion of the statute.

In *Spear v. City of Bremerton*, 90 Wash. 507, 156 Pac. 825, the statement of facts shows that a contract for the sale of the bonds was made with John E. Price & Co., whereby that company agreed to attend to all the proceedings necessary in the issuance of the bonds, and to take the bonds at a discount of 5 per cent. The court properly held that this was clearly an evasion of the statute and the reason given was that under a statute forbidding the sale of the bonds at less than par the taxpayer could not be put to the burden of paying the purchaser of the bonds anything in the way of commission or bonus, or for attorney's fees and expenses of printing, etc. So, too, in *Bay City v. Lumberman's State Bank*, 193 Mich. 533, 160 N. W. 425, the court held that under the facts stated the transaction was a sale and purchase of the bonds by the bank from the city, and that the payment of the commission to the bank by the city was a discount in violation of the statute. The bank in that case claimed that it merely acted as the agent of the city in selling the bonds, but the court held that under the facts the bank took over the whole issue of bonds itself and resold them to its customers. The court said that after the bank took over the bonds, the city had no interest in the selling value of the bonds, and if they had appreciated in value the bank, and not the city, would have received the benefit. On the other hand, had they depreciated, the loss would not have fallen upon the city. The bank never made any report of its sales of the bonds to the city, and there was no accounting for the proceeds of the bonds that it sold. The bank simply took over the whole issue of the bonds, and disposed of them as it saw fit to its customers.

In the case of *Paul v. City of Seattle*, 40 Wash. 294, 82 Pac. 601, relied on by counsel for the plaintiff, the charter of the city provided that no debt or obligation of any kind against the city should be created by the city council, except by an ordinance specifying the amount and object of the expenditure. Therefore the court properly held that the comptroller had no implied authority to contract with a broker to sell the bonds of the city.

Another case relied on by counsel is *Village of Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973. In that case the bonds con-

tracted to be sold by the water board included accrued interest, and amounted to \$50,444.44, whereas the contract price was but \$50,000. The court held that the executory contract provided for the sale of the bonds at less than their par value, and was absolutely void, because this was prohibited by the statute.

[3] So it will be seen that where the contract in express terms shows that the purchaser of the bonds is to receive a discount, the courts hold as a conclusion of law that there has been an evasion of the statute. On the other hand, where the evasion of the statute appears from the facts stated, and not from the contract itself, the courts hold, not as a matter of law, but as a matter of fact, that there has been an evasion of the statute. Whenever the facts show a subterfuge for an actual sale at less than par, or if the charges made are grossly unreasonable, or the transaction is attended by bad faith, the courts will not hesitate to declare such transaction fraudulent and void. No allegation of bad faith on the part of the commissioners in seeking the service of a broker to sell the bonds is made in the complaint. The plaintiff merely alleges that under the statute the commissioners have no authority, either express or implied, to procure the services of a broker to sell the bonds or to aid them in the sale thereof.

[4] This contention is against the weight of authority on the question. The statute gave the commissioners express power to issue and sell the bonds at not less than their par value and to pay interest thereon at not more than 6 per cent. per annum. The power to sell the bonds carried with it the implied authority to pay a broker to sell them, or to assist the commissioners in doing so, if this was reasonably necessary. The employment of a broker might be reasonably necessary in order to sell the bonds, and, if so, the expenses of his commission would be incidental to the express authority to sell, and would fairly come within the scope of the main power. The authorities cited below sustain this view, and say that it is according to the weight of authority. *State v. West Duluth Land Co.*, 75 Minn. 456, 78 N. W. 115; *Town of Manitou v. First Nat. Bank of Colorado Springs*, 37 Colo. 344, 86 Pac. 75; *Church v. Hadley*, 240 Mo. 680, 145 S. W. 8, 39 L. R. A. (N. S.) 248; *Armstrong v. Village of Ft. Edward*, 159 N. Y. 315, 53 N. E. 1116, and cases cited; *Miller v. Park City*, 126 Tenn. 427, 150 S. W. 90, Ann. Cas. 1913E, 83; *Brownell v. Town of Greenwich*, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685.

We believe that the above states the law applicable to this case, and that under the facts alleged in the complaint the commissioners would have the authority, if reasonably necessary to enable them to sell the bonds, to employ a third person as a broker for that purpose. Therefore the court



erred in overruling the demurrer to the third paragraph of the complaint, and in enjoining the commissioners from employing brokers to sell the bonds of the district.

[5] According to the allegations in paragraph 2 of the complaint, the commissioners are about to borrow money from the banks of the city of Little Rock, and to pledge the assessments for the security of the said loans. It is claimed by counsel for the plaintiff that the act only authorizes the commissioners to issue negotiable bonds at a rate of interest not exceeding 6 per cent. The complaint does not allege that the commissioners are going to pay more than 6 per cent. interest to the banks in the city of Little Rock from which they borrow money for the purpose of constructing the bridges. The bonds of the district would be nothing more than evidence of indebtedness of the district, and it could make no difference whether the commissioners borrowed the money in the city of Little Rock, or from banks or other persons elsewhere.

The issuance and sale of the bonds of the district is nothing more than borrowing money by the commissioners for the purpose of constructing the improvement. The only prohibition in the statute is that they shall get face value for the amount borrowed, and shall not pay more than 6 per cent. interest per annum. Consequently the court was right in sustaining the demurrer of the defendants to the second paragraph of the plaintiff's complaint.

From the views expressed, it results that the chancery court was right in sustaining the demurrer of the defendants to the second and fourth paragraphs of the complaint, and in these respects the decree will be affirmed.

It also follows that the court erred in overruling the defendants' demurrer to the third paragraph of the complaint, and for this reason the decree will be reversed and the cause remanded, with directions to enter a decree sustaining the demurrer to the third paragraph of the complaint, and for other proceedings in accordance with the principles of equity and not inconsistent with this opinion.

#### PEARCE v. HARDEN. (No. 148.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

**Exemptions**  $\S$  127—**Exceptions to schedule of exemptions held sufficient on demurrer.**

A judgment creditor's exceptions to debtor's schedule of exemptions that debtor does not "list any household furniture, furnishings, and supplies which he owns, if he is at the head of a household," and that he "does not state for what given period of time he is claiming exemption of wages," held sufficient on demur-

rer to raise the issue and place the burden upon debtor to prove that he was the head of a household, and entitled to have property specified in schedule declared exempt from execution, notwithstanding failure of exceptions to specifically deny allegations contained in schedule as to being head of household.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by Oul L. Pearce against G. H. Harden before a justice. Judgment was rendered for plaintiff, and defendant filed a schedule of exemptions. Plaintiff's appeal from judgment of the justice of the peace overruling exceptions to the schedule was dismissed by the circuit court, and plaintiff appeals. Reversed and remanded, with directions.

Culbert L. Pearce and Stephens Moore, both of Bald Knob, for appellant.

John E. Miller and C. E. Yingling, both of Searcy, for appellee.

WOOD, J. The appellant obtained a judgment in the justice court against the appellee in the sum of \$77. The appellee filed the following schedule:

"G. H. Harden, defendant in the above-styled cause, states: That he is a resident of the state of Arkansas and the head of a family; that he is the owner of the following described property in addition to the wearing apparel of himself and family, to wit: Ninety-two dollars and ten cents due him from Brundidge & Neely, \$60.30 due said defendant from J. F. Dyson; about \$235 due defendant at this time as salary from the counties composing the First judicial district, and \$25 cash on hand. \$412.40. That a writ of garnishment has been issued by A. Neely, justice of the peace, against his property. That under the provisions of article 9 of the Constitution of the state of Arkansas, he claims as exempt from seizure under such writ of garnishment the following described personal property, being all of his aforesaid personal property: \$92.10 due him from Brundidge & Neely; \$60.30 due said defendant from J. F. Dyson; about \$235 due defendant at this time as salary from the counties composing the First judicial district, and \$25 cash on hand. That this writ of garnishment was obtained in a suit for debt by contract.

"This, the 2d day of June, 1919.

"G. H. Harden.

"I, G. H. Harden, solemnly swear that the above and foregoing schedule embraces all of my property of every kind except my wearing apparel and that of my family, and that the personal property claimed as exempt does not exceed in value the sum of \$500, and that I am the head of a family, and a resident of the state of Arkansas, and the claim of plaintiff is for debt by contract.

G. H. Harden."

The appellant filed the following exceptions to the schedule:

"(1) That under the law the defendant, who is the duly appointed, qualified and acting court

reporter of the First judicial circuit of Arkansas, is neither a laborer nor mechanic, and therefore is not entitled to claim exemption of 60 days' wages.

"(2) Defendant does not list any household furniture, furnishings, and supplies which he owns, if he is at the head of a household.

"(3) The defendant does not show in said schedule of exemptions a list of all moneys received by him during the 60 days for which he is claiming exemption of his wages, which list should show his salary for said time.

"(4) Defendant does not state for what given period of time he is claiming exemption of wages.

"(5) Defendant does not state in what way he is the head of a household, which would entitle him to claim exemptions.

"Wherefore plaintiff prays that his exceptions and objections to said schedule of exemptions be heard by the court, and, finally, that said schedule of exemptions be rejected, and he be permitted to proceed according to law in the collection of judgment due him.

"Cul L. Pearce, Plaintiff."

The justice of the peace overruled the exceptions and issued a supersedeas. The appellant appealed to the circuit court. In the circuit court the appellee filed a motion to dismiss the exceptions, which the court treated as a general demurrer, sustained the same, and, appellant electing to stand on his exceptions, the court entered a judgment, dismissing the appeal, from which appellant prosecutes this appeal.

While the exceptions of the appellant filed to the schedule of the appellee are not artistically framed, the effect of these exceptions, when taken together, was to challenge the truth and accuracy of appellee's schedule and to put in issue the declarations contained in said schedule. True, the exceptions were not as specific as they should have been, but no motion was made to make them more specific, and the court on demurrer erred in treating them as wholly defective and insufficient to raise an issue as to the truth of the allegations contained in appellee's schedule. The effect of sustaining the demurrer was to deprive the appellant, under the allegations contained in his exceptions, from raising the issue as to the correctness of the appellee's schedule, whereas the exceptions should have been treated as a denial of the allegations contained in the appellee's schedule. It can be very plausibly contended that there is no denial in specific terms of the allegations contained in the appellee's schedule, but, as before stated, the effect of these various exceptions is to deny that the appellee was entitled to the exemption claimed by him, and this was sufficient at least on demurrer to raise the issue and place the burden upon the appellee to prove by a preponderance of the evidence that he was entitled to have the property specified declared exempt from execution to satisfy

appellant's judgment. *Blythe v. Jett*, 52 Ark. 547, 13 S. W. 137; *Porch v. Arkadelphia Milling Co.*, 65 Ark. 40-45, 45 S. W. 51, 67 Am. St. Rep. 895.

The exceptions of the appellant, in other words, should be treated as something more than a mere demurrer or general objection to the form of appellee's schedule. Appellant's prayer to his exceptions shows that appellant intended something more than a general objection to the form.

Exceptions No. 2 and No. 5, while not specifically denying, should nevertheless on demurrer be treated as a denial of the appellee's allegation that he was the head of a family and these, with the other allegations, should be treated as denying that the appellee was entitled to hold specific articles which he set up in his schedule exempt from appellant's judgment. The appellant prayed "that his exemptions and objections to said schedule of exemptions be heard by the court." The trial court, instead of dismissing the appellant's exceptions under the above prayer, should have treated them as raising an issue on the facts alleged in appellee's schedule. The judgment is therefore reversed, and the cause remanded, with directions to overrule appellee's demurrer to appellant's exceptions.

#### MISSOURI PAC. R. CO. v. FUQUA. (No. 157.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

1. Carriers  $\S$ 408(4)—Finding that loss of checked baggage by fire could have been prevented sustained.

In an action by a traveler against a railroad company for the loss of a suit case and contents, checked in defendant's parcel room and destroyed by fire, evidence held to sustain a finding that defendant could, by the exercise of ordinary care, have prevented the loss.

2. Carriers  $\S$ 405(4)—Contract limiting liability for baggage checked held to cover liability on any account.

A contract under which a traveler checked a suit case in the parcel room of a railroad, providing that "the carrier will not be responsible for loss, damage, or detention of articles left in storage for any amount in excess of \$25," held broad enough to cover liability on any account including negligence.

3. Warehousemen  $\S$ 24(7)—Where rate based on value, liability may be limited to agreed value.

A warehouseman may limit his liability to an agreed value of the article received, where the rate charged was based on the value of the article.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by C. C. Fuqua against the Missouri Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and modified by reduction in amount.

Ponder & Gibson, of Walnut Ridge, and Thos. B. Pryor, of Ft. Smith, for appellant. Brundidge & Neelly, of Searcy, for appellee.

HUMPHREYS, J. Appellee instituted suit against appellant in the White circuit court to recover \$300 for a suit case and its contents, alleged to have been destroyed by fire on the 7th day of April, 1920, through the negligence of appellant in failing to remove it after discovering that its depot at Little Rock was on fire.

Appellee filed an answer, denying the material allegations of the complaint, but pleaded in the alternative that, should appellee be permitted to recover the amount, it should be limited to a maximum of \$25, as per stipulation in the check issued to him when he left the suit case in storage.

The cause was submitted upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment in favor of appellee for \$150, from which judgment is this appeal.

The record reflects that appellee, en route to Oklahoma remained in Little Rock over night. He checked his suit case in the parcel room of appellant, and, upon payment of 10 cents, received a parcel stub check containing the provision that appellant "will not be responsible for loss, damage, or detention of articles left in storage for any amount in excess of \$25." There was an outside door and window to the checking room, and a chute to the basement. The depot was destroyed that night by an accidental fire, which started about 8 o'clock. The employees in the checking room were driven out by the fire within 30 minutes after it started. There were three employees in the room, who busied themselves finding and delivering parcels to those who called for them in person. About 100 parcels were saved by delivery in this way to those who rushed to the room. About 50 parcels were left in the room and burned. No effort was made by any of the appellant's three employees in the room to save the un-called for parcels, among which was appellee's suit case. The employees said they were busily engaged the entire time before leaving the building in getting parcels to those who applied in person for them; also, that, had they thrown the parcels out, some one would have carried them off, as they could not have gotten a reliable person to watch them; also, that, had they carried any of them out, the

police force and firemen would not have permitted them to return to the building. During the fire, employees in the basement were engaged in removing parcels to a safe place.

[1] It is contended by appellant that, in the exercise of ordinary care, it could not have prevented the destruction of the suit case and its contents. We think there is some substantial evidence tending to show otherwise. No effort whatever was made to save the parcels of those who did not call for them. Three employees were in the room, and they devoted their entire time to handing out parcels to those who called for them, spending frequently a minute in searching for the particular parcel. The jury might well have concluded that all the parcels might have been saved had they gotten them out and searched out the particular parcels and delivered them later. All might have been thrown down the chute where other employees were engaged in carrying the parcels to a place of safety from the basement; or the parcels might have been thrown through the door or window to a safe place on the outside. One of the employees might have guarded them on the outside while the other two removed them from the checking room. We think the evidence sufficient to sustain the verdict.

It is also contended by appellant that the court committed error in permitting a recovery in excess of \$25. Appellee contends otherwise, insisting, first, that the contract makes no attempt to exempt appellant or limit its liability by reason of negligence; second, that appellant could not limit its liability growing out of its own negligence.

[2] (a) We think the contract broad enough to limit appellant's liability on any account. The language of the contract is:

"The carrier will not be responsible for loss, damage, or detention of articles left in storage for any amount in excess of \$25."

It is broader than the language used in the Gulf Compress Co. v. Harrington, 90 Ark. 258, 119 S. W. 249, 23 L. R. A. (N. S.) 1205.

[3] (b) A warehouseman may limit his liability to an agreed value of the article received, where the rate charged was based upon the value of the article. This character of contract does not contravene the principle that one cannot contract for exemption or limitation from liability on account of his own negligence. The rule is stated in keeping with the principle announced in K. O. S. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

The judgment is therefore reversed, and modified by a reduction in the amount to \$25.

**HENDRICKS v. GARROUTE. (No. 155.)**

(Supreme Court of Arkansas. Oct. 10, 1921.)

**Sales —88 — Whether contract for sale of truck reserved title or lien for jury.**

In a suit on notes for the price of an automobile truck, where the sole issue was whether the parties intended to reserve title in the seller or merely a lien for the purchase price, and the notes were ambiguous, it was error to direct a verdict on the theory that the written sales contract constituted the reservation of a lien.

Appeal from Circuit Court, Crawford County; James Cochran, Judge.

Action by A. L. Hendricks against Will Meyers, wherein William Garroute interpleads. From a judgment on a verdict instructed for the interpleader, plaintiff appeals. Reversed and remanded.

Sam R. Chew, of Van Buren, for appellant.  
J. E. London, of Van Buren, for appellee.

**HUMPHREYS, J.** This suit was instituted in the circuit court of Crawford county by appellant against Will Meyers, upon three notes in the sum of \$166.75 each, evidencing the purchase money of an automobile truck, in which an attachment was sued out and levied upon the truck. The notes were made exhibits to the complaint. Appellee filed an interplea, claiming the automobile, and retained the possession of the property under bond filed for that purpose.

Subsequently appellant filed an amended complaint in the nature of a replevin for the possession of the truck, alleging that the sale of the truck by appellant to Will Meyers was conditional, the condition being that the title thereto should remain in appellant until all the purchase money was paid. Thereupon appellee filed an amended interplea alleging that he obtained a judgment against Will Meyers at the July, 1920, term of the Crawford circuit court in the sum of \$726; that execution was sued out and levied upon the automobile truck; and that he purchased same at the execution sale.

To this amended interplea, appellant filed an answer, in substance, to the effect that Will Meyers was not the owner of the automobile truck at the time of the alleged sale under said execution, but that appellant was the original owner thereof under contract, having retained title to said automobile truck at the time he sold it to Will Meyers until the purchase money therefor had been paid, and that Will Meyers had never paid the purchase money.

Appellee interposed a demurrer to the amended complaint and answer to the amended interplea, which, omitting the caption and signature thereto, is as follows:

"Comes the interpleader in this cause and demurs to the answer and amended complaint of the plaintiff, and for grounds therefor, says that the original complaint in this cause filed by plaintiff sets out a written contract, and that the verbal contract, pleaded in the amended answer and interplea, does not state a cause of action against the interpleader, as plaintiff is bound by his written contract."

On the 27th day of November, 1920, the cause was submitted to the jury upon appellant's amended complaint, the appellee's interplea, the answer of appellant to appellee's interplea, and the evidence adduced. At the conclusion of the evidence, over the objection and exception of appellant, the court refused to peremptorily instruct for appellant, or to submit the cause to the jury upon instructions requested by appellant, embracing the theory that, if appellant reserved the title until the payment of the purchase money at the time he sold the automobile truck to Will Meyers, and that the purchase money had not been paid, he would be entitled to recover in the action, but, on the contrary, upon his own motion peremptorily instructed a verdict for appellee upon the theory, as gleaned from the pleadings, that the written contract constituted the reservation of a lien upon the automobile truck, and not the reservation of title therein to secure the purchase money.

Appellant's contention on appeal is that the court erred in thus construing the contract in the light of the evidence. Appellee's contention is that the court correctly construed the contract, and that the peremptory instruction and resultant verdict and judgment were founded upon an election to sue on the note, which, in effect, waived any reservation of title in the vendor, if the latter reservation was embraced in the contract.

The only issue presented by the pleadings was whether or not the vendor reserved the title in the automobile truck until the vendee should pay the purchase money therefor. The amended complaint and the answer to the interplea of appellant tendered that issue only, and the demurrer filed by appellee to the amended complaint and answer to appellee's interplea accepted that as the only issue tendered. It was stated in the demurrer that the original complaint in this cause filed by appellant sets out a written contract, and that the verbal contract, pleaded in the amended answer and interplea, does not state a cause of action against the interpleader, as appellant is bound by his written contract. The only evidence adduced was the written notes and the evidence of A. L. Hendricks and Will Garroute in aid of the alleged verbal contract. So no other issue arose out of the pleadings and evidence, except the issue of whether there was a reservation of title in the vendor until the vendee paid the purchase money for the automobile truck.

No waiver of the reservation of title, if any, was suggested by the pleadings, the evidence, or the judgment of the court.

This court recently ruled, in the case of *M. Sternberg, Trustee in Bankruptcy, v. City National Bank of Ft. Smith, Ark.*, 233 S. W. 691, on a written contract in the identical words of the notes in the instant case, that the notes themselves were ambiguous, and that oral testimony was admissible to show whether it was the intention of the parties to reserve the title until the purchase money was paid or a lien thereon to secure the payment of the purchase money. The court erred therefore in peremptorily instructing the jury to the effect that the written contract was the reservation of lien to secure the payment of the purchase money, for there was evidence allunde to the effect that the intention of the vendor, acquiesced in by the vendee, was to reserve the title of the automobile truck in the vendor until the vendee paid the purchase money therefor. The court therefore should have submitted the cause to the jury to determine that issue.

For the error in not doing so, the cause is reversed and remanded for a new trial.

#### ROAD IMPROVEMENT DIST. NO. 4 OF PRAIRIE COUNTY v. MOBLEY et al. (No. 158.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

1. Courts  $\S$ 206(3/4) — Supreme Court's jurisdiction is merely appellate and supervisory, except as to quo warranto.

Under Const. art. 7,  $\S\S$  4, 5, the Supreme Court's jurisdiction is merely appellate and supervisory, except in the single instance of the exercise of original jurisdiction in the issuance of writs of quo warranto; the various writs issued by such court being merely in aid of such appellate or supervisory jurisdiction.

2. Courts  $\S$ 206(3/4) — Supreme Court has no authority to inquire beyond the record made in lower court.

The Supreme Court has no authority to inquire beyond the record made by the lower court, since such further inquiry would constitute the exercise of original jurisdiction.

3. Certiorari  $\S$ 6 — Will not lie to review judgment on ground that petitioners had been deprived of the right of appeal through stenographer's failure to prepare transcript.

Certiorari will not lie to bring up for review by the Supreme Court a judgment of the circuit court, on the ground that court stenographer's failure to prepare transcript within required time prevented petitioners, without fault on their part, from preparing the record; the remedy for the loss of the right of appeal without fault on their part being a proceeding in chancery.

Certiorari to Circuit Court, Prairie County; Geo. W. Clark, Judge.

Petition by Road Improvement District No. 4 of Prairie County for a writ of certiorari to review a judgment rendered against petitioner in favor of R. Mobley and others. Writ denied.

Emmet Vaughan, of Des Arc, and Brundidge & Neelly, of Searcy, for appellant.

R. D. Campbell, of Cotton Plant, and F. H. Brown and John F. Clifford, both of Little Rock, for appellees.

**PER CURIAM.** This is a petition for a writ of certiorari to bring up for review a judgment for the recovery of money, rendered against petitions by the circuit court of Prairie county on September 10, 1920, in favor of the respondents, who were the plaintiffs in the action below. It is alleged in the petition that a motion for a new trial was filed and overruled by the court, that an appeal to this court was granted by the trial court, and that time was allowed (120 days) within which to prepare and file a bill of exceptions. The sole ground urged for the issuance of the writ of certiorari is that the court stenographer failed, without fault of petitioners, to prepare the transcript of the oral proceedings within the time allowed by the court, and that petitioners were thus prevented, without fault on their part, to prepare the record so that an appeal was available for a review of the record in this court.

[1, 2] The jurisdiction of this court is, under the Constitution, merely appellate and supervisory, except in the single instance of the exercise of original jurisdiction in the issuance of writs of quo warranto. Constitution of 1874, art. 7,  $\S\S$  4 and 5. The various writs authorized to be issued by this court are merely in aid of such appellate or supervisory jurisdiction. *Jackson, Ex parte*, 45 Ark. 158; *Arkansas Industrial Co. v. Neel*, 48 Ark. 283, 3 S. W. 631. And a review by this court for errors of inferior tribunals is confined to the record made below. This court has no authority to inquire beyond the record made by those courts. Such further inquiry would constitute the exercise of original jurisdiction. It is not claimed that there is any error appearing in the record made in the court below. In other words, it is not claimed that there is any error on the face of the proceeding; but the claim is that the petitioners were prevented, without their fault, from making a record by bill of exceptions, which would have disclosed errors in the proceedings; and the contention is that they are entitled to relief under the remedy afforded by the writ of certiorari.

[3] Counsel for petitioners rely upon decisions of this court, holding that the remedy

under the writ of certiorari is available where the right of appeal has been unavoidably lost. *Burgett v. Apperson*, 52 Ark. 213, 12 S. W. 559; *Lamb & Rhodes v. Howton*, 131 Ark. 211, 198 S. W. 521. Those were cases where relief was sought in the circuit court from judgments of inferior courts over which that court had supervisory control, and under and pursuant to the statute which authorizes a review of proceedings in inferior courts for relief against either erroneous or void judgments. *Crawford & Moses' Digest*, § 2237. Those cases, therefore, have no application to the question of the authority of this court, for this court has no original jurisdiction, and such original jurisdiction for relief against fraud, accident, or mistake is cognizable in courts of chancery, and in that court alone must petitioners seek relief for the alleged unavoidable loss of the right of appeal. *Kansas & Arkansas Valley Rd. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 980, 54 Am. St. Rep. 211; *Little Rock & Ft. Smith Ry. Co. v. Wells*, 61 Ark. 354, 33 S. W. 208, 30 L. R. A. 560, 54 Am. St. Rep. 216. The writ is therefore denied.

**MILES et al. v. AMERICAN RY. EXPRESS CO. (No. 149.)**

(Supreme Court of Arkansas. Oct. 10, 1921.)

1. Damages §23—In reasonable contemplation of parties may be recovered for breach of contract.

Damages which might reasonably have been expected to follow from a breach of a contract may be recovered for such breach, and in determining what might reasonably have been contemplated, the nature and purpose of the contract, and the attending circumstances known to the parties at the time the contract was executed, may be considered.

2. Carriers §105(2)—Express company informed of facts held liable for expense of Pasteur treatment due to its delay in delivering dog's head to laboratory for examination.

Where the head of a dog which had bitten a child was so delayed in transportation to a laboratory for microscopic examination that it decomposed before delivery, rendering an examination impossible, the carrier, which had notice of the facts, was liable for the expense of giving the Pasteur treatment, since it might have anticipated such a precaution in the event of such delay.

3. Parent and child §7(1)—Parent cannot recover for physical suffering endured by child.

Parent suing express company for negligent delay in delivery to laboratory of head of dog by whom child had been bitten, making examination for rabies impossible, could not recover for physical suffering endured by child in taking the Pasteur treatment.

4. Damages §49—Parent of child bitten by dog could not recover damages for mental suffering against carrier for delay in delivery of head of dog to laboratory for examination for rabies.

Parent of child bitten by dog, suing carrier for failure to deliver head of dog to laboratory until so decomposed as to prevent a successful examination for rabies, could not recover damages for mental suffering, since damages cannot be recovered for mental suffering unaccompanied by physical injury.

5. Carriers §105(1)—Punitive damages not recoverable in absence of malice.

Parent of child bitten by a dog, suing express company for negligent delay in delivery of the dog's head to laboratory for examination for rabies, requiring the child to undergo the Pasteur treatment, could not recover punitive damages from the express company in the absence of facts from which malice might be inferred.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Consolidated actions by E. W. Miles and by W. N. White against the American Railway Express Company. Demurrers to complaints sustained, and judgments of dismissal rendered, and plaintiffs appeal. Reversed and remanded.

Culbert L. Pearce, of Bald Knob, for appellants.

Mehaffy, Donham & Mehaffy, of Little Rock, for appellees.

HART, J. This is an appeal from a judgment sustaining a demurrer to and dismissing the complaint for damages for an alleged breach of contract. On Jan. 31, 1921, E. W. Miles filed an amended complaint against the American Railway Express Company, which is as follows:

"The plaintiff alleges:

"That defendant is and was at all times hereinafter mentioned a common carrier engaged in the carriage of express matter for hire, over the line of the Missouri Pacific Railroad Company, between the town of Bald Knob and the city of Little Rock, Ark.

"That on the 15th day of June, 1920, plaintiff, through his agent, the Huffaker Mercantile Company, delivered to defendant, and the defendant accepted at its office in the town of Bald Knob, one metal bucket properly packed, iced, and labeled, containing the head of a dog to be transported to the city of Little Rock, a distance of 57 miles, and there delivered to the Hygienic Laboratory, and that plaintiff, through his said agent, paid the sum required of him as charges for said services, and at the time informed defendant's agent of the contents of said shipment, and the specific purpose for which it was intended to be used.

"That on the morning of said day, the dog from which the head was afterwards severed, while showing symptoms of hydrophobia—which symptoms also show in other and less danger-

ous diseases of dogs—severely bit and lacerated Florence Miles, aged 6, a daughter of the plaintiff.

"That plaintiff, for the purpose of protecting the said child from the probable danger of contracting hydrophobia from the bite of said dog, and acting upon the advice of a local physician, killed said dog, severed the head therefrom, and caused the same to be shipped as aforesaid for microscopical examination to determine whether said dog was affected with hydrophobia or rabies, a dangerous and dreaded disease which may be communicated to human beings, and which, in most instances, causes great suffering and certain death.

"That defendant willfully, negligently, and wrongfully failed and refused to deliver said bucket to the consignee until the evening of the fourth day after the day of shipment, at which time said dog head was so decomposed that a microscopical examination to determine the presence or establish the absence of hydrophobia germs could not be successfully made, and plaintiff was thereby deprived of the only method known and recognized by medical science for determining whether the said dog was infected with germs of hydrophobia.

"That the plaintiff repeatedly communicated with the said Hygienic Laboratory by telephone, seeking information concerning the results of the intended examination, but each time was informed that no such shipment had arrived; and each time thereafter plaintiff went to defendant's office at Bald Knob and urged its agent to investigate the delay, but was given no information or satisfaction by the defendant's said agent, he appearing very indifferent about the matter.

"That on the account of the failure as aforesaid to determine the presence or to establish the absence of hydrophobia germs in said dog by means of a microscopical examination, which failure was caused by the negligence of the defendant, plaintiff was then advised by his physician that the only reasonable course left for the protection of the said child from the probable dangers of hydrophobia would be to cause it to undergo a preventive treatment, which treatment is commonly and generally known as the 'Pasteur' treatment for prevention of hydrophobia or rabies.

"That plaintiff, acting upon said advice, took said child to the department of pathology of the University of Arkansas School of Medicine, located in the city of Little Rock, and caused it to undergo the said treatment, which treatment required a 21 days' course, and caused the said child much pain and suffering.

"That plaintiff expended the sum of \$127.50 for medical services and medicine, attendant for said child, hospital fees, board, railroad fare, and other necessary items, including express charges on said shipment, and telephone messages in trying to secure delivery thereof, all of which he was compelled to expend on account of defendant's willful negligence and wrongful failure and refusal to deliver said package within a reasonable time, and plaintiff further suffered much annoyance and inconvenience by reason of said default and suffered great anxiety and distress of mind on account of the pain and suffering of his said

child by reason of said antihydrophobia treatment.

"That plaintiff is entitled to the sum of \$127.50 for money actually expended as aforesaid, and the sum of \$500 for special and exemplary damages on account of defendant's negligence as aforesaid.

"Wherefore, plaintiff prays judgment for the sum of \$127.50 on his first count, and for the sum of \$500 on his second count, and for costs and for all other and proper relief."

On the same day W. N. White filed an amended complaint against the American Railway Express Company which is the same as the above complaint, except as to the name of the plaintiff and the name and age of the plaintiff's child. The defendant filed a demurrer to the complaint in each case. The cases were consolidated by order of the court, and the demurrer to each complaint was by the court sustained. The plaintiffs elected to stand on their amended complaints, and refused to plead further. Whereupon the court dismissed the plaintiffs' cause of action, and gave judgment against them for costs.

Counsel have not cited us to a case similar to the one at bar, and, after a somewhat diligent search, we have not been able to find a case directly in point. Counsel in their respective briefs have ably discussed the general principles of law applicable to the case. It is not necessary to go beyond our own decisions to find a statement of the general principles governing suits for damages for breach of contract. This court has always intended to follow the old English case of *Hadley v. Baxendale*, 9 Exch. 341, on this subject.

In *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744, the court said that the rule is correctly laid down in *Hadley v. Baxendale*, as follows:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things, from such breach of contract itself—or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of a breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not

affected by any special circumstances, from such a breach of contract."

[1] To the same effect see *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 275, 79 S. W. 1052. In determining the reasonable contemplation of the parties, it is proper to consider the nature and purpose of the contract and the attending circumstances known to the parties at the time the contract was executed, and those damages should be awarded which might reasonably have been expected to follow from a breach of the contract.

[2] In the case at bar the express company might have reasonably anticipated that plaintiffs would be put to the expense of the Pasteur treatment if the package containing the head of the dog, which bit the plaintiffs' children, should not be promptly carried and delivered at the point of destination, and this, too, regardless of the fact that the dog might have been rabid. It is commonly known that the Pasteur treatment diminishes the dangers by hydrophobia from the bites of rabid dogs. Under the allegations of the complaint the express company knew when it received the dog's head for shipment that the object of the analysis was to ascertain whether or not the dog that bit the children was suffering from rabies. The express company must have reasonably anticipated that the Pasteur treatment would not only be administered to the children if an analysis of the dog's head showed that the dog was rabid, but that it would be also given as a precautionary treatment if the package was not delivered promptly, so that an analysis of the dog's head might be made. So it may be justly assumed that such damages were within the contemplation and purposes of the parties in entering into the contract, and that the breach of contract on the part of the express company was the proximate cause of the damages suffered by the plaintiffs in giving the Pasteur treatment to their children.

Counsel for the defendant urged that, if the dog suffered with rabies, the Pasteur treatment would have been given in any event,

and that the complaint is faulty because it does not allege that an analysis would have shown that the dog was not a rabid animal. The argument is faulty in this respect. Counsel do not take into consideration the fact that the plaintiffs made known to the defendant the object and purposes of the analysis, and the defendant might have anticipated that it would be necessary to give the Pasteur treatment regardless of the fact of whether the dog was a rabid animal or not, if there was a violation of the contract by the defendant in respect to the prompt carriage and delivery of the package containing the dog's head. The parties knew the purpose for which the package containing the dog's head was sent, and might have reasonably anticipated that a breach of the contract would cause the plaintiffs of necessity to go to the expense of the Pasteur treatment, and that the breach of the contract was the direct cause of the damages suffered by the plaintiffs.

[3, 4] This is a suit by parents for damages, and they cannot recover for the physical suffering endured by their children. Neither can they recover damages for mental suffering. The parents did not receive any physical injury, and it is well settled in this state that mental suffering alone, unaccompanied by physical injury, cannot be made the subject of an action for damages against the carrier. *St. L., I. M. & S. R. Co. v. Taylor*, 84 Ark. 42, 104 S. W. 551, 13 L. R. A. (N. S.) 159, and *St. L., I. M. & S. R. Co. v. Buckner*, 89 Ark. 58, 115 S. W. 923, 20 L. R. A. (N. S.) 458.

[5] There was no element of wilfulness or statement of facts from which malice might be inferred. Hence, there is nothing to justify the infliction of punitive damages against the defendant. *St. L. S. W. Ry. Co. v. Evans*, 104 Ark. 89, 148 S. W. 264, and *St. L., I. M. & S. R. Co. v. Dysart*, 89 Ark. 261, 116 S. W. 224.

It follows that the court erred in sustaining the demurrer to the complaint and for that error the judgment will be reversed, and the cause remanded for a new trial.



## BYRKETT v. JOSEPHS et al. (No. 154.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

**1. Wills §212—Agreement compromising will contest held to make parties thereto distributees.**

In a will contest where parties entered an agreement compromising the contest, although the widow's share was free from liability for general debts, and in the agreement a fund was provided out of which to pay the debts of the estate, and each of the parties specifically relinquished all their rights in the estate except as agreed, the purpose of the agreement was to make the parties thereto distributees in the specified proportions.

**2. Descent and distribution §64—Widow sui juris may agree to take a share in the estate in lieu of dower.**

A widow sui juris may enter an agreement to take a share of an estate in satisfaction of her claim of dower.

**3. Wills §212—Agreement as to distribution by testators of a will held no attempt to remove estate from probate.**

Where parties entered an agreement compromising a will contest, to which the creditors were not parties, and the parties knew the creditors were proving up their demands in the probate court, there was no attempt by the parties to remove the administration of the estate out of the probate court.

**4. Wills §212—Compromise between parties to will contest and decree entered thereon held to provide fund for payment of debts, as against widow's claim to share of fund.**

Where the parties to a will contest made a compromise, in which part of the estate was set aside, and it was agreed that the rents from the estate for 1910 should be used with the fund set aside for the payment of debts owed by the estate, the purpose of the agreement was to create a fund for the payment of the debts of the estate, and when this fund was exhausted by debts, the widow, who was a party to the agreement, cannot recover from the other parties a share of the rents represented by her dower interest in the estate.

Appeal from Lawrence Chancery Court; Lyman F. Reeder, Chancellor.

Suit by Louis Josephs, executor, and another against Fairbelle Byrnett and others. From an order approving the report of a master in chancery, the named defendant appeals. Affirmed.

W. P. Smith and W. A. Cunningham, both of Walnut Ridge, for appellant.

Ponder & Gibson, of Walnut Ridge, and Sloan & Sloan, of Jonesboro, for appellees.

SMITH, J. The pleadings and the testimony in this case develop the following facts: A. W. Shirey died testate in March, 1910. His will indicated a complete estrange-

ment from his wife; in fact, he had unsuccessfully prosecuted a suit against her for divorce. *Shirey v. Shirey*, 87 Ark. 175, 112 S. W. 369. Mrs. Shirey, since the death of Mr. Shirey, intermarried with one Byrnett, and she is referred to throughout the record by the name of her last husband. In his will Shirey referred to the fact that his wife was the mother of a child the paternity of which he disclaimed. He gave to this child and to his wife each the sum of one cent. There were no other children, and he gave to each of his collateral heirs the sum of one cent. The remainder of his estate he gave in trust to the Grand Lodge, Independent Order of Odd Fellows, of the state of Arkansas, hereinafter referred to as the Grand Lodge, to erect a hospital and an orphanage. The estate was a very valuable one, and the parties in interest began preparations to litigate over its division.

The widow promptly renounced the will, and made an election to take dower under the statute. This claim was opposed by the collateral heirs and by the Grand Lodge. The collateral heirs claimed the will was invalid, and that the widow was not entitled to dower, and that the Grand Lodge took nothing under the will, and that they, as next of kin, took the entire estate. The Grand Lodge claimed the entire estate under the will. The estate was known to be solvent, but the amount of the indebtedness against it was not known. The estate consisted principally of lands, none of which was ancestral.

For the purpose of settling these conflicting claims, the parties entered into an agreement in writing on April 19, 1910. The purpose of this agreement was to settle the conflicting claims of the parties, and to furnish a basis for the partition and division of this estate. This agreement is a very elaborate instrument, and sets out the contentions of the respective parties, and is signed by all the parties and their numerous attorneys. Among other things, this agreement recites that:

"Whereas, it is the desire of all the parties hereto to adjust and settle all of the differences between them, or any of them, on account of the matters and things aforesaid without resort to litigation, and mutually to release each other and the said estate severally and jointly from any and all demands or claims of whatever character growing out of the said estate, or any right or interest therein, now or heretofore existing, as well as any claim or claims or other demands upon the said estate which might be made by any of the said parties at any future time by virtue of rights in the premises existing:

"Now, therefore, this agreement witnesseth, that in consideration of the premises and the several mutual promises and agreements here-

inafter stipulated and contained, the said parties jointly and severally covenant and agree, to and with each other, that the said estate may and shall, so far as they or their rights in the said estate are concerned, be treated as if the said widow, the following named collateral heirs, to wit, Barney C. Shirey, Jane Witt Matthews, and Martha Witt Sparks, and the Grand Lodge of the Independent Order of Odd Fellows of the state of Arkansas, have all of the distributive shares of said estate, in the following proportion, namely:

"First. The said widow, Fairbelle Byrnett, formerly Fairbelle Shirey, shall receive forty per centum (40%) of the gross estate of the said decedent, to be assigned to her in kind at her option as soon as practicable under the rule of law of the state of Arkansas, providing for the assignment or allotment of dower.

"Second. The said Barney C. Shirey shall receive ten per centum (10%) of the gross estate of the said decedent.

"Third. The said Jane Witt Matthews shall receive five per centum (5%) of the gross estate of the said decedent.

"Fourth. The said Martha Witt Sparks shall receive five per centum (5%) of the gross estate of the said decedent.

"Fifth. The said Grand Lodge of the Independent Order of Odd Fellows of the state of Arkansas shall receive forty per cent (40%) of the gross estate of the said decedent; but it is hereby distinctly understood and agreed by all of the parties to this instrument, that all debts contracted for the purchase of lands which were owned by the said A. W. Shirey at the time of his death, the cost of defending the suit of the Fletcher Heirs v. A. W. Shirey, being for the possession of certain lands and the expense incurred in the recovering, getting together, inventorying and appraising any assets not yet discovered, or which have not yet been taken possession of by the executor, and the expense of dividing lands of the estate are to be borne by all of the parties hereto, in the proportion of their respective interests thereunder, and that all other debts and expenses of administration shall be borne by the said lodge, and the said heirs in the proportion as their several interests are herein declared to be, and that each of the said heirs and the said Grand Lodge shall have the right to take their said several distributive shares as herein set out in kind at their option."

There were recitals that, in consideration of the premises, the widow relinquishes—

"to the said estate and to the other parties hereto, jointly and severally, all of her right, title, and interest in and to said estate, including all the dower interest which she has or may have in said estate, and all right, interest, or title which she has or may have in the estate of the said A. W. Shirey, deceased, by virtue of any will or wills or any other testamentary paper or papers that may have been executed by said A. W. Shirey, and all claim or claims that she may have against said estate, or that may later accrue to her in the premises by virtue of the said estate, or of any right or interest she may have growing out of her relations to the said decedent or to the said estate, save her right to her distributive share in said estate as hereinbefore indicated."

This agreement contained similar relinquishments by the other parties of their respective interests.

It was agreed that the will should be probated and that the executor should receive the assistance of all parties in winding up the estate and in resisting the probate of any improper claims against the estate. It was further agreed that the widow, the Grand Lodge, and the collateral heirs should each appoint an appraiser, and that the three appraisers together should appraise all real estate belonging to the decedent, and that their report, when filed with the probate court, should—

"stand as a basis upon which distribution of all in kind as herein contemplated shall be made, and that such distribution of all real estate shall convey and transfer title thereto in fee simple \* \* \* wheresoever the same may be located."

Other provisions of the agreement need not be recited. It will be observed that under this agreement the share of the widow is fixed at 40 per cent. of the gross estate, subject to the payment of certain specified debts, and the share of each party in interest is referred to as a "distributive share." Notwithstanding the agreement of April 19, 1910, was a very elaborate instrument, it did not prove sufficiently comprehensive, and the parties entered into a second agreement in writing under date of November 11, 1910. This last agreement summarized the provisions of the first agreement, and contained the recital that—

"It is not the purpose of this contract to in any way change or modify any of the provisions of said contract and agreement of April 19, 1910, \* \* \* and that it and this contract shall be construed and executed together."

This last agreement recites that the appraisers have made a report of their appraisal, and these appraisers were directed to make partition of the lands and to make a report thereof to the chancery court for the Eastern district of Lawrence county, and that—

"Upon said report being approved a decree shall be entered in said chancery court vesting and divesting title in accordance with said report, and after entry of record of said decree, the parties hereto agree that they will, as soon as practicable, execute and deliver quitclaim deeds with relinquishment of dower and homestead in accordance with the provisions of said decree."

Section 6 of this agreement is as follows:

"Sixth. It is agreed that real estate of the value of fifteen thousand dollars (\$15,000) shall be reserved and excepted from said partition by said commissioners for the following purposes:

"(1) To be used, if necessary, by the executor of the last will and testament of said A. W.

Shirey, in the payment of debts of his said estate; and,

"(2) If title to any tract or tracts of real estate which may be set apart or allotted to any of the parties hereto shall fail, and such failure of title be judicially adjudged or decreed within five (5) years from the date of entry of decree hereunder in said Lawrence chancery court for the Eastern district, then the party hereto against whom such adjudication as to such title shall have been made shall be reimbursed to the extent of the value of the real estate covered by said decree, title to which shall have been adjudged not to have been in said A. W. Shirey at the date of his death, such value, if appraised separately, to be determined according to said appraisement, and if not appraised separately, then to be determined as of the date of the decree to be entered hereunder; and,

"(3) If in a suit now pending in said chancery court title to any part of said Robbins farm shall be decreed not to have been in said Shirey at the date of his death, then the second party hereto shall be reimbursed to the extent of the value thereof as soon as practicable after the rendition of said decree so divesting title out of the estate of said Shirey.

"The provisions of this paragraph shall not continue in force for a period of more than five (5) years from the date of entry of decree hereunder. Upon any such failure of title as is mentioned herein being judicially adjudged or decreed the party hereto sustaining such loss may immediately select from said real estate of fifteen thousand dollars (\$15,000) in value to be excepted and reserved from said partition, an amount at appraised value to reimburse such party for such loss and legal costs and upon such selection being made, the other parties hereto shall execute and deliver deeds with release of dower and homestead conveying the real estate so selected to the party selecting same."

By section 8 it was provided that:

"Said Louis Josephs, as the executor of said estate, shall for the year nineteen hundred ten (1910) collect all rents due and owing to said estate, and as soon after collecting the same as is practicable shall therewith pay debts of said estate."

Section 9 provides that all parties signatory should enter their appearance in a suit then pending in the chancery court for the Eastern district of Lawrence county wherein the widow was plaintiff and the Grand Lodge and the collateral heirs were defendants.

Thereafter, on November 21, 1910, a decree was rendered in the above-styled cause, by consent of all parties, giving effect to this second agreement, and there was an investiture of title in severalty to each of the parties. This decree contains the following recitals:

"And it appearing from the report of said commissioners that the following described real estate has not been divided or partitioned among the parties hereto, it is by consent of parties by the court considered, ordered, and decreed that, as to said real estate, the value

thereof, as shown by said appraisement for the purposes of this partition, being \$30,800, this cause is continued, and may hereafter be continued from term to term for a period of five years, unless sooner dismissed by consent of all parties hereto, or their grantees, successors, assigns, executors, or administrators, or unless said real estate not so partitioned be otherwise disposed of or partitioned, within said time; said real estate not so partitioned being described as follows, to wit: [Various lands.]"

These lands will be hereinafter referred to as the "reserved lands."

The executor collected the rents for 1910 on all of the lands of the estate, and used them in the payment of debts probated against the estate. On April 24, 1913, the executor obtained, in the probate court, an order for the sale of certain of the reserved lands. This sale was duly made, and was confirmed at the July, 1913, term of the court. A second order of sale of these reserved lands was made by the probate court on January 19, 1916, and the sale had pursuant thereto was confirmed at the July, 1916, term of the court. These reserved lands were the least valuable, and it was known that the titles thereto were more or less imperfect, and the decree of November 21, 1910, directed suits to be brought and settlements to be made quieting these titles, but this action was never taken. The title to several tracts of the reserved lands failed, and the whole thereof brought only a little more than \$10,000, falling short of the amount agreed to be placed in the reserve fund by \$5,000.

The executor filed annual reports of his administration, and these were regularly approved in due course. A number of debts were probated against the estate, the largest being that of Mrs. Mai Sparks Briant. This claim, at the end of the litigation required to establish it, amounted to about \$15,000. The Grand Lodge paid Mrs. Briant \$8,500 on this demand after it had been duly probated, and she demanded of the executor the payment of the balance. There were other debts which were not paid in full.

The executor, in conjunction with the Grand Lodge, filed this suit and set out in detail the facts above recited. All parties in interest were made parties defendant. The complaint gave a full history of this litigation in all its ramifications. There was a recital of the proceedings had and done in the probate court, and the showing made that, after exhausting all the assets available under the compromise decree of November 21, 1910, there remained unpaid approximately \$15,000 in debts. This unexpectedly large balance arose out of the fact that the probated debts were much larger than had been anticipated—notably that of Mrs. Briant—and a smaller sum was realized from the

sale of the reserved lands, out of which the \$15,000 fund was to be raised, than had been anticipated. It was alleged that this unsatisfied probated indebtedness was payable, under the terms of the consent decree, by the Grand Lodge and the collateral heirs in the proportion of two-thirds and one-third. It was also alleged that there was a small indebtedness, 40 per cent. of which, under the terms of the consent decree, should be paid by the widow. There was a prayer that an accounting be had to ascertain what amount each should pay, and that liens be declared on the respective allotments of land to enforce payment of same.

The widow filed an answer and cross-complaint, in which she alleged that the reservation of the reserved lands, of the appraised value of \$30,300, from division for the purpose of paying debts meant only the payment of debts in the proportion as provided in the contracts set out above, and that it was not intended in any manner to subject her interest in said lands to the payment of the general debts of the estate, and that her liability for debts was limited to the specific indebtedness mentioned in the contract of settlement and the decree of November 21, 1910, and that these debts did not exceed \$3,000.

By way of cross-complaint, she alleged that her title to certain lands had failed, and she prayed compensation for their value. She further alleged that she was entitled to 40 per cent. of the rent for 1910 collected by the executor, and to dower out of the lands designated as the reserved lands.

There was a prayer that dower be assigned to her out of these lands, but that, in the event these sales were not set aside, she have judgment for 40 per cent. of their appraised value, and that this sum be adjudged a lien against the lands allotted to the Grand Lodge and to the collateral heirs.

Separate answers were filed by the various purchasers of the lands sold under the order of the probate court, and various defenses were raised by these purchasers which need not be stated. The decree contains the following findings of fact:

First. That under the agreement of April 10, 1910, the widow is entitled to receive 40 per cent. of the gross estate of her husband, out of which she should pay 40 per cent. of all balances due on the purchase of lands, and the costs of defending certain litigation pending against Shirey at the time of his death, and the costs of dividing the lands.

Second. That there was no modification of the agreement except that, under the contract of November 11, 1910, and the decree in conformity thereto, it was further agreed that the rents of 1910, and lands of the value of \$15,000, should be used by the executor in paying the general debts of the estate.

Third. That under the decree of November 21, 1910, lands of the appraised value of \$30,-

300 were reserved from which to raise the \$15,000, but on account of defective titles and for other causes only \$10,000, was realized from the sale of these lands.

Fourth. That, as the executor had collected the rents on the lands reserved, and had accounted for same in his settlements in the probate court, thus evincing his intention of appropriating and using same, and that, as this occurred more than five years before the filing of the cross-complaint herein, the cross-complaint was barred, and found further that, by acquiescence in the executor's action, she was estopped from claiming these funds in this action.

Fifth. That the collateral heirs are together entitled to 20 per cent. of the gross estate, and the Grand Lodge to 40 per cent. thereof; but that these two distributees are liable for all debts legally proven against the estate remaining unpaid in the proportion of  $33\frac{1}{3}$  per cent. and 66% per cent., respectively, and also for 20 per cent. and 40 per cent., respectively, of the specific debts of which the widow, under the agreements, was to pay the remaining 40 per cent.

Sixth. That, if it be found that the widow's title to any land had failed, she should have judgment for one-third and two-thirds of the value thereof against the collateral heirs and the Grand Lodge, respectively.

Seventh. That all other creditors whose claims have not been paid should have judgment against the collateral heirs, and the Grand Lodge for one-third and two-thirds thereof, respectively, except the claim of Mrs. Briant.

Eighth. The claim of Mrs. Briant was adjusted by giving the Grand Lodge credit for the \$8,500 which it had paid on that demand.

There was a reference to a master to state the account. The master was directed to take into account the value of any land to which the title had failed, to whomsoever assigned, except the reserved lands, and to ascertain the specific debts which all the parties were to pay in proportion to their respective distributive shares. All parties excepted to the finding and decree of the court.

The master made a very elaborate report, which was filed November 10, 1920. Numerous exceptions to the report were filed, but it was in all things approved. All parties prayed an appeal from this order; but as only Mrs. Byrnett has perfected an appeal, we consider only the questions raised by her.

[1] The big and controlling question in the case is what construction should be given to the agreements of April 19 and November 11, 1910, and the decree thereon. When that has been settled, other questions cease to be difficult. The court below evidently had the view that the purpose of these agreements was to make the parties thereto mere distributees in given proportions; and we concur in this view. It is true the widow was given her share freed from liability for the general debts which would have to be established in the probate court, but we do not think that fact alters the character of the share which she took.

It was recognized that there was certain indebtedness for which the entire estate was liable, and for this reason the executor was made a party. A fund was provided which was thought to be sufficient to discharge the debts—this fund being composed of the reserved lands, the personal property, and the rents of 1910. Manifestly all parties surrendered their interest in the reserved lands. Indeed, each of the parties specifically relinquished all of their rights in the estate, except their respective distributive shares, both to the estate and to the other parties to the agreement.

[2] The rights of the widow were, of course, taken into account in fixing her share, but the share assigned her under the agreement was that of a mere distributee. She was given this share in satisfaction of her claim of dower, and, being *sui juris*, there was no reason why she might not make that agreement. *Felton v. Brown*, 102 Ark. 658, 145 S. W. 552.

[3] We think there was no attempt here to lift the administration of the estate out of the probate court. The creditors were not parties to the agreements set out herein. They had no place to go except the probate court to prove up their demands. All parties knew these creditors were proving up their demands in the probate court, and that they were being paid *pro tanto*, through the orderly processes of that court, full statements of which appeared from the annual settlements and reports of the executor.

[4] The manifest purpose and effect of the agreement of November 10, 1910, and of the decree thereon of date November 21, 1910, was to provide a fund which would be used for the three purposes therein specified; but the fund was exhausted, contrary to the expectations of the parties, in the discharge, in part, of the first purpose for which it was apportioned. None of that fund was therefore available for the second and third purposes there specified. This appears to be the fair and reasonable construction of the language employed in the agreements of the parties and of the consent decree putting those agreements into effect.

We are reinforced in this view when we consider the conduct of the parties thereunder. This consent decree provided that the cause, as to the reserved lands, should be continued from term to term for a period of five years, unless dismissed by consent of all the parties thereto, or unless said reserved lands were partitioned or otherwise disposed of within that time.

With the apparent acquiescence of all parties, the executor proceeded to sell these reserved lands under the orders of the probate court, and to this action no objection was made. A very forceful argument is made that, even though the court below erroneously

interpreted the agreements between the parties and the decree thereon, yet the widow has become barred by the statute of limitations, and by laches, and that by her conduct she has estopped herself to raise the questions she now presents.

These last questions we do not feel called upon to decide; but, as we have already said, we think her conduct reinforces the interpretation of these agreements and the consent decree given to them by the court below; and the decree rendered in accordance with that view is therefore affirmed.

# WADE et al. v. TEXARKANA BUILDING & LOAN ASS'N et al. (No. 147.)

(Supreme Court of Arkansas. Oct. 10, 1921.)

1. Principal and agent ⇨103(4)—Agent's authority to receive payments established by receipt of prior payments.

Vendors, who permitted agent through whom they had sold land to collect installments of purchase price from purchaser, and who credited payments so received on purchaser's contract, are estopped from denying agent's authority to receive such payments.

2. Vendor and purchaser ⇨93—Vendors could forfeit for default on payments.

Where contract for sale of land provided for forfeiture if purchaser defaulted in payments for 60 days, vendors, in the event of such default, had the right to declare the contract at an end, and to treat purchaser thereafter as their tenant, and the payments made by him as rents.

3. Vendor and purchaser ⇨95(1)—Forfeiture may be waived.

Forfeiture provision of land contract, having been made for vendors' benefit, could be waived by vendors.

4. Vendor and purchaser ⇨95(2)—Vendors held to have waived right of forfeiture.

Vendors, who continued to accept payments from purchaser notwithstanding purchaser's failure to make the payments when they fell due, without indicating to purchaser that they considered his contract forfeited, and that they would treat him as a tenant, waived the right to declare the contract forfeited and to treat purchaser as their tenant rather than as the purchaser.

5. Estoppel ⇨74(2)—Grantors held estopped as to grantee's mortgagee from denying that amount specified in deed as consideration had in fact been paid.

Where vendors, without forfeiting purchaser's contract, conveyed land by warranty deed to third person, who thereafter obtained a mortgage on the land by showing mortgagee such warranty deed, the mortgagee, on mortgage being declared void, could recover from vendors the amount specified in such deed as

the consideration, though in fact a smaller amount was paid by third person to vendors at time of execution of deed; the vendors being estopped from denying that the full amount recited as the consideration had in fact been paid.

6. Evidence  $\S$ 419(2)—Parol testimony admissible to show true consideration in suit for breach of warranty in deed.

In a suit for breach of warranty in a deed, parol evidence is generally admissible to show the true consideration for the purpose of increasing or diminishing the damages.

7. Covenants  $\S$ 79(1), 130(7)—On covenant of warranty covenantor's vendee may recover from remote warrantor the sum such warrantor received from his grantee, but not more.

The covenant of warranty runs with the land, and passes to covenantor's vendee or assignee, who in case of eviction or failure of title may recover from the original or remote grantor or warrantor the sum which such original grantor or warrantor received from his grantee, with interest thereon from the time of the conveyance to the last vendee or assignee, but cannot recover more than such sum.

Appeal from Miller Chancery Court; Jas. D. Shaver, Chancellor.

Action by the Texarkana Building & Loan Association against John W. Welch and wife, in which Frank Mosley intervened and to which M. C. Wade and B. H. Kuhl were made parties. From the decree rendered, in favor of plaintiff and intervener Mosley, M. C. Wade and B. H. Kuhl appeal. Affirmed.

Jones & Head, of Texarkana, for appellants.

Arnold & Arnold, of Texarkana, for appellees.

WOOD, J. On the 7th day of April, 1921, Frank Mosley and M. C. Wade entered into the following contract:

"I hereby make application for lots 12 and 13 in block 3 in Iron Mountain addition to Texarkana, Arkansas, at the price of \$425.00, payable \$10.00 per month without interest, except after maturity, and all past-due payments to draw 10 per cent. interest. It is agreed that I am to get general warranty deed when I have paid amount due in full. It is understood and agreed that when payments are sixty days behind, this contract is null and void, and all payments made shall be forfeited as rents."

M. C. Wade and B. H. Kuhl were the owners of the lots described, and Wade, in entering into the above contract, was acting for himself and Kuhl. The Iron Mountain addition was a negro settlement. John W. Welch, a negro, was employed by Wade and Kuhl to sell lots for them, and to receive and turn over to them contracts of sale made by him with purchasers of lots, and to collect the

first payment. The sales he made were subject to the approval of Wade and Kuhl. The contracts when entered into were to be signed by Wade and returned by Welch to the purchaser.

The above contract was consummated in this manner. Following the printed matter on the sheet were blanks to be filled in showing the particular date and amount of each payment. All of the payments made under the above contract were made to Welch. Of the amounts paid Welch he turned over to Wade and Kuhl the sum of \$317.50. Mosley testified that he made other payments to Welch which were not turned over by him to Wade and Kuhl, and these payments were indorsed on the contract, which brings the total amount of the payments made by Mosley as shown by the indorsements to \$412.50. The last of these indorsements was made July 15, 1919. Mosley made a further payment to Welch, as shown by a receipt dated April 24, 1920, of \$30, making a total of \$442.50 paid as purchase money by Mosley to Welch on the lots under the contract above mentioned.

According to the testimony on behalf of Wade and Kuhl, all the payments under the contract matured in 1915. Mosley never complied with the terms of the contract, but the vendors continued to receive payments under it long after maturity of the contract. In November, 1919, there being still a considerable sum due, the vendors elected to declare the contract of sale void, and to treat the payments as rents, and on December 1, 1919, they sold the lots mentioned to John W. Welch, executing to him a warranty deed for the same, in which the consideration mentioned was \$425. John W. Welch actually paid them the sum of \$142.20. Kuhl testified concerning this transaction as follows:

"We deeded the lots to John W. Welch without figuring the interest on the deferred payments for practically what was due on the contract at the time he purchased. We took his representation for it. He claimed that Mosley had left the country—was down in South Texas or somewhere, and his wife was here in bad circumstances—and we told him at the time that the contract was void because the time had elapsed, and we declared it now void, and we wanted him to go ahead and sell it to some one else. He begged because I think he said Mosley's wife was his cousin, and asked if I would allow him to preserve the woman's equity in the property by paying the balance and deeding it to him, and let him in turn deed it to her, and I said I would under the circumstances. \* \* \* The sum of \$142.20 paid by John W. Welch was the balance due at the time of the contract without figuring the interest on deferred payments."

Mosley went into possession of the lots soon after the contract for the purchase

thereof was entered into, and made improvements thereon, and has since continuously occupied the same with his family as a home.

On January 16, 1920, the Texarkana Building & Loan Association took a mortgage from John W. Welch on certain properties, including the lots mentioned, to secure a note for \$2,525, representing the amount of money which the association had loaned Welch.

This suit was instituted by the Texarkana Building & Loan Association and the trustee in the mortgage against John W. and Mattie Welch, his wife, to foreclose the mortgage. Mosley intervened, and set up that he was the owner of the lots in controversy under his contract of purchase above mentioned, which he alleged had been fully executed on his part by the payment of the purchase money. He alleged that he had no knowledge of the warranty deed executed by Wade and Kuhl to John W. Welch, and that the same was executed by the parties to it by collusion, and with a fraudulent intent to defeat him of his rights of title to the property; that the grantees, Welch and wife, thereafter executed a mortgage or deed of trust to the Building & Loan Association, conveying the lots in controversy, with a fraudulent intent also to deprive him of his title; that the association and its trustee, Sanderson, were cognizant of and charged with notice of Mosley's equity in the lots. He prayed that his title to the property be declared and vested in him.

The Building & Loan Association answered the intervention of Mosley, setting up the deed from Wade and Kuhl to Welch and wife, and the mortgage from Welch and wife to it, and asked that the same be foreclosed. It also alleged that, if Wade and Kuhl breached their contract with Mosley by conveying the lots in controversy to Welch, it was entitled to recover of Wade and Kuhl the sum of \$425, the amount of the consideration named in the warranty deed from them to Welch, because it had relied upon said deed in making the loan to Welch. It also set up that Mosley had forfeited his contract with Wade and Kuhl. It prayed that the intervener take nothing, that Wade and Kuhl be made parties, and that in the event it be adjudged that Mosley was the owner of the lots, it have judgment against Wade and Kuhl for breach of warranty of their deed to Welch in the sum of \$425, the consideration named therein. Wade and Kuhl were made parties, and they also answered the intervention of Mosley, denying all of its allegations, set up the contract mentioned, and claimed that Mosley had forfeited his right as purchaser thereunder, and that they had declared such forfeiture and had treated the contract as one of rental, and had declared the same null and void as to Mosley, and had conveyed the property by warranty deed to Welch. They also answered the cross-com-

plaint of the Building & Loan Association and the trustee in the mortgage, denying its allegations, and setting up that they had executed a warranty deed to Welch for the actual consideration of \$142.50, and that the sum of \$425 mentioned in the deed was not the true consideration. They prayed that the intervention of Mosley be dismissed, and their deed to Welch be confirmed, and for all proper relief.

The above are substantially the issues and the facts upon which the court rendered a decree vesting the title to the lots mentioned in Mosley, and divesting the title out of Welch and wife and out of Wade and Kuhl, and also entered a decree in favor of the Building & Loan Association against Wade and Kuhl for breach of warranty in their deed to Welch in the sum of \$425, with interest at 6 per cent. from January 16, 1920, and also foreclosing the mortgage on the other property mentioned therein. It was shown that the Building & Loan Association derived from the mortgage foreclosure the sum of \$1,824.35, leaving a balance due it under the decree of \$618.40. From the decree of the court Wade and Kuhl and Mrs. Kuhl prayed and were granted an appeal.

[1, 2] Both the appellants, Wade and Kuhl, testified that Welch had authority to sell the lots in controversy and to collect the first payment, but they also testified that he had no authority beyond this. But whether Welch had any actual authority to collect any but the first payment we need not stop to consider, for it is certain from the preponderance of the evidence in this case, which it is unnecessary to set out and discuss in detail, that Welch had apparent authority to represent the appellants, not only in making the sale and collecting the first payment, but also in collecting subsequent payments. Mosley continued to make the subsequent payments to Welch which the appellants received from him and credited on Mosley's contract of purchase. Indeed, Mosley testified that he paid all the money on the property to Welch, and the appellants do not controvert this, nor do they controvert the fact that they received such payments as were made by Welch, and credited the same on Mosley's contract of purchase. By their conduct they clearly held Welch out to Mosley as having authority to receive the payments made by him on his contract of purchase, and they are now estopped from saying that Welch had no such authority. By the express terms of the contract under review it became null and void as a purchase contract if Mosley defaulted in the payments for 60 days, and the appellants had the right under the contract after such default to declare the contract of purchase at an end, and to treat Mosley thereafter as their tenant, and the payments made by him as rents. *Sorrels v. Marble*, 142 Ark. 300, 218 S. W. 671; *Hanson v. Brown*,

139 Ark. 60, 213 S. W. 12; *Souter v. Witt*, 87 Ark. 593, 113 S. W. 800, 128 Am. St. Rep. 40.

[3] But, the provision forfeiting the right of Mosley as purchaser upon default in making payments as prescribed was one made for the benefit of the appellants, which they could waive. See above cases. The facts are that Mosley, immediately upon the execution of the contract, entered into possession of the property, and continued in the possession of the same, making improvements, paying the taxes, and holding the same continuously as purchaser and owner and not as tenant. The appellant testified that Mosley made default after the first payment, but the uncontroverted testimony in the record shows that the appellants never at any time indicated to Mosley that they considered his contract of purchase forfeited, and would thereafter treat him as a tenant. On the contrary, they continued even to the time of making the warranty deed to Welch to treat Mosley as the purchaser, and the testimony of Kuhl himself shows that their warranty deed was executed to Welch for the consideration of \$142.50 upon the representation made by the latter that he should be allowed "to preserve the woman's equity in the property by paying the balance and deeding it to him and let him in turn deed it to her."

[4] The issue as to whether the appellants had waived the forfeiture was one depending upon the facts and circumstances developed by the testimony, and, as we view the evidence, the facts are undisputed, and show clearly that the appellants had waived their right to treat Mosley as their tenant rather than as the purchaser. See *Souter v. Witt*, and other cases, *supra*.

As between the appellants and Mosley the next question then is: Had Mosley complied with the terms of the contract by making full payment of the purchase money? This is purely an issue of fact. The original contract of purchase shows indorsements of payments made thereon, and the last payment of \$10 was indorsed July 15, 1919, which brought the total payments to that date to \$412.50, and left a balance due at that time on the principal of \$12.50, not including interest. Mosley testified that on April 24, 1920, Welch brought the final report, showing that the balance due on the purchase money for the lots was \$70, and he presented in connection with it a deed purporting to be signed by Wade and Kuhl to Mosley and wife; that he paid Welch at that time the sum of \$30, leaving a balance due of \$40; that he was going away, and told Welch that he would pay the balance when he returned. When he came back Welch was gone, and the \$40 claimed by Welch as the balance was not paid. But it appears from the indorsements on the original contract of purchase that, exclusive of interest after the last payment on July 15, 1919, there was only due the sum

of \$12.50. Therefore the payments made by Mosley of \$30 on April 24, 1920, overpaid the balance due of the purchase money in the sum of \$17.50, not including interest. But we are convinced from the testimony of Kuhl himself that the appellants did not intend to and did not charge Mosley any interest on the deferred payments of purchase money, for the reason that the testimony of Kuhl shows that the appellants received the sum of \$142.50 as a balance of the consideration due by Mosley under the contract. Kuhl expressly stated that the sum of \$142.50 was paid by Welch and received by the appellants as the balance due under that contract.

As before stated, the testimony clearly shows that Mosley had paid to Welch, treating him as the agent of the appellants, more than the amount called for as purchase money under the contract, not including interest. It occurs to us that the determination of the appellants to charge Mosley interest on the deferred payments of purchase money was an afterthought, and one of the eventualities of this lawsuit; that such was not in contemplation of the parties at the time Welch, acting for the appellants, received from Mosley payments which in the aggregate exceeded the balance due by Mosley at the time the last payment of \$30 was made. That Welch did not account to his principals for all the money which Mosley paid him is not the fault of Mosley. The appellants, as we have shown, held Welch out to Mosley as having authority to receive these payments, and Mosley was justified in so treating him and in making the payments to him. The court, therefore, was correct in holding that Mosley had paid the full consideration for the lots, and in entering a decree investing and quieting title to same in him.

[5. 6] The court entered a decree in favor of the Building & Loan Association against the appellants in the sum of \$425, the amount of the consideration named in the warranty deed from appellants to John W. Welch, with interest thereon at the rate of 6 per cent. per annum from the date of the mortgage by Welch to the association. The decree in this respect was correct. When Welch executed the mortgage to the association, including the lots in controversy, he presented to the association a warranty deed from appellants to him, showing as a consideration for the lots in controversy the sum of \$425. On the mortgage debt to the association Welch is still due the sum of \$618.42, with interest and costs of the foreclosure suit. Under the circumstances disclosed by the undisputed testimony, the appellants, as between them and the association, are estopped from claiming that they only received a consideration of \$142.50 for their warranty deed to Welch, conveying the lots in controversy. Welch represented to Wade and Kuhl that the \$142.50 was being paid by him for Mosley on the



latter's contract of purchase. The testimony of Kuhl showed that the appellants acted upon this representation, and made a deed to Welch, expecting him in turn to deed the lots to Mosley. In making up the consideration for the deed the former payments that had been made by Mosley to Welch were embraced. By deeding the lots directly to Welch instead of to Mosley, they thus put it in the power of Welch to defraud the building and loan association by presenting their warranty deed to him. Appellants knew at the time they executed the deed to Welch that Mosley's contract of purchase was outstanding. The appellee did not know this. In a suit for breach of warranty in a deed, as a general rule, parol testimony is admissible to show the true consideration for the purpose of increasing or diminishing the damages. *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464; *Davis v. Jernigan*, 71 Ark. 494-497, 76 S. W. 554. But the appellants cannot avail themselves of that rule against the association, because their conduct in connection with their deed to Welch should estop them from disputing the consideration which they specified.

[7] The covenant of warranty runs with the land, and when the purchaser or coven-

antee conveys the covenant passes to his vendee or assignee, and such vendee or assignee, in case of eviction or failure of title, may recover from the original or remote grantor or warrantor the sum which such original grantor or warrantor received from his grantee, with interest thereon from the time of the conveyance to the last vendee or assignee, but he cannot recover more than this sum. *Barnett v. Hughey*, supra; *Hollingsworth v. Mexia et al.*, 14 Tex. Civ. App. 363, 37 S. W. 455; *Lewis et al. v. Ross et al.*, 95 Tex. 358, 67 S. W. 405. See, also, *Phillips v. Reichert*, 17 Ind. 120, 79 Am. Dec. 463; *Brooks v. Black*, 68 Mass. 161, 8 South. 332, 11 L. R. A. 176, 24 Am. St. Rep. 259; *Rogers v. Golson* (Tex. Civ. App.) 31 S. W. 200. See, also, 11 Cyc. 1170.

Since appellants, under the circumstances, must be held to have received from Welch the sum of \$425 for the purchase of the land, and are estopped from asserting otherwise, the court was correct in awarding a decree in favor of the appellee for that sum, with interest thereon at 6 per cent. from the date of its mortgage from Welch. The decree being in all things correct, it is affirmed.

**JOHNSON v. KANSAS CITY RYS. CO.**  
(No. 14023.)

(Kansas City Court of Appeals. Missouri. June 13, 1921. Rehearing Denied July 7, 1921. Certiorari to Supreme Court Denied.)

**1. Trial  $\S$ 83(1)—Objection to evidence must be specific and state grounds.**

An objection to the admission of evidence must be specific and contain the proper ground for its exclusion, else the trial court will not be convicted of error for overruling it.

**2. Negligence  $\S$ 138(3)—Charge confined to specific allegations.**

Where petition pleads specific negligence, a judgment will not be permitted to stand where the case is submitted upon general negligence.

**3. Carriers  $\S$ 321(23)—Petition held to charge general negligence as to operation of car, so that case was properly submitted under such charge.**

Allegation in a petition that the "defendant, its agents, servants, and employees in charge of and operating the car, \* \* \* carelessly and negligently caused and permitted said car \* \* \* to strike and collide with another car upon the same track," etc., held a general charge of negligence as to operating the car on which plaintiff was riding, and not specific negligence, though the crowded condition of the car was alleged, but only in explanation of plaintiff standing where she did, and the case was properly submitted under a general charge as to such negligence causing the collision, there being no question of any persons other than those in charge of the car on which plaintiff was riding being at fault.

**4. Trial  $\S$ 122—Jury held not led by colloquy between counsel and court to understand defendant had a right to examine injured plaintiff.**

In a personal injury case, where there was a colloquy between counsel and the court, concerning right of defendant to have plaintiff examined, held, that the jury could not be led to understand that defendant had an absolute right to have a commission examine plaintiff.

**5. Appeal and error  $\S$ 1015(5)—Construction of colloquy taken by trial court on motion for new trial adopted unless record clearly shows error.**

When the trial court has by its action on motion for new trial indicated its construction of what took place in a colloquy between counsel and the court, the appellate court should not disagree therewith unless the record is absolutely and clearly the other way.

**6. Trial  $\S$ 133(3) — Improper remarks of counsel held not to require discharge of jury.**

In a personal injury case, remarks of plaintiff's counsel to the jury that plaintiff was a single woman and had no husband to care for her and might become a charge upon the county if she did not recover damages were not such as to require the court to discharge the jury on the request of defendant's counsel; the court sustaining defendant's objections to such remarks.

**7. Damages  $\S$ 130(3)—\$7,500 not excessive for injuries to ribs, spine, ankle, lungs, etc.**

A verdict for \$8,250 reduced to \$7,500 was not excessive as to a single woman who had her nose and lips cut and mashed, teeth loosened, hemorrhage into the antrum, causing an abscess on her cheek and much pain, four ribs broken, wrist, ankle, spine, and pelvic organs injured.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Edith Johnson against the Kansas City Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. J. Higgins, of Kansas City, Kan., and Chas. N. Sadler, John E. Connors, E. E. Ball, and Gabriel & Conkling, all of Kansas City, Mo., for appellant.

Joseph G. Littick and Milton J. Oldham, both of Kansas City, Mo., for respondent.

**TRIMBLE, P. J.** Plaintiff's action is for damages on account of personal injuries received while a passenger on one of defendant's cars through its collision with another car headed the same way and on the same track. She obtained a verdict of \$8,250, of which amount she voluntarily remitted \$750, reducing it to \$7,500, for which judgment was rendered, and defendant has appealed.

The evidence in plaintiff's behalf tended to show that on the morning of the 2d of October, 1918, plaintiff was a passenger on one of defendant's cars. It was crowded, and she was standing in the front vestibule immediately behind the motorman, who was fenced off from the vestibule by a little partition the top portion of which was glass. Her evidence is that the car was going north, and plaintiff could see ahead of the car. When the car plaintiff was on reached a point about halfway between Thirtieth and Twenty-Ninth streets she saw another car on the same track at Twenty-Ninth street which was standing still to take on or let off passengers. It was a foggy morning, the fog being thick in low places. From the point where plaintiff noticed the standing car the one she was on ran rapidly to and collided with the standing car. Plaintiff was thrown against the partition in front of her and then to the floor unconscious, and was unable to say what occurred after the collision. She was picked up and carried in an unconscious state to a nearby drug store, and was afterwards taken, still in an unconscious condition, to the hospital. During the time at least that she was being taken from the car and cared for in the store she was moaning and spitting blood. She was unconscious for several days in the hospital, and remained there for fourteen weeks, and then was taken home, where she was in bed and about the house for

seven weeks, during all of which time she was under the care of a physician. She left the hospital on January 7, 1919, but on December 11 of that year she returned and stayed for a period of six weeks. As to this second trip to the hospital, however, one of her witnesses said she went there because of an attack of pneumonia, but, on objection of defendant, this was stricken out because the witness was not competent or qualified to speak on that subject. Another of her witnesses said she went back to the hospital the second time on account of a "bad cold." Afterwards her doctor, on cross-examination, said she was stricken with bronchial pneumonia a day or two before her second admission to the hospital.

[1] Later on plaintiff sought to prove by the doctor that the pneumonia could be superinduced by her condition resulting from the injury, to which defendant objected, and thereupon plaintiff's physician testified that, as plaintiff had a chest injury, she would be more liable to infections. Defendant's objections to the questions, however, were that they called for the witness' conclusion, that the evidence was incompetent, irrelevant, and immaterial, and did not tend to prove or disprove any issue in the case. No objection was made that the evidence was not within the pleadings, nor was the trial court's attention called to that feature or ground of objection. It is well settled that an objection to the admissibility of evidence must be specific and contain the proper ground of its exclusion, else the trial court will not be convicted of error for overruling it. *Griveaud v. St. Louis, etc., R. Co.*, 33 Mo. App. 453; *O'Neill v. Kansas City*, 178 Mo. 91, 77 S. W. 64; *Carthage, etc., Co. v. Central Methodist Church*, 156 Mo. App. 671, 137 S. W. 1023.

The evidence in plaintiff's behalf tends to show that her face, nose, and lips were cut and mashed; four of her teeth were loosened; there was a hemorrhage into the antrum causing an abscess on her cheek and much pain; she had four ribs broken; her wrist, one ankle, and her spine were injured, with indications that the latter suffered a concussion producing a derangement of the cells of the spinal cord and a resulting neurosis; also her pelvic organs were injured, her womb retroverted, her menstrual flow first interrupted and then coming on and continuing without ceasing; and many other conditions, including insomnia, nervousness, and the necessity of submitting to an operation if the displacement of her womb is to be corrected. Before the injury she was a well, strong woman, able to do hard work, but cannot do such work since. She was under the care of the doctor throughout the time from the injury to the date of the trial, and was still suffering therefrom when she went to the hospital the second time.

The defendant's evidence admitted the col-

lision, but asserted that it was very slight, causing a jar, but not a severe one. Its evidence was further to the effect that it knew of no one being carried off the car or being injured; that no report of any injury was made to the company. Concerning the collision the conductor testified:

"Q. I will get you to state, Mr. Crandell, what, if anything, unusual occurred at Twenty-Ninth and Main street on this morning? A. Well, I couldn't say there was anything unusual. Our car was running very slow, I should judge above five miles per hour, when the front end of our car ran into the rear end of another car. It caused a jar in the car, but not a severe one, but I know there were several people who said they were shaken up. I took the names of about three or four and possibly five people, but none of them I would say was injured, but if they were it was very slightly."

And the motorman testified:

"Q. Just state in your own words how your car ran into the other car, and at what place? A. I was running north on Main street at about Twenty-Ninth street, and was going at about the rate of five miles per hour, and when I saw the car in front of me, I immediately applied my brakes and stopped car at about the time my car collided with the other."

Also the defendant introduced the evidence of a witness by the name of Sherwood, who testified that he had known the plaintiff for ten years, and during that time she was a woman of apparently poor health; that about four years before the trial she fell on the ice and injured her back and head; since that fall she has been getting worse; that he assisted her to her home, where she remained in bed for about four weeks. He did not know the name of the physician who attended her and never inquired.

The plaintiff denied that she ever had a fall on the ice, and a number of witnesses testified to her good health and ability to do hard work prior to the injury on the car and of her long disability on account thereof and her subsequent inability to work. There was evidence from her physician that her condition is permanent.

[2] It is urged that plaintiff's petition pleaded specific negligence, and that her instructions 1 and 2 submitted the case upon general negligence. Of course, if this be true, then the judgment must be reversed, and the cause remanded.

The allegation of negligence is as follows:

"The defendant, its agents, servants, and employees in charge of and operating the car upon which the plaintiff was riding as a passenger, when it reached a point at or near the intersection of Twenty-Ninth and Main streets in said city, carelessly and negligently caused and permitted said car on which plaintiff was a passenger to strike and collide with another car upon the same track operated in the same direction by the defendant bound north to the

downtown district; that said car at the said time plaintiff took passage thereon was overloaded and crowded, wherein plaintiff was compelled and required to stand in the vestibule, the front part of the car; that at the time of the collision and contact with said forward car plaintiff was thrown with great force and violence against the iron railing encircling the motorman, the framework, and to the floor of said car and received serious, lasting and permanent injuries, as hereinafter alleged, all by reason of the carelessness and negligence of the said defendant, its servants, agents, and employees, in the management, operation, and control of its said car, whose duty it was to carry said plaintiff safely to the point of destination."

Plaintiff's instruction 1 told the jury that, if plaintiff was a passenger on said car, defendant's obligation was—

"to use the highest degree of care practicable among prudent, skillful, and experienced men in that same kind of business to carry her safely, and a failure of the defendant (if you believe there was such a failure) to use such highest degree of care would constitute negligence on its part; and defendant would be responsible for all injuries resulting to the plaintiff, if any, from such negligence, if any. And if you believe from the evidence that there was a collision between two street cars of defendant on one of which plaintiff was a passenger (if you believe she was a passenger thereon), the presumption is that it was occasioned by the negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injury, if any, was occasioned by inevitable accident, or by some cause which such highest degree of care could not have avoided."

Plaintiff's second instruction told the jury that, if they believed plaintiff was a passenger on the car "at the time of the collision appearing in evidence, and received injuries therein, then the burden of proof is shifted from the plaintiff upon the defendant to show, to the satisfaction of the jury, that said collision was caused through no fault or negligence or carelessness of defendant's agents, and, unless it is so shown, the jury should find a verdict for the plaintiff."

[3] With regard to the alleged error here considered, it will be observed that the only negligence charged is that the "defendant, its agents, servants, and employees in charge of and operating the car, \* \* \* carelessly and negligently caused and permitted said car \* \* \* to strike and collide with another car upon the same track operated in the same direction," etc. The fact that the car was crowded was alleged, but only in explanation of why plaintiff stood where she did instead of being seated; it is nowhere alleged that the crowded condition of the car was negligence or that such caused or had anything to do with causing her injury. Indeed, the quotations made by appellant's

brief show that it does not consider that the crowded condition of the car is any part of the negligence alleged or relied on by plaintiff. Furthermore, there is nothing in the case anywhere, either in the pleadings or in the evidence, that the collision came about through the acts or negligence of the operatives of the other or motionless car, but only through the negligence of those "in charge of and operating the car" on which plaintiff was riding. Moreover, the plaintiff's instructions 1 and 2, of which complaint is made, clearly do not attempt to extend the question of the cause of plaintiff's injuries to anything other than the collision and to the negligence of defendant, its agents and servants in charge of the car, in allowing that to occur. There was nothing anywhere in the case tending in any way to show that such negligence was other than the negligence of the operatives of the car plaintiff was on. The other car was standing still, headed the same way as plaintiff's car, and engaged in letting off or taking on passengers. The defendant admitted the collision, but sought to excuse it because of a fog, and the motorman of plaintiff's car said he was running slow, not over five miles an hour, and when he saw the car ahead he applied the brakes and stopped just as his car struck the other one, causing only a slight jar. He does not say how far he could have seen the car, but only that when he saw it he applied his brakes, though the implication from defendant's other evidence may perhaps be that the fog was so dense that one could see only five feet ahead, and that on this account the motorman saw the car as soon as it could be seen. So that the whole controversy as to negligence was solely as to whether the operatives of the car plaintiff was on were negligent. And plaintiff's instructions, referring as they do to the car on which plaintiff was a passenger and to the defendant's duty to carry her safely thereon and to the question of the negligence of defendant's agents, are so worded as that the jury could not fail to understand that it was the negligence of the operatives of plaintiff's car in causing or permitting the collision that was submitted. Especially is this true where defendant, having admitted the collision, sought to avert the presumption of negligence arising from that fact by attempting to show that the operatives of said car were not negligent because of the fog. Hence we are unable to perceive any real difference between the petition and the instructions as to the negligence charged. Certainly the jury could not fail to understand that the issue of negligence was as to the negligence of those in charge of plaintiff's car, and not some other agents of defendant. So that we cannot see how it can be successfully maintained that reversible error was committed in that the petition declared on specific negligence while the instructions permitted a recovery for general

negligence. So far as concerns the manner in which or how the collision occurred, the charge is certainly general. It is not like the one in the case of Beave v. St. Louis Transit Co., 212 Mo. 331, loc. cit. 351, 111 S. W. 52, 53; for there the petition specified wherein the collision was brought about, namely, because the defendant "negligently maintained said car and the machinery and appliances thereof, and the brakes and running gear thereof." It is also unlike the case of Gibler v. Quincy, etc., R. Co., 148 Mo. App. 475, 481, 128 S. W. 791; for there the petition specified what caused the jar, namely, the engineer's handling of the train, whereby the cars became uncoupled, and the evidence tended to show that the "rough handling" of the train by the engineer caused the cars to uncouple, thereby setting the automatic air brakes on the cars equipped therewith, thus stopping them, but allowing the cars not so equipped to continue on in their course and strike the others with terrific impact, causing the injury. If the petition in the case at bar had alleged a collision and then had pointed out wherein that collision was negligently brought about or caused, or had it charged a negligent failure to have proper appliances and pointed out the insufficient appliances, or "had it charged that the collision was due to some negligent condition of the track, naming and pointing out such, or other such similar specific acts, then there would have been [a charge of] specific negligence." Price v. Metropolitan St. Ry. Co., 220 Mo. 435, 454, 119 S. W. 932, 937 (132 Am. St. Rep. 588).

The case at bar is not like that of Miller v. United Railways Co., 155 Mo. App. 528, 134 S. W. 1045, for in that case the doctrine of *res ipsa loquitur* did not apply. For there the collision was between a runaway team and the car, and the charge was against the motorman, and the evidence was that he saw the team coming and slowed down the speed of the car so as to make of the car a barrier across the street to stop the team. In other words, the accident was such as, in the ordinary course of things, would not have happened if proper care had been used as in the case of a collision of one car with another headed the same way and on the same track.

Since writing the above we have come across the case of Kean v. Smith-Reis Piano Co., 227 S. W. 1091, and it confirms our view as to the allegation in the case at bar being one of general, and not specific, negligence. The cases bearing on the subject are cited and analyzed in the Kean Case, and we need only call attention thereto. We do not think that the charge in the case at bar has been changed from general to specific negligence merely because of the fact that the petition inserted after the word "defendant" the words "its agents, servants, and employees in charge of and operating the car upon

which the plaintiff was riding," etc. The defendant is a corporation, and could only act through its agents and servants, and hence the petition alleged no more than if it had said "the defendant negligently caused and permitted said car on which plaintiff was a passenger to strike another car upon the same track operated in the same direction."

We do not agree with appellant in its contention that the plaintiff's evidence showed any specific act of negligence but only showed a violent collision through a want of care, which defendant attempted to excuse on the ground that there was a fog. So that there was no element of "unfairness" in the way the case was submitted, since the jury could not fail to understand and know that the issues they were to decide were whether the collision could have been prevented by the degree of care required and whether plaintiff was injured thereby, and, if so, to what extent.

It is urged that reversible error was committed in the argument of plaintiff's counsel to the jury. Once plaintiff's counsel referred to plaintiff as a single woman and asked, if she is unable to work, who is going to care for her, as she had no husband. Defendant objected, and the court sustained the objection, and ruled that the remark was improper. The defendant asked that the jury be discharged. The court, without ruling on that request, continued to admonish counsel who had made the improper argument to confine himself to the record and not argue something else. Later on counsel for plaintiff remarked that she (plaintiff) was compelled to make her own living or she would become a public charge. That was objected to, and the objection sustained; the court ruling that it was improper. Defendant asked to have the jury discharged. The court overruled the request, but again admonished plaintiff's counsel.

Later on counsel, after reviewing the evidence on one side, proceeded to sum up the testimony on the other side, and remarked that, outside of one witness who in three words said it was a foggy morning, there were the affidavits "of three or four witnesses that counsel for defense read to you, which we agreed to admit, and it is true—" Here defendant objected to counsel's statement as being incompetent, irrelevant, and immaterial and prejudicial, and moved that the jury be discharged. Counsel immediately withdrew the statement. The court rather sharply chided counsel for plaintiff, telling him, among other things, he "ought to know that it is not proper argument," and at the conclusion of the court's remarks to plaintiff's counsel said it would overrule the motion to discharge the jury at this time, but counsel "had better confine your argument—" Here defendant interrupted the court by saving an exception to its ruling.

Afterward plaintiff's counsel said, "These statements of the testimony of defendant in this case, it was agreed to admit it." It does not appear in what connection the words were used nor what idea was being conveyed. No objection of any kind was made to these words, nor was the attention of the trial court called thereto in any way.

During the course of the argument of another of plaintiff's counsel, in answering the defendant's argument that plaintiff had "camouflaged" or had hidden the plaintiff's condition from them, he said that they (the defendant company) could have had her examined by physicians, and all they had to do was to ask for it, they could have taken her deposition." The defendant objected on the ground that "that is entirely within the discretion of the court." Plaintiff's counsel replied, "Oh, no; it is in your discretion if you want it done." Defendant's counsel said:

"I object to it because it is entirely within the discretion of the court whether the plaintiff should be examined or not. I move that the jury be discharged.

"The Court: Yes; the court appoints on application.

"Plaintiff's Counsel: I understand that, if the court please, but I say they could have taken her deposition. They say we had hidden this from them. We have hidden nothing.

"Defendant's Counsel: That is objected to, if the court please; that is entirely in the discretion of the court.

"The Court: You make an application and the court appoints.

"Plaintiff's Counsel: I say they could have taken her deposition without any appointment.

"The Court: Oh, her deposition."

[4, 5] We think that, taking the record as a whole, it shows that the court, when it said in reply to defendant's contention, "Yes; the court appoints on application," was agreeing with defendant's contention that it was in the discretion of the court, and that when plaintiff's counsel said, "I understand that, if the court please, but I say they could have taken her deposition," this was in effect a concession that such was the rule. And that the trial court so understood it is shown by his remark of, "Oh, her deposition," when he recognized that the insistence was not over the appointment of a physician, but as to the deposition. So that the case does not present itself as in *Bergfeld v. Dunham*, 201 S. W. 640, or as in *Stubenhaver v. Kansas City Rys. Co.*, 213 S. W. 144, for in the first of those cases the plaintiff's counsel repeatedly asserted that the statutes of the state gave defendant a "perfect right" to have plaintiff examined; and in the second the plaintiff repeatedly stated that the defendant had the right to have a doctor appointed by the court; that under the law it had the right to have a doctor appointed by the court, and it was the law that defendant

was so entitled. And the court in both cases sanctioned such statements by not ruling, though in one of them it afterwards attempted to correct the matter by an oral instruction. The situation in the case at bar is somewhat different, for here the plaintiff's counsel, in saying that defendant could have had plaintiff examined for the asking, could have taken her deposition, was answering the claim of defendant that plaintiff was hiding her condition from defendant, but was not talking about what right the law gave defendant to have the court appoint physicians to examine her. It is true counsel for plaintiff, in answer to opposing counsel's suggestion that it was "entirely within the discretion of the court whether the plaintiff should be examined or not," did say to opposing counsel, "Oh, no; it is in your discretion if you want it done," but this was receded from when he said, "I understand that, if the court please, but I say they could have taken her deposition." The defendant's counsel had just asserted that the question of whether plaintiff should be examined was entirely within the discretion of the court, and to this the court assented, and then plaintiff's counsel said, "I understand that, if the court please, but I say they could have taken her deposition," and then, when the court understood that it is only as to the deposition plaintiff's counsel was still asserting, the court said, "Oh, her deposition." Taking the record as a whole, it does not bear out the contention that the court in what it said was upholding the idea that defendant had the right to have a commission appointed; and to hold that the court was doing so would not be fair to it, nor would it be in keeping with the court's remarks when it finally understood the situation, nor in keeping with its later action on the motion for new trial. Under all the circumstances we do not think the jury would be led to understand that defendant had an absolute right to have a commission examine plaintiff. When such is the case, and the trial court has, by its action on the motion for new trial, indicated its construction of what took place, we should not disagree therewith unless the record is absolutely and clearly the other way.

[6] As to the other improper remarks hereinbefore set out, the court sustained the objections whenever they were made. It will be observed that counsel for defendant did not request the court to reprimand counsel or to do anything, but only to "discharge the jury." In *Ostertag v. Union Pacific R. Co.*, 261 Mo. 457, 479, 169 S. W. 1, 6, the situation was pretty much the same as here, but the Supreme Court said:

"There is nowhere, so far as we know, any authority for discharging the jury for such cause, though we do not now decide that in no case would such action be proper."

In McKinney v. Martin, etc., Laundry Co., 198 Mo. App. 386, 398, 200 S. W. 114, 118, citing and quoting from Milliken v. Larrabee, 192 S. W. 103, 106, the proper procedure is pointed out, and the court there says:

"Unless the record shows this to have been done, our courts, except in extreme cases, will not grant a new trial on this ground." (Italics ours.)

The objections were sustained by the court in the case at bar, and we do not think the case is so extreme as to call for a reversal on the ground asserted, though we do not wish to be understood as even impliedly sanctioning the use of such methods in argument.

[7] It is urged that the verdict is excessive. We cannot say so from the record in the case.

The judgment is affirmed.

All concur.

# KANSAS CITY COMMERCIAL PHOTO VIEW CO. v. KANSAS CITY BRIDGE CO. (No. 14066.)

(Kansas City Court of Appeals. Missouri.  
May 23, 1921. Rehearing Denied June 13,  
1921. Certiorari to Supreme Court Denied.)

## 1. Account stated §1—Essentials enumerated.

To support an action on an account stated, plaintiff must show that there is a demand on one side that is acceded to on the other, and there must be a fixed and certain sum admitted to be due, but the admission need not be express, and silence may constitute acquiescence.

## 2. Account stated §20(1)—Where facts undisputed whether transaction is amount stated is question of law.

Where the facts are undisputed, whether the transaction amounts to an account stated is a question of law and not of fact.

## 3. Account stated §6(1)—Rule of implied admission by acquiescence available only to creditor.

The rule of implied admission by acquiescence to constitute an account stated is applicable only where the party insisting that the demand is established by acquiescence was the one who presented or rendered the account; the debtor cannot make that claim.

On Motion for Rehearing.

## 4. Appeal and error §832(4)—Appellant not entitled to reopen case to present new theory.

An appellant cannot have the case reopened after an adverse decision, so that he may present a different theory, in view of court rule 20 (169 S. W. vii).

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by the Kansas City Commercial Photo View Company against the Kansas City Bridge Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Clarence I. Spellman and John G. Park, both of Kansas City, for appellant.

Jacob G. Wine, of Kansas City, for respondent.

BLAND, J. This is an action upon an open or running account had between plaintiff's assignor and defendant. The first item of the account is of date January 22, 1909, and the last, March 9, 1910. Plaintiff recovered a verdict and judgment in the sum of \$1,731.80, and defendant has appealed. This is the second appeal in the case. See Kansas City Photo Co. v. Kansas City Bridge Co., 195 S. W. 1051.

There was but one witness, C. K. Bowen, who was plaintiff's assignor. Defendant introduced no evidence. At the close of plaintiff's case defendant requested the court to instruct the jury that all items of the account sued upon, except those of the year 1910, amounting to \$14, were withdrawn from the consideration of the jury. The court refused this instruction.

The facts show that in January, 1909, Bowen was called to defendant's office, and employed to photograph a number of bridges, to make enlargements of the photographs, and to frame them; that in January, March, April, and May, 1909, Bowen and his assistants made a large number of negatives of bridges constructed by defendant, took prints from the negatives, and enlarged and framed them; that the reasonable value of said work was \$1,089.40; that after May 10, 1909, he did no more work until March 9, 1910, when he enlarged and framed two photographs, which amounted to \$14. The total amount of the account sued upon was \$1,103.40.

Defendant pleaded the five-year statute of limitations against all the items except for the work done in 1910, claiming that the items down to and including May 10, 1909, had become a stated account, and was barred by the five-year statute of limitations. Suit was brought on March 1, 1915. However, if the 1910 items are to be included within the account, then under the doctrine that if the last item of a running account is not barred by the statute of limitations the whole is saved from the operation of the statute, the defense of the statute of limitations fails. But, of course, if the 1909 items constituted a stated account, the 1910 items were not a part of the account, and the 1909 items were barred by the statute. Defendant contends, and the evidence shows, that on or about May 25, 1909, Bowen rendered a statement of the account to defendant; that no objection was made to the work at any time, and none was made to the account until after suit was

brought, when an officer of the defendant objected that the bill was generally too much. Under the doctrine that where the party receiving the account keeps it and makes no objection within a reasonable time his silence is taken to be consent and acquiescence in the account, and he will be bound by it as if it were a stated account, defendant contends that the account as a matter of law became a stated account not later than six months after May 25, 1909, or November 25, 1909, and as the suit was not instituted until March 1, 1915, more than five years after the last-mentioned date, it was barred by the statute.

In relation to the contention that a statement was rendered on May 25, 1909, containing sufficient facts to form the basis of an account stated, the evidence shows that Bowen sent bills and statements at various times to defendant and in various forms, some showing merely the amount due, others the items of work done to the date the statement was sent and charges for each item, and still others covering merely the work done upon a particular order and the charges therefor. Bowen testified:

"That whenever I did any work I charged it upon my books, a continuous bill. Several times I rendered a memorandum up to date; then I would, once or twice, when I would take pictures or frame, I would leave them a memorandum of that account. The items as they were taken were added to the original account, and then I rendered them after \* \* \* it seemed like all the work they were going to give me; then I rendered them a bill for all they had. That was in April, 1910, and was for all the work that I had done. The account was kept open because they promised me more work."

About May 25, 1909, Bowen sent some kind of a statement to defendant. This statement does not appear in the evidence. He testified that this was an itemized bill of the part completed; that about this time the defendant told him that it had more work to be done. As before stated, it gave him no more work until March, 1910. It was not until about the 1st of December, 1909, that he sent his account to the defendant, and appended at the foot these words:

"Gentlemen, this is the third reminder. Will you kindly remit all or part as soon as possible and oblige. Yours truly, C. K. Bowen."

Plaintiff contends that the evidence fails to show that the statement rendered on or about May 25, 1909, was sufficiently definite as to form a basis for an account stated, and we are very doubtful if it was, but it is not necessary for us to so hold, as, assuming that it was, we think it never became an account stated in view of the facts in this case.

[1-3] It is well settled that to support an action on an account stated plaintiff must show that there is a demand on one side that is acceded to on the other, and there must be

a fixed and certain sum admitted to be due. There need not be an express admission, for if the party receiving the account keeps the same and makes no objection within a reasonable time, his silence will be construed into acquiescence in its justness, and he will be bound by it as if it were a stated account. Where the facts are undisputed, as in this case, whether the transaction amounts to an account stated is a question of law and not of fact. *Powell v. Pac. R. R. Co.*, 65 Mo. 858; *Grocery Co. v. Hotel Co.*, 183 Mo. App. 429, 436, 166 S. W. 1125. But the rule of implied admission by acquiescence is applicable only where the party insisting that the demand is established by acquiescence was the one who presented or rendered the account. As was stated in *White v. Campbell*, 25 Mich. 463, 469:

"The inference of the assent from mere passiveness has always been made against the passive party, and never in favor of that party as against the other."

The same rule is laid down in *Payne v. Walker*, 26 Mich. 60; 25 Oyc. 1134; 1 Amer. & Eng. Encl. of Law, 452 (2d Ed.). We, therefore, hold that defendant is in no position to make the defense that the statement rendered on or about May 25, 1909, together with the circumstances that defendant claims show acquiescence in its correctness by the defendant, constitutes the items prior to that date a stated account. There is some evidence that defendant from time to time promised to pay for the work, but when any of these times were is not shown.

Complaint is made of the court's instruction No. 2, which covers the entire case and purports to direct a verdict. The undisputed evidence shows plaintiff's assignor did the work charged for at defendant's request; that the work done was the kind ordered; that the prices charged were reasonable; and that statements were repeatedly sent to defendant and payment requested. There was therefore nothing to submit to the jury except the amount of plaintiff's recovery, which was properly submitted. It is therefore unnecessary for us to discuss the point made against the court's instruction No. 2.

The judgment is affirmed.

All concur.

#### On Motion for a Rehearing.

It is claimed that the foregoing opinion is in conflict with the opinion in the case when it was formerly here. *K. C. Photo Co. v. K. C. Bridge Co.*, 195 S. W. 1051. We fail to so find. It appears from the opinion in the former appeal that the question of the account being stated, and the statute of limitations affecting it as such, was not an issue, for the court said at loc. cit. 1052, "But defendant did not try the case on that theory" (that is, that the account became stated by its



retention by defendant). However, it appears that there was an issue as to whether the \$14 item that was necessary to save the whole account from the statute was a part of the running account, that is, whether or not the first items were settled and agreed upon before the transaction giving rise to the last item, and plaintiff's instructions were declared erroneous in regard to that point. A reading of the former opinion fails to disclose that the court had before it the question as to whether retention of an account by the debtor could be used by him to defeat the debt by using the statute of limitations in connection with the fact of retention. The court in the concluding paragraph in the former opinion was careful not to declare that the first items of the account became an account stated.

It is also insisted that the evidence was not undisputed, that defendant filed a general denial, and that, although there was no testimony except on behalf of plaintiff, the facts were for the jury to decide. This is a new contention in the case. The only witness in the case was Bowen, and appellant submitted this appeal originally on the theory that what Bowen said was true, and that under his testimony defendant was entitled to judgment as a matter of law. In its brief defendant stated:

"In the instant case it is undisputed that plaintiff visited the sites of the bridges, photographed them, made the negatives, photographs, enlargements, and furnished the frames and delivered them on the dates mentioned, all as charged in the account sued on for the year 1909," and "on agreed facts, the question of whether or not there was an account stated is a question of law."

"In the absence of dispute as to rendition of account and time of objection, the reasonableness of the time in which the objection should be made is a question of law for the court, and not a question of fact for the jury."

[4] Defendant is not in a position to have the case reopened so that he may submit another theory. Rule 20. 169 S. W. vii.

With the concurrence of the other judges the motion for a rehearing is overruled; and it is so ordered.

#### CHAMBERS v. HINES, Director General of Railroads. (No. 13900.)

(Kansas City Court of Appeals. Missouri. May 2, 1921. Rehearing Denied June 13, 1921. Certiorari to Supreme Court denied July 22, 1921.)

#### 1. Pleading $\S$ 247—Amendment during trial claiming wages lost to time of trial properly allowed.

In an action by servant for personal injuries, the court did not err in permitting plaintiff during the progress of the trial to amend

his petition as to the amount of wages lost by him up to the time of the trial, in view of Rev. St. 1919,  $\S$  1274.

#### 2. Master and servant $\S$ 264(4) — Evidence held admissible under allegations as to passageway in roundhouse.

In action by servant for personal injuries under a petition complaining that defendant railroad failed to properly light a passageway in its roundhouse, and did not maintain a passageway of sufficient width, thereby causing plaintiff to fall into a pit, the court did not err in admitting testimony as to presence of steam in the roundhouse, obstructions in plaintiff's path tending to narrow it, faulty construction of the roundhouse; the gist of plaintiff's cause of action being that he was not furnished a reasonably safe place in which to work, especially where defendant charged plaintiff with contributory negligence in walking upon the passageway.

#### 3. Evidence $\S$ 99 — What evidence is "relevant."

A fact is "relevant" which tends to render probable the contention of the party producing it, and, while as a matter of evidence a fact does not become relevant merely because its existence is consistent with a party's claim, the court may receive aid from evidence which in itself is not relevant to any issue in the case, but is corroborative of other testimony on a disputed point.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Relevant.]

#### 4. Master and servant $\S$ 286(3)—Negligence in lighting passageway in roundhouse held for the jury.

In action by servant who fell into a pit in master's roundhouse while walking along a passageway, whether the roundhouse at the place in question was properly lighted held for the jury.

#### 5. Master and servant $\S$ 289(16)—Contributory negligence in choosing route to leave roundhouse held for jury.

Whether plaintiff, who fell into a pit in a roundhouse, was guilty of contributory negligence in choosing a dangerous route in leaving the roundhouse for the defendant's office, held for the jury.

#### 6. Master and servant $\S$ 226(1)—Risk of employer's negligence not assumed.

There could be no assumption of risk by a servant if master was negligent, and such negligence was the proximate cause of the injury.

#### 7. Appeal and error $\S$ 1033(5)—Though one ground of negligence alleged in conjunctive is not supported by evidence, there is no error in submitting it.

When grounds of negligence in personal injury case brought by servant are stated in the conjunctive, and the jury is required to find negligence in the several respects, it is not error merely because one ground submitted is without evidence to support it, if another ground is alone sufficient to warrant a verdict in favor of the plaintiff.

8. Damages  $\$130(3)$ — $\$10,000$  reduced to  $\$5,000$  for injury to nervous system.

A verdict of  $\$10,000$  for injuries to nerves, rendering railroad employé unable to do manual labor, reduced by the trial court to  $\$7,500$ , was further reduced to  $\$5,000$  on appeal.

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

Action by David Chambers against Walker D. Hines, Director General of Railroads, in charge of the Chicago Great Western Railroad Company. John Barton Payne, as Director General of Railroads, was substituted as defendant. Judgment for plaintiff, and the defendant appeals. Affirmed on condition of remittitur.

Warner, Dean, McLeod & Langworthy, of Kansas City, for appellant.

Atwood, Wickersham, Hill & Popham, of Kansas City, for respondent.

ARNOLD, J. This is a personal injury suit prosecuted by a servant against his master on the ground that the injury was caused by negligence of the master. Suit was brought against Walker D. Hines, Director General of Railroads, and Chicago Great Western Railroad Company, but the action later was dismissed as to the railroad company, and afterwards John Barton Payne, as Director General of Railroads and Agent of the President under the 1920 Transportation Act (Act Cong. Feb. 28, 1920, c. 91, 41 Stat. 456), was substituted for said Hines, Director General.

Plaintiff, colored and 59 years of age, was employed as a fire builder in defendant's roundhouse in Kansas City, Mo., and on January 3, 1919, at about 6:10 o'clock p. m., he fell into a pit in the roundhouse while on his way from the dressing room to the office to check out, and sustained injuries thereby which he alleges completely and permanently destroyed his earning capacity.

The petition charges that defendant negligently maintained a passageway for use of employés alongside an unguarded engine pit; that said passageway was of insufficient width, and insufficiently lighted, so that it was dangerous and not a reasonably safe place in which to work. The answer was a general denial, and also charged plaintiff with contributory negligence in the use of the passageway and pleaded assumption of risk.

The roundhouse in which the accident occurred was fan-shaped in its general contour and large enough to accommodate eight tracks inside the roundhouse, said tracks being numbered from 1 to 8, inclusive, counting from the east side thereof. The turntable was on the north and outside the roundhouse. The width of the roundhouse structure from north to south was about 80 feet. The en-

gines entered from the turntable at the north through large, double swinging doors at each track. Beneath each track in the roundhouse, beginning about 8 feet from the north doors, was an excavation or pit about 68 feet long and 4 feet deep. On the west side of the roundhouse and adjacent thereto were two washrooms and locker rooms, the north one for white men and the south for colored men employed at the roundhouse. The colored men were not allowed to use or be in the washroom reserved for white men, nor to pass through it, nor to be or remain therein. The office where the men were required to check in and out was northeast of, and detached from, the roundhouse.

Defendant maintained a passageway between track 8 and the west wall of the roundhouse, which passageway had a board floor for the use of employés in passing back and forth. This passageway, due to the fanlike shape of the structure, was about 7 feet in width at the south end, tapering to 4 feet at the north end, where it connected with a small door cut out of the westerly side of the west one of the two large doors at the north end of track 8, which said small door was provided for the use of employés in passing in and out of the roundhouse.

The testimony tends to show that at the time of the accident there was piled along the west side of the passageway above described and near the north or narrower end thereof some timbers that had been used in the process of repairing an engine on track 8, thus reducing the width of the passageway at that point to about  $2\frac{1}{2}$  feet. Plaintiff states the passageway was dark, obscure, dimly and insufficiently lighted. Further the testimony tends to show that the only artificial lights in the roundhouse were a series of oil lamps attached to the south wall, one at the end of each track, about 6 feet above the floor, and that there were no lights in the north side of the building; that plaintiff quit work and went to the dressing room shortly before the accident to lock up his tools preparatory to checking out; that while he was in the dressing room an engine was run in on track 8, the south end of it being within 2 or 3 feet of the south end of the pit, thus leaving that part of the pit north of the engine unlighted and open for a space of 15 to 18 feet. The engine obstructed the light that was on the wall at the south end of the pit. The testimony further shows that while the plaintiff was in the dressing room an engine in the roundhouse was "blown down"—that is, the steam was blown off—and that the steam therefrom filled the room and further obscured the lights.

At about 6:10 p. m. plaintiff emerged from the dressing room into the passageway and proceeded toward the small door at the north end thereof, as was his custom, and when

near the north end, owing to the insufficient light and narrowed passageway, he fell into the pit and was injured.

The case was tried before a jury and resulted in a verdict for plaintiff in the sum of \$10,000. Motions for a new trial and in arrest were overruled, a remittitur of \$2,500 was made by plaintiff, and judgment for \$7,500 entered for plaintiff. Defendant appealed.

[1] Defendant complains that the court erred in permitting plaintiff to amend his petition during the progress of the trial. The amendment related solely to the amount of wages lost by plaintiff up to the time of the trial. There was no amendment as to any of the allegations of negligence of the defendant and the issues were not changed.

"The allowing of such amendments to pleadings as do not change the character of the cause of action or defense is largely in the discretion of the court and should be permitted when the ends of justice so require." *McClanahan v. Boggess*, 154 Mo. App. 600, 136 S. W. 237.

Section 1274, Rev. Stat. 1919 (section 1848, R. S. 1909), provides:

"The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other proceedings, by adding or striking out the name of any party, \* \* \* or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

It must be concluded that the court did not err in overruling defendant's objection to the amendment.

[2] Defendant contends that the court erred in admitting incompetent, irrelevant, and immaterial testimony: (a) As to the presence of steam in the roundhouse where plaintiff was injured; (b) obstructions in plaintiff's path; (c) faulty construction of the roundhouse.

The charges of negligence in the petition are:

"That the defendants and each of them negligently and carelessly failed and omitted to illuminate and light or have illuminated said engine house and the premises and said plank walk and said wells or pits, and that, by reason of the darkness and murkiness and the conditions herein complained of existing at said time and place, it was dangerous and not reasonably safe, and that defendants and each of them negligently and carelessly failed and omitted to furnish plaintiff a reasonably safe place to work, or reasonably necessary and sufficient light by which to work and perform his duties with reasonable safety, and negligently and carelessly failed and omitted to place about and around said wells or pits any guard rail, and negligently failed to maintain and keep said plank walk lighted or in repair, smooth, or even of reasonably sufficient width, and to furnish plaintiff a reasonably safe place in,

about, and around which to be, walk, and perform his duties to defendants with reasonable safety, but negligently permitted said premises and said conditions to be as herein described and set forth; and the plaintiff alleges that the above conditions were to him unknown and unappreciated prior to said occurrence, but that the defendants, and each of them knew, or by the exercise of ordinary care could have known, all the above facts, dangers, and conditions, prior to his injury, and in time by the exercise of ordinary care to have remedied said dangers and conditions and thereby have prevented injury to plaintiff, all of which it was defendants' duty to do, and which defendants negligently and carelessly failed and omitted to do."

The gist of plaintiff's cause of action, if he has any, is that he was not furnished a reasonably safe place in which to work. The testimony complained of simply tended to prove the allegations of the petition as to insufficient light. Proof of the presence of steam in the room because of the faulty construction of the building merely tended to establish the condition as to darkness and murkiness; and the evidence relative to the blocking of the passageway tended to sustain the charge of negligence in that the way was not of sufficient width by reason of the presence of the blocks and was therefore dangerous. The testimony admitted by the court on these points, over the objection of defendant, was proper, upon the theory upon which the case was tried.

Defendant charged plaintiff with contributory negligence in walking upon the passageway. Testimony showing the condition thereof as to its safety was relevant and properly admitted.

[3] This general principle of law is laid down in 16 Cyc. p. 1118 et seq.:

"A fact is relevant which tends to render probable the contention of the party producing it. \* \* \* While as a matter of evidence a fact does not become relevant merely because its existence is consistent with a party's claim, the court may receive aid from evidence which in itself is not relevant to any issue in the case, but is corroborative of other testimony on a disputed point."

In *Baldwin v. Hanley*, 202 Mo. App. 650, 216 S. W. 998, the court held that, where a defendant was charged with negligence in not providing sufficient light to render a first floor a safe place in which to work, testimony as to the basement light was, under the circumstances appearing in the evidence, admissible under this allegation in the petition.

We have examined defendant's citations on this point, and fail to find that any of them is determinative thereof.

Defendant contends that there was no evidence adduced in support of plaintiff's allegation of latent or unknown dangers. The testimony tends to show that the passageway was provided by the company for use of its

employés in passing back and forth. Plaintiff testified that he knew of no other way to reach the office than by that passage. Besides the plaintiff, Robert Finley, George Kirscher, H. H. Eggleston, Clem Boling, and M. R. Elder (night foreman) and others testified to the effect that the passage was so used. The testimony shows that this passageway was especially narrow at the north end, being about 4 feet wide, and that blocking timbers left thereon by defendant reduced this already narrow width to about 2½ feet. It was also shown that it was practicable to have placed a protecting railing alongside the pit. Isaacs, general foreman, testified that he never used this passageway after dark, but went around the other way (presumably through the white men's washroom), and that when there was steam in the roundhouse it was difficult to see to get around. He also stated that there were obstructions of the light at the north end of the pit. There was testimony to the effect that there was no light at or near the north end of the pit, and that the steam made it "dark and murky." Witness Finley testified that it was dark after 6 o'clock on January 3, 1919.

Defendant's witness Elder testified that an engine on track 8 would obstruct the light and would cast a shadow on pit 8, and that to a certain extent it would be "cloudy and murky" in the roundhouse when engines were blown off therein. This witness also testified that the company had installed electric lights in the roundhouse before the trial. This may or may not have been competent testimony, but there was no objection and it is significant.

[4] It must be concluded that the place was not sufficiently lighted. There was some testimony introduced on behalf of defendant that the place was lighted, but there is much evidence to the contrary, and it was a fact for the wise determination of the jury.

In *Haggard v. Railroad Co.*, 205 Mo. App. 7, 13, 220 S. W. 22, loc. cit. 24, the court held:

"Under the decisions of this state there can be no doubt on the question of negligence in failing to provide sufficient lights at the place they put plaintiff to work. It is held in the very recent case of *Baldwin v. Hanley et al.*, 216 S. W. 998, that, where artificial light is necessary to render safe the place where the servant is required to work, the failure of the master to exercise ordinary care to provide such light renders him liable for consequent injuries. See, also, *De Late v. Loose-Wiles Biscuit Co.*, 213 S. W. 885; *Wright v. Hammond Packing Co.*, 199 S. W. 754; *Yost v. Atlas-Portland Cement Co.*, 191 Mo. App. 422, 177 S. W. 690."

The chief contention between the parties at the trial was as to whether or not defendant negligently allowed and permitted the place where the accident occurred to be and remain so dark as to render it unsafe, and whether such unsafe condition was the proximate

cause of plaintiff's injury. That the place was dark, too dark to see at the point of the accident, there is abundant testimony to show. There was sufficient evidence that such dark and insufficiently lighted condition was the proximate cause of the injury. The evidence showing these elements of defendant's liability so fully justified the verdict in plaintiff's favor that we find no reasonable ground for interference.

Defendant further argues that plaintiff was guilty of negligence as a matter of law which would deprive him of the right to recover even if defendant had been negligent, in that, if plaintiff knew the route taken by him was dangerous, he is guilty of contributory negligence in failing to use the means at hand for his safety, to wit, a route that was less dangerous.

[5] Two other routes were, by inference, suggested which plaintiff might have used: (a) One by a roadway on the south of the roundhouse used as a wagon road, but there was no evidence that such road was provided or used as a way to go from the roundhouse to the office, or that it was a safe way, and the record shows that plaintiff knew nothing of such passageway; and (b) the one along the south end of the tracks to the east side, thence north. But it appears that route was not available for employés, because there were no doors other than the large ones through which the engines passed in and out of the building. The only small doors that were placed in the large doors for exit were in those opposite tracks 4 and 8. We therefore must conclude that the evidence tends to show that the route taken, viz. along the passageway at the west wall, was the only practicable one for use at that time and the only one known to plaintiff. Further it is shown that the only passageway that was boarded over was the one used by plaintiff. In the light of all the testimony adduced at the trial on the question of available routes, we are unable to say that plaintiff was guilty of contributory negligence as a matter of law.

[6] The contention of defendant that there was assumption of risk by plaintiff is without substantial merit, since, if defendant were negligent, and such negligence was the proximate cause of the injury, plaintiff could not, under the rulings in this state, assume the risk of such negligence.

[7] The charges of negligence in the petition are pleaded conjunctively. In *Troutman v. Cotton Oil Co.*, 224 S. W. 1014, the court held (loc. cit. 1016):

"But when, as here, the grounds of negligence are stated in the conjunctive, and the jury is required to find negligence in the several respects, then, if one of the grounds of negligence is alone sufficient to warrant the verdict, it is not error merely because some other ground also submitted is without evidence to support it. *Jackson v. Railroad*, 171 Mo. App. 431, 443, 156 S. W. 1005; *Gibler v. Rail-*

road Co., 129 Mo. App. 98, 101, 107 S. W. 1021."

In such a case plaintiff merely imposes upon himself an unnecessary burden, the failure to carry which does not defeat his recovery. In the case at bar plaintiff sufficiently proved negligence with reference to the proximate cause of the injury—i. e., the insufficient lighting of the premises—and it is not material to determine whether or not the evidence supports the other allegations of negligence.

We fail to find any prejudicial error in the case and the verdict is for the right party.

There remains but one other question for determination, to wit, the amount of the verdict (\$7,500), which defendant contends is excessive. There is much difference between the attorneys as to how seriously plaintiff is injured, and the doctors are not agreed as to the seriousness and permanency of his injuries. Plaintiff contends that "the judgment is but small compensation for the terrible and lasting and totally incapacitating injuries received." Defendant declares that "this verdict and judgment are so disproportionate to the injury sustained by plaintiff that a remittitur would not be sufficient to meet the situation, and that the verdict and judgment should not be permitted to stand."

[8] This court is loath to interfere with the conclusions of the jury where there is proof to sustain the same. From a careful examination of the testimony in the case, however, we conclude that the verdict is in excess of what the facts would justify. Plaintiff testified that he went back to work in 10 days after the accident and was engaged in "cleaning house and wiping engines" for a couple of days, and then went back to building fires and continued working for a period of 15 days, though he was not without suffering. Dr. Smith, plaintiff's witness, testified that he was called to attend plaintiff and examined him on January 4th, following the accident; found him in bed; bruised condition on inner side of left knee and over left arm and on shoulder and back and to a little below the left knee. He prescribed sedatives and liniments; saw the patient several times during the 10 days he was at home, and again at the end of the 15 days when he had been working. He advised plaintiff to stop work for a while. There were no scars and no bones were broken. The difficulty which had not been overcome, the doctor testified, was "somewhere in the nerves, the nerve supply to the joints." Further the testimony shows that plaintiff is unable to do manual labor, is compelled to use a cane in walking, that he suffers pain in his left knee, hip, and left ear, and that he has not the normal use of his left arm.

We think the verdict should stand in an

adequate sum, and therefore direct that, if within 10 days plaintiff will remit \$2,500 therefrom, as of date of the rendition of the judgment, we will permit the judgment to stand for \$5,000, as of the date of its rendition. Should such remittitur be entered; the judgment above indicated will be affirmed; otherwise it will be reversed, and the cause remanded.

All concur.

**ALLEN v. EDWARD LIGHT CO. et al.**  
(No. 14059.)

(Kansas City Court of Appeals. Missouri.  
May 28, 1921. Rehearing Denied June 18,  
1921. Certiorari to Supreme Court Denied  
July 22, 1921.)

**1. Corporations §513(3)—Petition against corporation and its president for slander held sufficient.**

In an action against a corporation and its president for slander, a petition alleging that one uttering slander was employed by defendants to confront and accuse plaintiff of stealing, that in so doing he acted within the scope of his employment, and that defendants ratified his acts, stated a cause of action against defendants, though it did not make such person a party.

**2. Corporations §493—Corporation may slander.**

There may be slander by a corporation.

**3. Libel and slander §77—One uttering slander as employee of another cannot be made party in action against latter.**

One employed to accuse another of theft cannot be made a defendant in an action against his employer for slander; he being liable only for his own slander.

**4. Libel and slander §24—Slander by president of corporation and its detective, in presence of another detective in its employ, sufficiently published.**

In an action against a corporation and its president for slander, where the latter and a detective employed by defendants to investigate alleged thefts by an employee accused him in the presence of another detective also hired by defendants, there was a sufficient publication, though the slanderous words must be spoken in the presence of and be understood by some other person than plaintiff and defendant, the latter detective having heard all that the former said, and both all that the president of the corporation said.

**5. Libel and slander §24—Publication to single person sufficient.**

To constitute publication of slander it is enough that the slanderous words were heard by a single person.

**6. Libel and slander §24—No defense that words spoken to, and not of, plaintiff.**

It is no defense to an action for slander that the words were spoken to, and not of, plaintiff, when other persons were present and heard them spoken.

7. Libel and slander  $\S$ 7(13)—Charge of theft against salesman making donation to purchaser held slanderous per se.

Where a store salesman, with power to make small donations to purchasers, sent out with an order more than was paid for, words charging him with theft of such additional articles were slanderous per se.

8. Libel and slander  $\S$ 56(2), 87—Not necessary to allege slanderer knew words were false; honest belief in truth not a defense.

In an action for slander, petition held to charge that the words uttered were false, and it is not necessary to allege that a person speaking slanderous words knew them to be false and untrue, since defendant cannot rely on his honest belief in the truth of the charge.

9. Corporations  $\S$ 432(12)—Evidence held sufficient to show person accusing plaintiff of theft was employed by defendants for such purpose.

In an action against a corporation and its president for slander uttered by a detective alleged to have been employed by it to confront and accuse plaintiff of theft, evidence held sufficient to sustain such charge, though the only direct evidence as to such employment was that he was employed for the purpose of investigating and reporting.

10. Corporations  $\S$ 423—Connection between corporation and its president held such as to make each liable for slander by latter and by detective employed by them.

Though in slander publication cannot be the joint act of two or more persons, where there is no agency between them, each being responsible for his own slander only, where the evidence in an action against a corporation and its president showed that the latter owned the former, the jury might find that in uttering his slanderous words he was acting for the corporation, and that a detective employed by him on behalf of the corporation, in likewise accusing plaintiff was acting as the agent of defendants, both of whom in such case would be liable for his utterances.

11. Trial  $\S$ 194(14)—Instruction held not erroneous as comment on evidence.

In action for slander, an instruction that, if defendant called plaintiff into a room, where he found two men, one of whom stated he was a detective and falsely accused plaintiff of stealing from defendant, that the latter had employed him to confront and interview plaintiff and aided and abetted him in his actions, and that defendant owned practically all the stock and was president and manager and acting in behalf of his codefendant, the corporation by which plaintiff was employed, the verdict should be for plaintiff against both defendants, was not erroneous as being a comment on the evidence.

12. Appeal and error  $\S$ 1066—Difference in words used in instruction and petition held not reversible error.

In an action for slander, plaintiff's instruction to find for him if a detective who accused plaintiff of theft was employed by defendant "to confront and interview" him was not prej-

udicial to defendant, though the petition charged the detective was employed to "confront and accuse" plaintiff, where the instruction required the jury to find sufficient facts to show that defendant ratified the detective's acts, made the initial employment of him, and acted for his codefendant, a corporation of which he was president; the effect of such difference in wording being to impose an unnecessary burden on plaintiff.

13. Libel and slander  $\S$ 5—Malice may be inferred from fact words uttered were false and uttered knowingly and intentionally without justification.

In an action for slander, an instruction that it is not essential that malice be proved by express and direct testimony, but that it may be inferred from the facts that the words uttered were false and untrue and uttered knowingly and intentionally and without legal justification or excuse, was not erroneous.

14. Appeal and error  $\S$ 882(12)—Plaintiff's instruction not reversible error where converse of defendant's instruction.

In an action for slander, where the court gave defendant's instruction that, if an alleged written confession of plaintiff was made of his own free will and accord, the verdict must be for defendant, plaintiff's instruction that, if defendant signed the statement under coercion and duress, and not of his own free will, the jury might disregard and give no effect to it was not reversible error as being a comment on the evidence; such instruction being the converse of defendant's instruction, and the error, if any, being joined in the latter.

15. Appeal and error  $\S$ 882(15)—Amending requested instruction to conform to instruction of complaining party not erroneous.

In an action for slander, amending defendant's requested instruction so that as given it conformed to other instruction requested by defendant cannot be complained of by him.

16. Libel and slander  $\S$ 101(5)—Burden of proving justification or truth is on defendant.

In an action for slander, the burden of proving justification or the truth of the words charged is on defendant.

17. Appeal and error  $\S$ 1003—Verdict not set aside as against weight of evidence.

A verdict will not be set aside on appeal as being against the weight of the evidence.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by John H. Allen against the Edward Light Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Samuel Eppstein, of Kansas City, for appellants.

J. C. Rieger and T. L. Carns, both of Kansas City, for respondent.

BLAND, J. This is an action for slander. There was a verdict and judgment for plaintiff in the sum of \$1,000 compensatory and

\$3,000 punitive damages and defendants have appealed.

The facts show that defendant corporation conducted in Kansas City, Mo., a wholesale and retail business in gas and electrical fixtures and the like; that defendant Lefkovits was the president, manager, and owner of the defendant corporation; that on March 14, 1919, plaintiff was employed by the defendant corporation and was in charge of the sales department. It was his duty to "look after the business in general." He had power to make small donations to purchasers. On said day he sold a bill of goods to the wife of a minister for use in a church at Mt. Washington, a suburb of Kansas City. The amount of the sale was \$12.95. When he gave her a receipt for the money she remarked, "I wish I had bought a chain for the chain hanger." Plaintiff then told her that he would donate that. She did not take the goods with her, as they were to be sent. Plaintiff went to the foot of the stairs and called one Clark, who was in charge of the shoproom in the basement, showed him the order, and told him when the order went out to put in a chain for the chain hanger, and Clark said, "If you are donating the chain, why don't you make it up right and donate it [the chain hanger]?" and plaintiff replied, "All right, go ahead." The value of the things donated was \$1.10. Plaintiff's statement that he would donate the chain was made in the presence of another employee by the name of Jacoby. Plaintiff testified that he thought defendant Lefkovits was in the room down stairs at the time.

Lefkovits was told before the goods went out that "there is more merchandise going out than paid for." Upon hearing this he decided to "test the matter out." So he went to the Harb Detective Agency and employed a detective named Milton to go to the minister's house and investigate the matter and see "whether there was more merchandise delivered than bought and paid for and report to me." Milton, together with Jacoby, went out to the minister's house and investigated the matter, and Milton reported to Lefkovits the afternoon of March 15th. Late that afternoon Milton and another detective by the name of Valteau, who was likewise an employee of the Harb Detective Agency, came to defendants' place of business and went into a small room in the rear. Lefkovits then called plaintiff and took him to the room where the detectives were, and Lefkovits shut the door and stood in front of it and introduced plaintiff to Milton and Valteau. Milton pulled his coat back and said: "I am a detective. How much of this man's goods have you stolen?" Plaintiff replied that he had not "stolen a penny's worth." Milton then said to plaintiff, "You have been stealing; you have been stealing goods," and said he had papers in his pocket to

show that he could have plaintiff put in the penitentiary inside of a week. He then pulled the papers from his pocket and said to plaintiff: "How about the job at Mt. Washington that you sold?" Plaintiff replied, explaining that he made a donation and had authority to do so and turned to Lefkovits and asked him if he had not such authority, and Lefkovits replied: "No; you stole that chain hanger, and you sold two batteries for one and turned in money for one." "You stole that chain hanger, and you also sold two batteries for one." It appeared that Lefkovits' daughter, who had been acting as cashier, had told Lefkovits that plaintiff had sold two batteries and had turned in money for only one. Plaintiff replied to the accusation in regard to the batteries that he had not sold two batteries and accounted for but one, but that a woman brought in a battery and bought a new one, and that she wanted to take the old one with her, and he wrapped up the old one with the new. Lefkovits contended that plaintiff had no right to make a donation except with Lefkovits' consent.

Lefkovits then called Milton outside of the room, where they remained for two or three minutes, and came back, and Milton again accused plaintiff of stealing the chain hanger, and Milton became angry and called plaintiff a "son of a bitch and a thief." Lefkovits and Milton then went outside again, and shortly returned, when Milton cursed plaintiff "for a minute," and plaintiff said to him, "Treat me as a gentleman," to which Milton said, "Gentleman, hell; you are a thief." Milton then jumped up and pulled a revolver and handcuffs from his pocket and said: "You are under arrest: swear out the warrant, E. C. (meaning Lefkovits), and we'll take him now." Milton and Lefkovits again went out of the room and shortly returned, and Lefkovits and Milton wrote the following:

"K. C. Mo., Mch. 15-19.

"This is to certify that I, J. H. Allen, now employed by the Edward Light Co., 1317 Grand Ave., hereby agrees to reimburse the Co. for one chain hanger, the value of \$1.10, which I gave to the wife of a pastor. I did not own this mdse. and made no accounting of it. I am also willing to reimburse the Co. for the expense of an investigation which was made by them on acct of this action; the amt of this expense being \$8.12."

They asked plaintiff to sign the writing, Lefkovits saying: "You sign it and we will drop it." Plaintiff did not want to sign the statement and demurred, but on account of a threat to take him to jail, and it being Saturday, and fearing that he might have to stay in jail until Monday, and never having been arrested before, he finally signed the statement to prevent his arrest, although he stated at the time that it was not right for

him to sign it; that it did not state the facts. The amount mentioned in the statement was afterwards taken from plaintiff's pay check. After plaintiff signed the statement, Lefkovits said to plaintiff: "Let's forget it; you work on as if nothing had happened. I won't say anything to anybody, and you don't either." Plaintiff replied: "I can't forget it." Lefkovits then left the room. Plaintiff remained in the room a few minutes, and then went out to see a friend about the matter. He voluntarily quit his employment the Thursday or Friday following this interview, which occurred on Saturday.

The petition is lengthy, and it would serve no useful purpose to copy it in this opinion. Suffice it to say that it alleges the facts about as we have stated them. It charges:

That Lefkovits was president, treasurer, and general manager of the corporation and owner of its capital stock; that Lefkovits and the corporation employed Milton and Valleau to come to the place of business of defendants and "there confront and accuse this plaintiff of stealing goods from the defendants," and that Milton, in the pursuance of his employment by the defendants "in the presence and hearing of Valleau and said Lefkovits, falsely, wantonly, and maliciously spoke of and concerning plaintiff the following false, malicious, and defamatory words, to wit: 'How much of this man's goods have you stolen?'" and "falsely, wantonly, and maliciously spoke of and concerning the plaintiff the following false, malicious, and defamatory words, to wit: 'We have papers here to show that you have been stealing stuff'—and, continuing, maliciously, falsely, and wantonly uttered the following false, malicious, and defamatory words, to wit: 'Now, Mr. Allen, are you sure you have not been stealing this man's goods? Do you swear to that?'"

#### The petition alleges:

That Lefkovits for himself and for the corporation, "in the presence of said Milton and said Valleau, falsely, maliciously, and wantonly uttered of and concerning the plaintiff the following false, malicious, and defamatory words, to wit: 'No; you have been stealing my goods. You stole that chain hanger.' And, continuing, said Lefkovits then and there, and in the presence of said Milton and said Valleau, falsely, maliciously and wantonly uttered of and concerning this plaintiff the following false, malicious, and defamatory words, to wit: 'You sold two batteries for one, and stole one.'" The petition then alleges that Milton, acting within the scope of his employment by the defendants and in the presence of Valleau and Lefkovits, "falsely, wantonly, and maliciously uttered of and concerning the plaintiff the following false, malicious, and defamatory words, to wit: 'You are a son of a bitch and a thief'"—and "falsely, maliciously, and wantonly uttered, in the presence of said Lefkovits and said Valleau, the following false, malicious, and defamatory words of and concerning plaintiff, to wit: 'Gentleman, hell; you are a thief.'"

[1-3] It is insisted by appellants that their objection to the introduction of any evidence being offered under the petition in the case should have been sustained for the reason that the petition does not state facts sufficient to constitute a cause of action; that, Milton not being made a party defendant, his statements are not slanderous and binding on the defendants. The petition alleges that Milton was employed by both defendants to "confront and accuse this plaintiff of stealing goods from the defendants," and that Milton, in uttering the slanderous words, was acting for the defendants within the scope of his employment. It also alleges facts showing that defendants ratified the acts of Milton in slandering plaintiff. We think there is no question but that the petition states a cause of action against the defendants, although it does not make Milton a party. *Davis v. Chi., R. I. & P. R. Co.*, 192 Mo. App. 419, 423, 424, 182 S. W. 826; *Gibson v. Ducker & Son*, 170 Mo. App. 135, 148, 149, 155 S. W. 462; *Steppuhn v. Railroad Co.*, 199 Mo. App. 571, 580, 581, 204 S. W. 579; *Carp v. Ins. Co.*, 203 Mo. 295, 350, 351, 101 S. W. 78. It is now well established there may be slander by a corporation. *Fensky v. Maryland Casualty Co.*, 264 Mo. 154, 174 S. W. 416, Ann. Cas. 1917D, 963. We do not see how Milton could well have been made a party, for he would not have been liable for Lefkovits' slander, but only for his own. *Newell, Libel and Slander*, § 487 (3d Ed.).

[4-8] It is insisted that there was no publication for the reason there was no showing that the words complained of were communicated to a third person; that plaintiff in his petition pleads that defendants employed two defectives, Milton and Valleau, to confront and accuse plaintiff; that no outsider heard the alleged slander; Lefkovits, Milton and Valleau under plaintiff's petition being one and the same as the defendants. We think there is no merit in this contention. The petition alleges that four men were present—plaintiff, Lefkovits, Milton, and Valleau. Valleau heard all that Milton said, and Milton and Valleau all that Lefkovits said. We think there is no question but there was sufficient publication, although it is true that in order to constitute slander the slanderous words must be spoken in the presence of and be understood by some other person than plaintiff and defendant. *Walker v. White*, 192 Mo. App. 13, 178 S. W. 254. As to the rule in libel, see *Bedell v. Richardson Lubricating Co.*, 226 S. W. 653. However, it is enough that the slanderous words were heard by a single person. 25 Cyc. 366. It is no defense to an action for slander that the words were spoken to, and not of, plaintiff when other persons were present and heard the words spoken. 25 Cyc. 365, 366.



[7] It is insisted that the words spoken are not slanderous per se, and the failure to plead an innuendo is fatal. There is no question but that the words charged in connection with the facts with which they were used, all of which were alleged, were actionable per se. *Johnson v. Bush*, 188 Mo. App. 107, 171 S. W. 636; *State ex rel. v. Reynolds*, 273 Mo. 131, 140, 200 S. W. 296; *Callahan v. Ingram*, 122 Mo. 355, 368, 369, 26 S. W. 1020, 43 Am. St. Rep. 583; *Krup v. Corley*, 95 Mo. App. 640, 69 S. W. 609; 25 Cyc. 300-303.

[8] It is insisted that the petition fails to state a cause of action for the reason that it fails to allege that Lefkovits and Milton spoke the words knowing them to be false and untrue and that they were untrue. The language we have quoted from the petition in effect charges that the words uttered were false. *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Fensky v. Casualty Co.*, supra. It is not necessary to allege that the persons speaking the slanderous words knew them to be false and untrue. Defendants, in order to defeat an action of this kind, cannot rely upon their honest belief in the truth of the charge. *Morgan v. Rice*, 35 Mo. App. 591; 25 Cyc. 414.

[9] It is insisted that the court erred in failing to give defendants' instruction in the nature of a demurrer to the evidence, it being contended that there is no evidence that defendants employed Milton "to confront and accuse" plaintiff as alleged in his petition. Defendants' evidence tends to show that Milton was employed for the purpose of investigating and reporting, and this is the only direct evidence as to Milton's initial employment. However, the undisputed evidence shows that Lefkovits took plaintiff into the room where Milton was waiting with the information that he had obtained. It was the intention to confront plaintiff with this evidence and get him to admit other thefts, if any. Milton testified on behalf of defendants that Lefkovits wanted him to find out if the goods were taken by Allen and what had become of them; that he went to Mt. Washington and investigated the matter of the chain hanger and came back and reported to Lefkovits, and later went to defendants' place of business and suggested to Lefkovits that "we talk to this man and try to ascertain what other stuff he had taken, if any, and what had become of it." Milton testified that Lefkovits sent for plaintiff and requested plaintiff to come into the room; "that we want to talk to him." According to plaintiff's evidence, Milton uttered the first slanderous words, and after he finished Lefkovits joined in the accusations when appealed to by plaintiff to refute the charges of Milton, thus adding insult to injury. If there could be imagined any case where a principal ratified the acts of his agent, Lefkovits did that in this instance, if plaintiff's

evidence is to be believed. The evidence is sufficient to sustain the charge in the petition that the detectives were employed to confront and accuse the plaintiff, and is of such a character as to sustain even a much broader allegation than that.

[10] It is insisted that Lefkovits and the corporation could not be sued; that either one or the other is liable, and not both. It is true that in slander, but not in libel, publication cannot be the joint act of two or more persons where there is no agency between such persons; in other words, each is responsible for his own slander, and not that of the other. *Newell, Slapder and Libel*, § 487 (3d Ed.). However, in this case the evidence shows that Lefkovits owned the defendant corporation. There was therefore a close connection between him and the corporation, and the jury might well say under the evidence that whatever he did he did for himself as well as for the corporation, and that Lefkovits, in uttering his slanderous words, was acting for the corporation. Of course, Lefkovits was liable himself for his own words. From what we have said the jury might well find that Milton when he uttered his slanderous words was acting as the agent of Lefkovits and the corporation, and, if such were the facts, both Lefkovits and the corporation are liable for the utterances of Milton. *Fensky v. Maryland Casualty Co.*, supra; *McGinnis v. Chi., R. I. & P. Rd. Co.*, 200 Mo. 347, 359, 360, 362, 363, 98 S. W. 590, 9 L. R. A. (N. S.) 880, 118 Am. St. Rep. 661, 9 Ann. Cas. 658.

[11] It is insisted that plaintiff's instruction No. 1 is erroneous. Said instruction is as follows:

"The court instructs the jury that, if you find from the evidence that on or about March 15, 1919, the defendant Lefkovits called the plaintiff into a room in the defendants' place of business, and that on entering said room plaintiff found two men therein, one named Milton and the other named Vallean, and that said Lefkovits then and there closed the door to said room and stood against the same, and if you further find that said Milton thereupon showed the plaintiff a badge that he (Milton) was then wearing and stated that he (Milton) was a detective, and that said Milton then and there, and in the presence of said Lefkovits and said Vallean, pointed his finger at the plaintiff and made to the plaintiff the following statements, or any of them, to wit: 'How much of this man's goods have you stolen?' or 'We have papers here to show that you have been stealing stuff' or 'You are a son of a bitch and a thief,' or 'Gentleman, hell; you are a thief'—and if you find that said statements were false and untrue, and if you further find that said Lefkovits had employed said Milton to be present at said time and place and to confront and interview the plaintiff, and that said Lefkovits was then and there aiding and abetting said Milton in said actions and inducing and procuring said Milton to make said statements to the plaintiff, or if you find from

the evidence that the defendant Lefkovits, at said time and place and in the presence of said Milton and said Vallean made the following statements or either of them to the plaintiff, to wit: 'No; you have been stealing my goods; you stole that chain hanger,' or 'you sold two batteries for one, and stole one'—and if you further find that said statements were false and untrue, then your verdict will be in favor of the plaintiff and against the defendant Lefkovits. And if, in addition to finding the facts as above stated, you further find from the evidence that the business of the defendants, as shown in the evidence and heretofore mentioned in this instruction, was at the time mentioned, and for a long time previous thereto had been, conducted in the name of the defendant Edward Light Company, and that during the time hereinbefore mentioned and for a long time previous thereto the defendant Lefkovits owned practically all of the capital stock of said Edward Light Company, and was the president and manager of the same, and that during the transactions and statements hereinbefore mentioned said Lefkovits was acting for and in behalf of said Edward Light Company, then your verdict will be in favor of the plaintiff and against both of the defendants in this case."

[12] In this connection it is insisted that the instruction is a comment on the evidence. We fail to see how it can be so construed. It is insisted that the instruction does not conform to the petition in that it tells the jury that they might find for plaintiff if Milton was employed by the defendant "to confront and interview the plaintiff," while the words used in the petition are "to confront and accuse plaintiff." We think that this difference between the wording of the petition and the language of the instruction is immaterial for the reason that the instruction has the jury find sufficient facts which, if true, show that Lefkovits and the corporation ratified the acts of Milton in slandering plaintiff. The instruction expressly has the jury find that Lefkovits made the initial employment of Milton. It also allows the jury to find that Lefkovits at all times acted for the corporation, and it submits facts which, if found by the jury to be true, constituted ratification by both defendants as a matter of law of Milton's acts in slandering plaintiff. In having the jury find that Milton was employed "to confront and interview the plaintiff" an unnecessary burden was assumed by plaintiff, and there was no reversible error.

From what we have said each one of the slanders submitted in the instruction are actionable per se, and the contention that both Lefkovits and the corporation could not be liable for the various slanders in the instruction is not well taken.

[13] Complaint is made of plaintiff's instruction No. 2, for the reason that it does not properly define malice. The instruction tells the jury that—

"\* \* \* In order to find that said words were uttered with malice, it is not essential that such malice should be proved by express and direct testimony; but such malice may be inferred from the fact, if such is the fact, that such words were uttered, and were false and untrue, and were uttered knowingly and intentionally and without legal justification or excuse."

Defendants have not pointed out wherein this definition is defective, and we find nothing wrong with it. *Buckley v. Knapp*, 48 Mo. 152, 161. The petition charges that the words were "malicious" and were "maliciously" uttered.

[14] It is insisted that plaintiff's instruction No. 4 is a comment on the evidence. Said instruction reads as follows:

"The court instructs the jury that, if you believe from the evidence that the plaintiff signed the statement (offered in evidence) under coercion and duress, and not of his own free will, then, in arriving at your verdict, you may disregard said statement and give no effect to the same."

Defendants' instruction No. 7 reads as follows:

"The court instructs the jury that, if you find and believe from the evidence that the defendant did not say the following: 'No, you have been stealing my goods.' 'You stole that chain hanger;' and 'You sold two batteries for one and stole one'—and if you further find and believe from the evidence that the plaintiff knowingly and wrongfully took the goods of the defendant, and without authority, and without making any charge or entry thereof, sent a certain chain hanger and other minor attachments to the M. E. Church on the 14th day of March, 1919, and thereafter paid the price of said chain hanger, together with the costs of investigation, and further stated that it was his written confession, as set out in plaintiff's petition, and if you further find and believe from the evidence that said written confession of plaintiff was made on his own free will and accord, then your verdict must be for the defendant."

Plaintiff's instruction No. 4 is the converse of defendants' instruction No. 7, and, if there is any error in plaintiff's instruction, it was joined in in defendants' instruction.

[15] It is insisted that the court erred in refusing defendants' instruction No. 14 and in giving the instruction as modified. The instruction as given reads as follows:

"The court instructs the jury that it is not sufficient that the words proved are of equivalent meaning with those charged by plaintiff and shown by the evidence, and, unless you find and believe from the evidence that the words proved are substantially the same words charged, your verdict must be for defendant."

The instruction as offered is substantially the same as that given, except that the words we have italicized were not in the one offered. There is no complaint in the motion for

a new trial in reference to the court's giving the court's instruction No. 14, but there is complaint of the court's refusal to give defendants' instruction No. 14. The instruction as given reads substantially the same as defendants' given instruction No. 3, which tells the jury that—

"Plaintiff must prove to the satisfaction of the jury, by a preponderance of the evidence, that defendant uttered the words charged as slanderous *substantially those words shown in the evidence; and proof that he uttered equivalent words or words of similar import will not do.*" (Italics ours.)

The court, no doubt, amended defendants' instruction No. 14 to conform to defendants' given instruction No. 3, and defendants, having asked and procured their instruction No. 3, should not complain of the action of the court in harmonizing all the instructions with the one given. We think the sense of instruction No. 14 as given is that plaintiff was required to prove substantially the words charged, and that proving words of similar import to those charged was not sufficient. If this is what the instruction means, of course, there was no error in the giving of it, and the court did not substantially change the instruction as offered.

[16] There was no error in refusing defendants' instructions Nos. 9 and 10 on the burden of proof, for the reason that they were misleading on the question as to who had the burden of proving justification or the truth of the words charged to have been slanderous. This burden was on defendants. (25 Cyc. 413.)

[17] It is insisted that the verdict is against the weight of the evidence and is the result of passion, prejudice, and mistake, and is for the wrong party. We have carefully read the record, and find there is nothing involved except the mere weight of the evidence, which was for the jury and the trial court, and not for this court. *Terry v. K. C. Rys. Co.*, 228 S. W. 835; *Harmon v. Irwin*, 219 S. W. 392; *Robertson v. Kochitzky*, 217 S. W. 543; *Abernathy v. Mo. Pac. Ry. Co.*, 217 S. W. 568.

The judgment is affirmed.  
All concur.

### THEE et al. v. WABASH RY. CO. (No. 13813.)

(Kansas City Court of Appeals. Missouri. April 4, 1921. Rehearing Denied May 2, 1921. Certiorari to Supreme Court Denied.)

1. Carriers  $\S$  47(1) — Contract by station agent for his company held good.

A contract entered into by a station agent in behalf of his company with a shipper to furnish cattle cars held good.

2. Release  $\S$  30—In shipper's contract held not to cover breach of prior oral contract to furnish cars.

Where a station agent's oral contract with a stock shipper to furnish cars was breached by the carrier, and the shipper subsequently entered into a written contract for shipment whereby he released all claims by reason of any prior verbal contract, held, that such release did not affect the cause of action on the oral contract; that being a different contract upon which a right of action had already accrued.

3. Carriers  $\S$  207(1) — Live stock contracts must be construed liberally for shipper.

All live stock contracts must be construed liberally in favor of the shipper against the carrier.

4. Carriers  $\S$  230(7)—Failure to define oral contract in suit against carrier held not error.

In a suit by a live stock shipper against a carrier for breach of an oral agreement to furnish cars, failure to instruct as to the meaning of the term "oral contract" held not error.

5. Appeal and error  $\S$  1001(1)—Verdict for plaintiff sustained by evidence will not be disturbed.

Where there is ample evidence to sustain a verdict for plaintiff, and the jury has passed upon it, the finding will not be disturbed on appeal.

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

Action by Ed Thee and others against the Wabash Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed. See, also, 217 S. W. 568.

McBaine, Clark & Rollins, of Columbia, for appellant.

North Todd Gentry, of Columbia, for respondents.

ARNOLD, J. This is an action in damages against the Wabash Railway Company based upon the violation of an oral contract made October 14, 1917, by the station agent of the defendant company at Columbia, Mo., with plaintiffs, whereby said agent agreed to have three empty cattle cars at said station on the following day, ready for plaintiffs' use in the shipment of 58 head of fat cattle.

The petition alleges that in pursuance of said contract the plaintiffs drove their said cattle to Columbia and placed them in defendant's stock pens for shipment on October 15, 1917; that the defendant failed to have any of said cars at Columbia on that day, and failed to provide plaintiffs with the three cars in which to ship their cattle according to contract; that, said cars not being furnished, plaintiffs were compelled to keep and feed said cattle until October 16th; that, owing to said delay, said cattle lost flesh and shrunk in weight more than

they would have done had they not been delayed; that said cattle depreciated in value and were unsalable and stale on the market, and the market price of such cattle declined, and plaintiffs were compelled to pay out and expend sums of money for extra feed for said cattle; wherefore plaintiffs sued for the sum of \$1,179.75.

Defendant's answer was: First, a general denial; and, second, defendant states that this was an interstate shipment of cattle, being from Columbia, Mo., to Chicago, Ill., with the privilege of the National Stockyards, Ill.; that said shipment was made under the provisions of a written contract among other terms of which was "section 8," which provided:

"The parties of the second part hereto agree to assume all risk of injury or damage to, or escape of, the live stock aforesaid, which may happen to it while in the stockyards of said party of the first part, awaiting shipment at any point on any line of railroad owned or operated by the party of the first part, and in consideration of said rate herein named shipper hereby releases and waives any and all cause or causes of action that may have accrued to him by reason of any written or verbal contract prior to the execution of this contract."

And as a further defense "section 10" of said contract was pleaded, as follows:

"In consideration of the rate aforesaid, it is further agreed that no claim for damages which may accrue to the party of the second part under this contract shall be allowed or paid by the party of the first part, or sued for in any court by the party of the second part, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the party of the second part, or his or their agent, and delivered to the freight claim agent of the party of the first part at his office in the city of St. Louis within ten (10) days from the time said stock is removed from said cars; and it is also agreed that, if any loss or damage occurs upon a connecting line, then such line shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some officer or general agent of the line on which the loss or injury occurs."

Defendant states that the plaintiffs wholly failed to comply with the provisions of section 10; and, further answering, defendant claims that the agent of defendant at Columbia had no power or authority to make an agreement with plaintiffs or any other shipper to furnish cars at any definite time. At the close of plaintiff's case the defendant offered a demurrer to the evidence which was overruled; and again at the close of all the evidence defendant asked a peremptory instruction in its favor which was by the court overruled. The jury returned a verdict for \$723.37, upon which judgment was rendered, and defendant appealed.

The cause was instituted in the circuit court of Boone county in September, 1918,

and is the second suit filed in the case, plaintiffs having been nonsuited in a previous action on the same state of facts. The original petition was in three counts, but the first and third counts were dismissed by plaintiffs prior to the trial of the cause on April 19, 1919. From the verdict in favor of plaintiffs on the second count, defendant appealed to this court, where judgment was reversed, and the cause remanded with the suggestion that, "in view of the possible right plaintiffs may have to amend (concerning which we make no decision), we will not reverse the judgment outright, but will remand the cause." *Thee v. Railroad*, 217 S. W. 566.

It appears from the contention of plaintiffs and the evidence produced that there were two contracts connected with this transaction, namely: (a) An oral contract to furnish three cars for the shipment of 56 head of fat cattle, upon which this suit is based; and (b) a written contract to ship 46 head of cattle. The oral contract is alleged to have been entered into on October 14, 1917, and the written contract on October 16, 1917. The oral contract was entered into first and was made up of a conversation between plaintiff Neeley and defendant's assistant station agent at Columbia. Neeley testified that on Sunday, October 14, 1917, he called the railroad station over the telephone, "and the young man in the office said he would take the order, and I said I wanted three cars for the next day, Monday, the 15th, and that we wanted to ship cattle, \* \* \* and I asked if he would have the cars there, and he said he would." Plaintiffs brought the cattle in the next day (Monday), arriving about 11 a. m., and placed them in defendant's stock pens, provided by defendant for stock awaiting shipment. The station agent then informed him that he had been unable to procure the cars for that day. This compelled plaintiffs to hold the cattle until the next day, causing an expenditure for feed, and a delay in reaching their destination, which caused shrinkage and compelled a sale on a lower market.

On ascertaining that the three cars ordered on the 14th could not be had on the 15th, 10 or 12 head of the cattle were shipped on that date in a car, together with a shipment by a neighbor. The remaining 46 head were held over until the next day, when they were shipped out from Columbia to Chicago, with the privilege of the National Stockyards, Ill. At this time (October 16th) a written contract was entered into between plaintiffs and defendant.

[1] Plaintiffs contend that the oral contract pleaded was for furnishing cars for the purpose of shipping cattle. When one of the plaintiffs notified the station agent that he wanted three cars on Monday "to ship cattle in," and the agent answered, "All right, they will be here," that was plainly no contract

of shipment. It was merely an agreement to furnish the cars. *Thee v. Wabash Ry.*, 217 S. W. 566. The oral contract to furnish three cars was clearly established by both plaintiff Neeley and by the memorandum entered by defendant's agent in the latter's car book and signed by Neeley. A contract entered into by a station agent in behalf of his company has been held good in this state. *Vivion v. Railroad*, 172 Mo. App. 352, 157 S. W. 971; *Miller v. Railroad*, 62 Mo. App. loc. cit. 260; *Kissell v. Railroad*, 194 Mo. App. 346, 188 S. W. 1118.

Defendant maintains that by signing the contract of shipment on October 16, 1917, plaintiffs waived any cause of action they may have had under the oral contract to furnish cars.

The waiver in clause 8 of the written contract did not embrace and could not embrace, without some consideration, an entirely different transaction which had been brought to an end by the action of the parties, and the damages thereon had already accrued before the execution of the written contract which concerned an original agreement and had nothing to do with a prior independent contract which had been terminated by the parties. This release clause does not relate to the contract breached and brought to an end the day before.

In discussing a similar state of facts in *Vivion v. Railroad*, 172 Mo. App. loc. cit. 355, 157 S. W. 972, and differentiating that case from *Fountain v. Railroad*, 114 Mo. App. 676, 90 S. W. 393, the court says:

"The release or waiver clause in the contract in that case was different from that contained in this contract. In that case the release was specifically from any cause of action by reason of any prior verbal contract. While in the present case, we have seen, the contract came to an end and had become a closed incident; and the release was not of any cause of action accruing on a prior verbal contract, but was a release of any cause of action or damage arising on any verbal representation made prior to the writing, clearly meaning any representations made concerning the shipment in which the writing was executed. And so does the reason of the matter confine the claim to 'such prior representations and agreements' merging in the contract. We think it manifest that the waiver clause quoted was not intended

by the parties to embrace a distinct and completed matter entirely foreign to it."

[2] Applying this line of sound reasoning to the case at bar, the conclusion seems inevitable that by the execution of clause 8 of the written contract pleaded by defendant plaintiffs did not waive any rights of action under the oral contract of October 14, 1917, which was breached by defendant by its failure to furnish three cars for shipping cattle. That contract was closed, and plaintiffs' right of action accrued upon said breach. The written contract was an entirely different one, and was for the shipment of a different number of cattle and a different number of cars.

[3] The authorities hold that all live stock contracts must be construed liberally in favor of the shipper against the carrier. *Richardson v. Railroad*, 149 Mo. loc. cit. 323, 50 S. W. 782.

In this view of the case it is clear that the citations of defendant in support of any other theory than the above do not apply.

The contention of defendant that the court erred in permitting plaintiffs to introduce papers addressed to defendant relative to clause 10 of the written contract is untenable in the light of the views herein expressed to the effect that the written contract pleaded by defendant does not affect the operation of the oral contract to furnish cars.

[4] Defendant complains that the court erred in giving instruction numbered 1 for plaintiffs, in this, that it left the jury to determine from the evidence what is an "oral contract." This contention does not merit serious consideration. There could have been no doubt in the minds of intelligent jurymen as to what an oral contract means, and we cannot consider as prejudicial a failure of the court to instruct as to the meaning of the term. Defendant failed to ask any instruction on this point, and he may not now be heard to complain.

[5] There was ample evidence produced on the part of plaintiffs to sustain the verdict; and, as the jury passed upon the same, the finding will not be disturbed for that reason. We find no reversible error in the case.

In accordance with the views herein expressed, the judgment is affirmed.

All concur.

**PHILLIPS v. STATE. (No. 6202.)**

(Court of Criminal Appeals of Texas.  
April 13, 1921. Rehearing Denied  
Oct. 19, 1921.)

**1. Criminal law §1090(8)—Evidence not reviewed in absence of bill of exceptions.**

The admission or rejection of evidence will not be reviewed on appeal in the absence of a bill of exceptions, notwithstanding complaints of rulings of the court upon the admission of evidence in the motion for a new trial.

**2. Criminal law §1144(14)—Charge presumed applicable to facts in absence of statements of facts.**

In view of Code Cr. Proc. 1911, arts. 735, 743, the court's charge will be presumed to be applicable to the facts, in the absence of a statement of facts.

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Marie Phillips, alias Jack Gafford, was convicted of robbery, and she appeals. Affirmed.

Howard H. Dailey, of Dallas, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

**MORROW, P. J.** Conviction is for robbery. Punishment fixed at confinement in the penitentiary for a period of five years.

The indictment lacks none of the essential elements. No statement of facts accompanies the record, nor do we find any bill of exceptions.

In the motion for a new trial there are complaints of certain rulings of the court upon the admission of evidence and certain criticisms of the court's charge and the refusal of special charges requested.

[1] To enable this court to review the rulings of the trial court upon the admission or rejection of evidence, a bill of exceptions is in practically all cases essential. *Daffin v. State*, 11 Tex. App. 76; other cases collated in *Vernon's Criminal Statutes*, vol. 2, p. 534, note 15.

A motion for a new trial is inadequate for this purpose. *Clifton v. State*, 70 Tex. Cr. R. 346, 156 S. W. 1179; *Hart v. State*, 61 Tex. Cr. R. 511, 134 S. W. 1178; *Brown v. State*, 58 Tex. Cr. R. 336, 125 S. W. 915; other cases in *Vernon's Crim. Statutes*, vol. 2, p. 535. By the statute it is required that objections to the charge shall be made before it is read to the jury (Code of Criminal Procedure, art. 735), and that the refusal of special charges must also be then objected to (Code of Criminal Procedure, art. 743; *Vernon's Criminal Statutes*, vol. 2, pp. 525, 526).

[2] The merits of the criticisms of the charge in the instant case would not be discernible in the absence of the statement

of facts which were before the trial judge and to which the charges are presumed to have been applicable. *Nelson v. State*, 59 Tex. Cr. R. 149, 127 S. W. 1020; *Vernon's Texas Criminal Statutes*, vol. 2, p. 520, notes 52 and 53.

In the absence of the disclosure of errors committed upon the trial, and without the facts before us, we must presume that the procedure was regular and the evidence sufficient.

The judgment is affirmed.

**On Motion for Rehearing.**

An affirmance was ordered on the 13th day of April last, and during the same month a motion for rehearing was filed stating that, though no statement of facts nor bills of exceptions accompanied the record, they were in existence, and that for reasons advanced in the motion unavoidable circumstances had prevented their filing. In the motion the court is requested to consider them together with the explanation of delay. Up to this time they have never been filed, and we feel constrained to pass on the motion without deferring the matter longer. In the absence of the bills of exceptions and statement of facts, we have nothing before us that was not disposed of on the original hearing. The motion is overruled.

**GREEN v. STATE. (No. 6341.)**

(Court of Criminal Appeals of Texas. June 22, 1921. Rehearing Denied Oct. 12, 1921.)

**1. Homicide §236(1) — Death from defendant's shot established.**

Evidence held to establish that the shot from defendant's gun killed deceased.

**2. Homicide §300(13) — Requested charge held to omit conditions as to defendant's conduct necessary for self-defense.**

Requested charge that, if defendant went to the deceased's home for a friendly purpose, and about the time he arrived, after inquiring for deceased, he saw him run and pick up a gun and use it in a threatening manner as if intending to shoot defendant, defendant in then shooting deceased would not be guilty, held insufficient, as defendant's own conduct after he arrived would necessarily enter into the question of his right to take deceased's life.

**3. Criminal law §829(1) — Request covered by general charge properly refused.**

Refusal of a requested charge fully and fairly covered by the court's charge is proper.

**4. Criminal law §829(5) — In view of charge on self-defense, charge on defendant's right to arm himself unnecessary.**

Defendant's perfect right of self-defense having been given in the charge, and in no

way limited by his going to deceased's home armed with a gun, there was no necessity for charging on defendant's right to arm himself.

5. Homicide  $\Leftrightarrow$  190(6) — Threats not naming deceased admissible if it can be reasonably gathered that he was meant.

Threat contained in statement by defendant's son to defendant on Saturday before the killing, "You come over Sunday and we will beat h— out of him," held admissible on the theory that, though deceased was not named, it could reasonably be gathered that he was meant; it appearing, among other things, that no man other than deceased and defendant's son lived at the house where defendant shot deceased.

6. Criminal law  $\Leftrightarrow$  942(1) — New trial not granted for newly discovered impeaching evidence.

Ordinarily new trial will be refused for newly discovered evidence admissible only for impeachment.

7. Homicide  $\Leftrightarrow$  250—Conviction of murder justified by evidence.

Evidence in a case where defendant claimed self-defense held to justify conviction of murder.

Appeal from District Court, Upshur County; J. R. Warren, Judge.

L. J. Green was convicted of murder, and appeals. Affirmed.

M. B. Briggs and T. H. Briggs, both of Gilmer, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Upshur county of murder, and his punishment fixed at five years in the penitentiary.

Deceased was a nephew of appellant, and was making his home at the time of the homicide with appellant's son, Oscar Green, at whose house the shooting took place. The homicide occurred Sunday morning about 8:30 or 9 o'clock. A recital of the facts would be of no value, except as illuminating our action in ruling upon the grounds presented by appellant for a reversal of his case.

[1] Appellant asked a peremptory instruction of not guilty upon the ground that the evidence did not establish that the shot from the gun of appellant killed deceased. This was refused, and we think properly so. It is true that no one described the wounds on the body of deceased with any particularity, nor did any one state in terms that deceased came to his death by gunshot wounds inflicted by appellant, but the evidence established conclusively that death was the result of such gunshot wounds. Without going into the testimony of the various eyewitnesses, we quote from the testimony of Miss Lewis, who said, referring to the incidents immediately connected with the shooting:

That appellant "threw up his gun; that deceased ran and got a gun, and both fired almost, if not exactly, together; that deceased walked into the dining room and fell in there; that he let into calling his niece, saying they had killed him"; that Oscar was shot in the right hip and George (deceased) in the lower bowels; \* \* \* when the defendant shot him, George Green went into the dining room and fell; \* \* \* that he let in to screaming, said they killed him; \* \* \* was standing out in the hall when Mr. Green shot him," etc.

Many other things occur in the testimony of other witnesses similar to the above.

[2] Appellant asked the following special charge:

"Gentlemen of the jury, at the request of the defendant, I give you in charge as a part of the law of this case the following instructions: That if the defendant on the occasion in question went down to the house of the deceased, George Green, for the purpose of having a friendly talk with him, or for the purpose of advising him to give up the six-shooter mentioned in the evidence, and that, when he arrived in front of the house, he inquired for deceased, George Green, and that about that time he saw George Green run from one room into the room where the gun was and saw the said deceased pick up the gun, and that the deceased was using said gun in a threatening manner that looked like he intended to shoot defendant, or if it reasonably appeared to the defendant that the deceased was fixing to shoot the defendant, and that the defendant then shot the deceased, he would not be guilty, and this you will view from the standpoint of the defendant as it appears to him at the time under all facts and circumstances and evidence, and if you shall find that he so acted you will find the defendant not guilty, or if you have the reasonable doubt as to whether or not the defendant so acted, you will give him the benefit of such doubt and find him not guilty."

This was properly refused. Irrespective of appellant's purpose in going to the place where deceased lived, his own language and conduct after he arrived there would necessarily enter into the question of his right to take the life of deceased, and might easily be such as to entirely deprive him of any right of self-defense, and might show mutual combat, and may have shown that deceased was justified in getting a gun and acting as if he intended to shoot appellant. The state witness Lewis said that when appellant saw deceased he threw up his gun before deceased made any effort to get a gun. Such testimony would clearly make inapplicable the propositions embraced in said special charge.

[3,4] The court's charge on threats in connection with self-defense was full and fair, and it was not error to refuse the special charge asked on this subject. In this connection, we observe that appellant's perfect right of self-defense having been given him in the charge of the trial court,

and, same having been in no way limited by reason of his going to the home of deceased armed with a shotgun, there was no necessity for charging the jury on the right of appellant to arm himself. *Harrelson v. State*, 60 Tex. Cr. R. 539, 132 S. W. 783; *Holmes v. State*, 69 Tex. Cr. R. 588, 155 S. W. 205; *Strickland v. State*, 71 Tex. Cr. R. 582, 161 S. W. 110.

[5] Complaint is made of the admission of testimony of Reuben White of the fact that on the day before the homicide appellant had a conversation with his son, at whose house the homicide occurred, and the statement was made, "You come over Sunday and we will beat hell out of him." This was objected to because too general, not being shown to have reference to deceased, and as being inflammatory and prejudicial. The bill of exceptions presenting this matter was approved by the trial court with the qualifying statement that the connection in which the language was used renders it admissible as shown by the statement of facts. The bill with this qualification was accepted by appellant, and might have been held by us to have precluded the necessity for further investigation, but we have looked to the statement of facts, and find that same shows that when appellant went to see deceased on the Sunday morning of the homicide he apparently wished to compel him to produce a pistol belonging to a negro named Shorty. It is also shown that at some time recently before the homicide deceased had used language concerning appellant which angered him very much. It further appears that on the Saturday afternoon preceding the killing on Sunday morning appellant testified that deceased came to his blacksmith shop and "they would not let him come into the shop." The threat complained of was supposed to have been made at said shop and on Saturday afternoon before the killing next morning. The witness who testified to said threat said he heard appellant and his son talking about somebody; they talked about a pistol, about being mad at somebody; and that the son said to appellant for him to come over to his house next day and they would beat hell out of him. The evidence further shows that no other man lived at said house where the killing occurred except Oscar Green and deceased. Appellant did go over the next morning, having borrowed a gun before going, and, if the testimony be true, having threatened to go there to harm deceased. These facts do not bring the instant case within the rule that general threats, not shown to have been directed at the injured party, nor to include him, are not admissible; but rather bring it within the line of authorities holding threats admissible, even though no name be called, if it can

be reasonably gathered that the injured party was meant or included in such threat. *Hardy v. State*, 31 Tex. Cr. R. 289, 20 S. W. 561; *Williams v. State*, 40 Tex. Cr. R. 501, 51 S. W. 220; *Sebastian v. State*, 41 Tex. Cr. R. 251, 53 S. W. 875; *Taylor v. State*, 44 Tex. Cr. R. 549, 72 S. W. 396.

[6] Appellant asked a new trial because of newly discovered evidence, attaching affidavits of certain parties as to statements made by witnesses in the case, in seeming contradiction to their testimony upon the trial. Ordinarily new trials will be refused for newly discovered evidence admissible only for purposes of impeachment. Some of the witnesses attacked by said affidavits were defendant's own witnesses.

[7] This disposes of all the contentions made by appellant upon the trial. All of the eyewitnesses to the homicide testified, two on behalf of the state, and three, including appellant, for the defense. It was in testimony by a witness having apparently no interest in the outcome of the trial that on the morning of the homicide appellant came to his house and borrowed a shotgun and got a couple of shells loaded with No. 4 shot, telling witness that he wanted same for the purpose of killing a hawk. This witness lived about a mile from the home of appellant's son, where the shooting occurred, and stated that about 30 minutes after appellant got the gun he heard the shooting. He also testified that a few days after the shooting he was passing the home of appellant and the latter called him in and asked him if he was mad with him because he got the gun, and told witness that he got the gun to shoot the boy with, and that he knew, if he told the truth as to why he wanted to get it, witness would not let him have it. Another witness testified that before the homicide appellant came by his house and told him that he was going to kill deceased that morning. We believe the facts justified the jury in arriving at the verdict rendered. The evidence was conflicting, appellant testifying that, after going to his son's house and inquiring for deceased and being told that he was not there, he made some statement about purposing to go to Gilmer and report deceased for some stealing, and that he got on his horse and was about to start away and turned to speak to his son, and that he knew nothing that occurred until a number of days after, when he recovered consciousness at his home. The evidence showed that two shots were fired almost simultaneously, one of them taking effect in the body of deceased and the other in the body of appellant. All these conflicts of evidence were before the jury and have been resolved against the accused.

Finding no error in the record, the judgment will be affirmed.



## On Motion for Rehearing.

In dictating the original opinion we stated the length of appellant's sentence to be five years. The conviction was for eight years with indeterminate sentence of from five to eight, and the clerk of this court noted the term on the outside of the record as being five years, which caused our erroneous statement, which is here changed, and the sentence is referred to as being eight years; our attention having been called to this error in the motion for rehearing.

Appellant again insists that it was error to allow Reuben White's testimony, which is referred to and discussed at some length in our original opinion. The authorities cited by appellant, upon careful examination, will be found differing in facts and their consequent principles from the instant case. In the Strange Case, 38 Tex. Cr. R. 280, 42 S. W. 551, this court says:

"And, in regard to the threat made by defendant against his brother Lewis, it is absolutely unconnected with any fact or circumstance shedding any light upon this case; and in that connection the fact that he 'laughed, and said he would kill somebody before Saturday night,' could have no significance as tending to make a solution of any act of defendant that was relevant and provable in the case. There is no pretense that he referred to the deceased, but they were then on friendly terms."

In the Godwin Case, 38 Tex. Cr. R. 466, 43 S. W. 336, the opinion states:

"We hold the rule to be that evidence of general threats made by the defendant on trial for murder, when such threats are not shown to be directed towards the person slain, or to embrace such person, are inadmissible."

Referring to the threats made in that case, the court says that the evidence does not even remotely suggest that they were directed at the deceased.

In Holley's Case, 39 Tex. Cr. R. 301, 46 S. W. 39, this court did not hold the threats inadmissible, but, on the contrary, used the following language, which is in support of the rule announced in the instant case:

"It occurs to us, however, from the other testimony in this case, that, notwithstanding deceased was not named in connection with the threats, it can be reasonably inferred that the threats were directed against him. Appellant was shown to have had malice against him, and he is not shown to have entertained hostile feelings towards any other person in the community."

In Fossett's Case, 41 Tex. Cr. R. 400, 55 S. W. 497, it was shown that appellant said he wished he had a saloon so he could shoot a bartender. This court said:

"While it is always important to show the state of mind of defendant before the killing, as

indicating malice, yet this state of mind must in some manner be directed towards deceased, either by direct expression, or the remark must, within its scope, embrace deceased. Neither of these conditions are shown here. It was not directed towards him by name, nor did it embrace him by intendment, inasmuch as deceased was not a bartender."

Discussing the statement of the accused that when he went after any one he generally got them, in the Lucas Case, 50 Tex. Cr. R. 219, 95 S. W. 1056, it is stated:

"It is very clear, from this bill of exceptions and the witness' testimony, that the remark was made before, and had no reference to deceased; for appellant and deceased up to this time had been friends."

In Barbee's Case, 50 Tex. Cr. R. 426, 97 S. W. 1059, where appellant was charged with the murder of Jenkins, it was held improper to prove that he said, "I am loaded for John Davis or any one else." Without discussion of the principle, Godwin's case, supra, is referred to as authority for this conclusion. In Fuller's Case, 54 Tex. Cr. R. 457, 113 S. W. 541, discussing the admissibility of the statement of the accused that he was going to kill a Dutchman or run him out of the country, this court said:

"We think probably this testimony was not admissible. It has occurred to us that the decisions of this court, at least in the language of some of them, have carried the rule rather further than as an original proposition the writer should have been inclined to go, but where, as in this case, there is no reference to the deceased, no suggestion in the testimony that his troubles with appellant were the subject of conversation, and nothing in the language of the parties to constitute even a remote reference to or connection with the deceased, it would seem under the authorities and in reason that such a statement ought not to be received. We can well understand how the evident idea of the court below that it was a question for the jury might apply if there was enough in the testimony to leave it open to a fair inference that the threats introduced had reference to the deceased."

Reference to our statement in the original opinion makes it clear that in the conversation testified to by White the deceased was probably under discussion by appellant and his son and was presumably the party referred to in the objectionable testimony. It is not necessary for deceased to be named in the threat in order to make same admissible, and in passing on the question as to whether the threat so made referred to or included the deceased its language will be viewed in the light of the entire record.

The motion for rehearing will be overruled.

**DOVE v. STATE. (No. 6041.)**

(Court of Criminal Appeals of Texas.  
June 15, 1921. Rehearing Denied  
Oct. 19, 1921.)

1. Criminal law §1144(1/2, 17)—Presumptions favor regularity of proceedings and correctness of judgment in absence of statement of facts and bills of exceptions.

In the absence of statement of facts and bills of exceptions, every presumption must be indulged in favor of the regularity of the proceedings and the correctness of the judgment.

On Motion for Rehearing.

2. Criminal law §1097(4)—Refusal to withdraw evidence from jury not considered in absence of statement of facts.

Court's refusal to withdraw certain evidence from the jury will not be considered on appeal in the absence of a statement of facts.

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Will Dove was convicted of having possession of intoxicating liquors, not for medicinal, mechanical, scientific, or sacramental purposes, and he appeals. Affirmed.

S. M. Adams, of Nacogdoches, for appellant on rehearing.

R. H. Hamilton, Asst. Atty. Gen., for the State.

**HAWKINS, J.** Conviction was for possession of intoxicating liquors, not for medicinal, mechanical, scientific, or sacramental purposes. Punishment fixed at three years in the penitentiary.

The record is before this court without statement of facts or bills of exceptions.

The conviction was had at a term of court which adjourned on March 27, 1920. The record was not filed in this court until October 22, 1920. As an excuse for not getting the record filed at an earlier date, the clerk certifies that the attorney for appellant carried the original papers to his office for the purpose of writing the bills of exceptions, etc., and lost the papers and was only able to produce them on October 20th, and did not prepare the appeal or furnish the statement of facts.

[1] We much prefer to dispose of cases on the merits; but, in the absence of statement of facts and bills of exceptions, every presumption must be indulged as to the regularity of the proceedings and correctness of the judgment.

The judgment is affirmed.

On Motion for Rehearing.

[2] In his motion for rehearing appellant insists that this court may consider his special charges which were refused, even in the

absence of a statement of facts. We did not overlook them in disposing of the case in the first instance. An application for suspended sentence was filed, and this issue was submitted to the jury. The first special charge requested sought to have withdrawn from the jury's consideration certain evidence which would have been pertinent under proper circumstances on the issue of suspended sentence. In the absence of statement of facts, we are deprived of any means by which we may determine this evidence to have been improperly admitted, hence must presume that no error in fact occurred.

The second special charge was a request for an instructed verdict of "not guilty," because of an alleged defective indictment. We have discovered no vice in the indictment.

The motion for rehearing is overruled.

**NEEDHAM v. STATE. (No. 6315.)**

(Court of Criminal Appeals of Texas. June 15, 1921. State's Rehearing Denied  
Oct. 19, 1921.)

1. Criminal law §511(1)—Evidence corroborative of accomplice held insufficient.

In prosecution for robbery, evidence corroborative of testimony of accomplice held insufficient to sustain conviction.

2. Witnesses §203—Testimony of county attorney and accomplice's attorney as to immunity agreement not privileged.

Testimony of the county attorney and the attorney of an accomplice who had testified for the state, as to immunity agreement between county attorney and accomplice's attorney, held not privileged, under Code Cr. Proc. 1911, art. 793, relating to communications between attorney and client; neither the accomplice nor his attorney being the county attorney's client.

Appeal from District Court, Harrison County; P. O. Beard, Judge.

Guy Needham was convicted of robbery, and he appeals. Reversed and remanded.

John Taylor, of Marshall, for appellant.  
O. M. Cureton, Atty. Gen., and O. L. Stone, Asst. Atty. Gen., for the State.

**HAWKINS, J.** Appellant was convicted of robbery, and his punishment assessed at five years in the penitentiary.

On the morning of December 27, 1920, about 3 or 4 o'clock, a robbery took place over a garage (or, as some described it, over Moore's Transfer Company), where a number of parties were engaged in a poker game; that Russell Jones was the man who held the pistol on the crowd, while one of his confederates secured the money from the parties present is a conceded fact.

We are met at the threshold of our in-

vestigation with an assignment that the evidence does not meet the requirements of the law in the corroboration of Jones. Without here setting out Jones' testimony, it may be stated that he makes out a case of conspiracy to rob, as to himself, Cornwall, Jackson, Harris, and appellant. According to the agreement as detailed by Jones, Cornwall and Harris were to enter the poker game and guard against any of the other parties present making any resistance and aid Jones in securing the money from those present. We may say that the evidence indicates that Cornwall and Harris carried out their part. At least, they were present, and Harris took the money from the parties, while Jones held the pistol on them; Cornwall in the meantime holding his hands up along with the others. Jackson was to drive the automobile and have it at a convenient and agreed place to facilitate escape from the scene after the robbery was accomplished. Jones was to go up and do the part of actually holding the poker game up, while Needham, appellant, was to remain at the bottom of the stairway with a pistol to prevent anyone entering or leaving during the robbery. Jones claims that Needham was at the bottom of the stairway to do his part when he (Jones) went up the steps. When Jones entered the door at the top of the steps, he met Dick Lancaster coming out. Jones permitted him to pass, expecting, as he says, that Needham would take care of him as he went down. Something in Jones' manner attracted Lancaster's attention, and he lingered long enough on the landing outside the door to hear Jones command to the crowd on the inside to "put your hands up."

From here on we will bear in mind the rule of excluding the testimony of an accomplice from consideration in ascertaining if other evidence tends to connect Needham with the robbery. After hearing Jones tell the crowd inside the room to hold up their hands, Lancaster immediately went down the stairway and almost directly across the street to the Marshall café. No one accosted him at the bottom of the stairs, and he observed no one there or thereabouts; in other words, he never saw Needham, where the latter was supposed to be. He found in the café Bechtold, a policeman, and Rogers, a night watchman. He told them at once that the poker game across the street was being held up. The two officers immediately went across the street and up into the room, and Lancaster walked out in front of the café. Within 30 seconds or a minute after the officers entered the room, Lancaster heard some shots, and Bechtold came running down the stairs, at which time the shooting was still going on upstairs. About the time Bechtold reached the foot of the stairs Lancaster heard a shot which he thought came from the east, on the street,

but did not see who fired the shot. The witness Lancaster says that, thinking possibly the shooting was coming out into the street, he stepped back into the doorway that went into the café. Bechtold ran into the café and directed somebody to telephone for help. The witness Lancaster then saw Rogers come down the stairs, and after him Jones. About the time he saw Jones coming down the steps Lancaster saw some one down at the end of the block; could not describe him, but merely noticed some one as they went around the corner.

Bechtold, one of the officers, never saw anybody when he and Rogers walked across the street and up the stairs after having been told by Lancaster that a robbery was in progress. After they got up the stairs and into the hall where the robbery occurred, Jones and the officers began shooting, and Bechtold was the first one down the steps. About the time he struck the bottom of the stairway coming out of the door, a shot was fired from the east, but he does not claim to know who fired it, and never saw anybody fire the shot. Later a sign hanging over the stairway was examined, and a hole was found in the sign, which was apparently made by a bullet traveling from the east. The testimony of Rogers, the other officer, is to the same effect as Bechtold's that they saw no one as they went across the street and up the stairway. About 15 or 20 minutes after the robbery he saw Needham mingling with the crowd at the Marshall café, and making inquiry about the robbery. Rogers was slightly wounded in the shooting in the gambling hall, and when he came down the steps after the shooting he first started east, but noticed nobody at that time near the foot of the stairway. Rausheck, one of the parties who was robbed during the transaction, went down the stairs after the shooting subsided, and, a little while after Jones went down, Rausheck claims to have seen a man whom he took to be Needham turning a corner of the block some distance east from the foot of the stairway; thought it was Needham only from his general description and his clothing (the fact seems to have been established that upon the night in question Needham was wearing a mackinaw coat); and this witness thought it was he from his general appearance and the character of the coat he was wearing, but was not close enough to him at that time to see the color of the coat. Rausheck went across the street to the café, and then up the street west with Bob Alexander, trailing blood which seemed to have been made from the wounds inflicted upon Jones. As they were following the blood trail they met Needham, who was coming towards the café, and who said something about blood being all over the sidewalk. Needham at this time was coming from the south, and going towards the Mar-

shall café. It was something like 12 minutes from the time of the shooting until they met Needham. Rausheck and Alexander only went a little further and then came back to the Marshall Café. Needham was there then asking about the holdup, and if anybody was killed, and who shot, and making general inquiries about the robbery. Bob Alexander was present at the time of the robbery, and after it was over and Jones and the officers had gone down the steps Alexander and the other parties came down. When he got down to the foot of the stairs he saw Needham standing either on the sidewalk, or just off the edge of the sidewalk east of Moore's garage, about 30 or 40 feet from the stairway. Alexander claims that Rausheck came down ahead of him. Later, this witness, Rausheck, met Needham at Perkins' Bros. corner, about a block and a half from the scene of the robbery. Alexander does not think it was over 10 minutes from the time he came downstairs and saw appellant on the sidewalk until he met him the second time on Perkins' Bros. corner. When Alexander came down the steps and saw Needham standing 30 or 40 feet from the stairway, he did not suspicion that he was implicated in the robbery, and made no report of seeing him there to the officers.

W. M. Drury testified that he was working at Simpson's café, and that about the middle of the night Needham was in his place of business and had been there for quite a while; when Cornwall, Jackson, Jones and a man he supposed was Harris came in. The four came in together and that all of them ate supper. This witness says Jackson had a pistol while he was in there, which he, witness, put away for him for a little while, and afterwards got the pistol and gave it back to Jackson; and that Cornwall, Jackson and Needham went back in the kitchen and were looking at the gun. Pittman, who was one of the parties engaged in the poker game, claims that about ten minutes after the robbery he, witness, was at the Marshall café and saw Jackson and Needham drive up beside the café in a car, and that Cornwall and Harris got in the car, and they all drove away. This same witness claims that 15 or 20 minutes later, while at the jail, he saw these same parties drive up in a car, and that two boys got out; Carl Craver and Roy Sisk. (This is the only mention of these parties in the record, and there is nothing to show why they got out at the jail, and there seems to be no connection between them and the other parties to the transaction.)

Does this evidence tend to connect appellant with the robbery? His part in the affair, according to Jones, was to guard the stairway. This he utterly failed to do. As Lancaster came down and the officers went up none of them saw him, and he in no way attempted to prevent their movements.

Nobody knows who fired the shot at Bechtold (if it was fired at him), as he emerged from the place of the robbery. Alexander is the only man who recognized Needham at a point nearer the stairway than the café, and his actions aroused no suspicion in the witness' mind at the time. This was after the shooting and robbery, when there was considerable excitement and everybody was moving about. The movements, and inquiries of appellant after the robbery, and while he was at the café, are perfectly consistent with that of a curious bystander. He seems to have been well known in Marshall, and was acquainted with all the parties claimed to have been implicated in the robbery, unless it was Jones, who had only been in the city about two weeks. His association with them as testified to by Drury, before the robbery, may have been entirely innocent; and, likewise, the incident related by Pittman of seeing him come up to the café in a car with Jackson, and drive away with Jackson, Harris, and Cornwall. In truth, the latter is the most suspicious circumstance related against him, and yet, after all, it might be only suspicion, because he may have done all the things any witness outside of Jones says he did do, and yet had no connection with the robbery.

[1] We do not believe the corroboration is sufficient to support the accomplice, and that on this account the judgment must be reversed.

In view of another trial there is one question raised we will discuss. While Jones was testifying he denied having any agreement with the county attorney promising immunity against prosecution. The county attorney also denied having promised Jones immunity, but, when asked if he had not made such an agreement with Jones' attorneys, he declined to testify on the ground that such agreement was a privileged matter. The attorney for Jones was then asked about such agreement, and also claimed it was privileged. The court refused to require them to answer.

[2] The inquiry was for the evident purpose of aiding the jury in determining the interest and bias of Jones, and to enable them to better weigh his testimony. That part of article 793 (773), C. C. P., applicable here reads:

"An attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship."

The quotation is an adoption of the common-law rule by our lawmakers with little change. Our courts have been jealous always in protecting communications between a client and his attorney, and properly so. But does this rule extend to embrace a situ-

ation like this? Jones was not the county attorney's client. The state of Texas was his client. Jones' attorney was not the county attorney's client. When Jones voluntarily agreed to go upon the witness stand and give evidence for the state, he became the state's witness, but not the state's client, and we see no reason why the county attorney should not have answered whether he had made an agreement with the witness's counsel promising immunity.

Mr. Wharton (volume 1, p. 1085, § 498, 10th Ed.) says:

"When an accomplice turns state's evidence, he cannot claim his privilege, because he must tell all he knows, as this is a condition of his immunity."

In Underhill on Criminal Evidence, p. 221, § 178, is the following.

"But an accomplice who consents to be a witness for the prosecution cannot claim the privilege for his statements to his attorney. He must, under his arrangement with the state, tell all he knows, and if he knowingly keeps back any relevant fact he loses his right to the immunity promised. And the fact that he may be compelled to state what he divulged to his attorney regarding his guilt may be the only means left to an innocent man accused of crime of meeting the perjury of the real criminal, posing as a penitent accomplice on the witness stand."

Many cases will be found cited in support of the text, but our own court in Sutton v. State, 16 Tex. App. 490, declines to go as far as the text or authorities cited thereunder would indicate. But that is not the exact question here. Jones was not being asked about any statement made to his attorney. His attorney was not interrogated about any statement made to him by his client. The inquiry was whether he had made a contract with a third party, the representative of the state, and his client's adversary, looking to an armistice and final peace as between the state and his client if the latter would testify for the state. We do not believe it was privileged. Unless the witness knew about the contract, if one existed, it could, of course, have no influence on his testimony, and would be immaterial. We think the appellant had a right to inquire of witness' attorneys if they had such a contract with the county attorney, and, if so, whether he had communicated it to the witness.

For the errors pointed out, the judgment must be reversed, and the cause remanded.

#### On Motion for Rehearing.

The state, through her representatives, Hons. F. M. Scott, James T. Casey, and O. L. Stone, has filed an able motion for rehearing, urging that the court was in error in holding that the testimony of the ac-

complice witness, Jones, was not sufficiently corroborated. In an equally strong answer the Hon. John E. Taylor, attorney for appellant, contends that the former opinion of the court was correct.

We have read with interest both the motion and the answer, and the arguments in connection with each. A proper consideration of the motion necessarily brings in review the entire evidence in the case, which we have again examined critically. It is a pleasure to review a record where it is apparent, as in this one, that both the state and appellant are represented in such a way that this court may feel assured nothing will be left undone to call its attention to every material fact upon which a proper disposition of the case would depend. We have not been able to bring our minds in accord with the proposition urged by the representatives of the state. We are still of the opinion, after another careful examination of the facts, that proper disposition was made of the case in our former opinion. We will not again review the facts, as this was exhaustively done before.

Therefore the state's motion for rehearing will be overruled.

#### GLASSER v. STATE. (No. 6270.)

(Court of Criminal Appeals of Texas. Oct. 5, 1921.)

1. Receiving stolen goods  $\S$ 6—Principal or accomplice in theft cannot be guilty.

If defendant's sole connection with a theft was that of an accomplice or a principal, conviction of receiving the stolen goods cannot stand.

2. Larceny  $\S$ 27—If participant's acts are all prior to theft, he is an accomplice, but performing specific part consummating the design might make him principal.

If defendant's criminal acts relating to a theft were all preliminary thereto, he was no more than an accomplice, but if he was a party to a conspiracy in pursuance of which property was stolen, each performing a specific part, consummation of the design would characterize him as a principal.

3. Receiving stolen goods  $\S$ 4—Possession of bill of lading held a possession of the goods.

Where bills of lading to stolen property were so drawn that the railroad company would deliver the property to the holder of the bills, possession of the bills put the property under the control of the defendant, and in receiving the bills he received the property.

4. Receiving stolen goods  $\S$ 8(3)—Evidence held to support conviction.

Evidence of possession of bills of lading and evidence as to whether defendant was an accomplice or principal in the original taking

held to support a conviction for receiving stolen property.

**5. Indictment and Information**  $\S$ 11(2)—Indictment not invalid for omission from record of names of grand jurors.

The indictment, having been presented by a grand jury composed of 12 men legally impaneled; was not rendered void by the mistake of the clerk in omitting from the record the names of 3 of the grand jurors.

**6. Indictment and Information**  $\S$ 11(3)—Omission of names of grand jurors was properly corrected by order nunc pro tunc.

Mistake of clerk in omitting from the record the names of three of the grand jurors, was properly corrected by order nunc pro tunc.

**7. Criminal law**  $\S$ 596(1)—Continuance properly refused for cumulative testimony to reputation.

A continuance was properly refused to secure attendance of witnesses to defendant's good reputation where it was already established by credible witnesses not controverted.

**8. Criminal law**  $\S$ 1166(1)—Failure to indorse witnesses on indictment not material where defendant had opportunity to interview them.

Where defendant was given ample time to converse with state's witnesses before they testified, failure to indorse their names on the indictment was not material.

**9. Witnesses**  $\S$ 337(6)—Indictment for other offense admissible on credibility.

On prosecution of defendant for receiving stolen goods, admitting indictment charging him with theft in another transaction was not error, it being admissible on the issue of his credibility as a witness.

**10. Criminal law**  $\S$ 1172(2) — Comment on weight of evidence not reversible unless harmful.

Violation of the statute forbidding the court to comment on the weight of evidence or convey his opinion is not reversible error if it is not harmful to the defendant.

**11. Criminal law**  $\S$ 823(1)—Refusal to instruct jury to disregard counsel's remarks on other offenses held not error.

Where, in prosecution for receiving stolen goods, indictments for similar offenses and for theft were admitted in attacking defendant's credibility as a witness, refusal to instruct the jury to disregard remarks of counsel as to other offenses was not error in view of a general charge that the other indictments could be considered alone on his credibility and that evidence of receiving other property was limited to the question of guilty knowledge in the instant case.

**12. Criminal law**  $\S$ 370, 371(2)—Evidence of receiving other stolen goods from same parties held admissible on intent.

In a prosecution for receiving stolen property, evidence of other similar transactions between the same parties and near the same time was admissible as original evidence on the

issue of guilty knowledge, the crucial question being intent and knowledge.

**13. Criminal law**  $\S$ 396(2)—Balance of a partly admitted conversation held not to be rejected as hearsay.

Where defendant, seeking to show state's witness had sought a bribe from him, introduced part of a conversation between himself and wife and witness, the state might, as against the objection of hearsay, introduce the balance of the conversation with statement that wife was pleading all the time for her husband, Code Cr. Proc. 1911, art. 811, permitting the whole of a conversation to be inquired into by parties where the adversary has introduced part.

**14. Witnesses**  $\S$ 193—Wife's statements in conversation when her husband was present held not privileged.

Where defendant sought to show state's witness had sought bribe from him by introducing conversation with witness, statements by defendant's wife, who was present and participated in the conversation, because of the presence of a third party were not privileged.

**15. Criminal law**  $\S$ 865(2)—Refusal to discharge jury for disagreement held not an effort to coerce.

Where, in prosecution for receiving stolen goods, the jury after 24 hours advised the court it was divided 9 to 3, requesting a discharge for failure to agree, and one of the jurors sent an individual request to be permitted to go home, refusal to discharge them was not an abuse of discretion nor effort to coerce.

**16. Criminal law**  $\S$ 1144(15)—Appellate court will not presume that a statement by the trial court was communicated to jury.

Where the court, on a message from the jury that they were unable to agree, remarked to the officer that he might tell the jury that it was unnecessary to communicate with him further unless they reached a verdict or were called for, the court on appeal would not, in the absence of affirmative showing, assume that the message was in fact delivered to the jury.

Appeal from District Court, Eastland County; E. A. Hill, Judge.

Phillip Glasser was convicted of receiving stolen property, and appeals. Affirmed.

Marks & Flaherty, of Ranger, and Burkett, Anderson & Orr, of Eastland, for appellant.

W. J. Oxford, of Fort Worth, and R. H. Hamilton, Asst. Atty. Gen., for the State.

**MORROW, P. J.** The appellant was charged in separate counts with the offenses of theft and having received stolen property.

The second count alone was submitted to the jury. The state used as a witness, on the promise of immunity, one De Vries, who testified that he stole the property in pursuance of an agreement with the appellant and one Sonduck, that they would do certain things

facilitating the theft; and that the property should be shipped by rail to Tulsa, Okl., and there sold, and the proceeds divided among the three. The stolen property consisted of a lot of pipe used in boring oil wells, was valued at \$3,000, was pointed out by De Vries to one Carlton, and by Carlton hauled to the town of Ranger and loaded into a car and shipped to Tulsa, Okl., under a bill of lading issued to H. B. Sanders. The appellant was found in possession of the bill of lading while the property was still in the hands of the railroad company, and made declarations concerning his connection with the transaction to the effect that he purchased the property from H. B. Sanders without knowledge or notice of the fact that it was stolen. Neither Sanders nor Sonduck was used as a witness. The testimony of De Vries was attacked by proof of his connection with various thefts, and his charge by indictment of other thefts, and promises of immunity.

There was evidence that the bill of lading came into possession of the appellant while he was in the city of Dallas, Tex., where his wife was confined in a sanitarium, and it was while he was at Dallas that he was found in possession of the bill of lading and made the declaration referred to. Whether, under the evidence, the appellant's connection with the theft was that of an accomplice or a principal therein were matters which might, with propriety, have been determined by the jury. This however, was not demanded, and, so far as the evidence is concerned, the question for review is whether or not there is sufficient evidence, if believed by the jury, to establish appellant's guilt as a receiver of the stolen property.

[1, 2] In deciding this question, it is necessary to keep in mind the law whereby, if appellant's sole connection with the theft was that of an accomplice or a principal, his conviction as a receiver could not stand. *Kolb v. State*, 228 S. W. 210; *Simpson v. State*, 81 Tex. Cr. R. 389; 196 S. W. 835; *Burow v. State*, 85 Tex. Cr. R. 133, 210 S. W. 805; *Middleton v. State*, 86 Tex. Cr. R. 307, 217 S. W. 1046. In other words, if appellant's criminal acts relating to the transaction were all preliminary to the theft, he would have been no more than an accomplice thereto. If, however, the appellant was a party to a conspiracy in pursuance of which property was stolen, each conspirator performing a specific part, the consummation of the design would characterize appellant as a principal. *Smith v. State*, 21 Tex. App. 108, 17 S. W. 552; *Burow v. State*, 85 Tex. Cr. R. 133, 210 S. W. 805.

De Vries, in his testimony to the effect that he stole the property, is corroborated by Carlton, who transported it to the car and was paid by appellant, but this he explains in a manner consistent with his innocence, claiming that Carlton was indebted to him,

and that by arrangement with his business associate, Sonduck, appellant paid the charges as a means of collecting his debt from Carlton.

A witness, testifying to the interview with appellant in Dallas after the discovery of the theft, imputed to the appellant a statement in substance that he bought a string of pipe from one Sanders, who came to him stating that he had a car of pipe to sell; that arrangement had been made with Carlton to load it on the car; that he was afterwards informed by Sonduck, whom he had sent to inquire whether the pipe was loaded, that the bill of lading was at hand, and paid Sanders part of the money—\$400. Testifying upon the stand upon this phase of the case, appellant said, in substance, that previous to the transaction in question he had formed a business arrangement with one Sonduck and one Weinert for the purpose of dealing in various kinds of used and abandoned property, including pipe, appellant furnishing the funds in the main; that Weinert had absconded with a large portion of the funds; that he was advised by Sonduck that a friend of his named Sanders had a string of pipe on hand which could be bought at a price very favorable to the purchaser; that Sonduck introduced appellant and Sanders, and Sanders insisted that, owing to his friendship with Sonduck and the low price for which he was to part with the property, he would make the sale to Sonduck alone; that leaving Sonduck to conclude the deal with Sanders, appellant went to Dallas, later receiving a letter from Sonduck and two bills of lading; that he desired the bills of lading as protection because of his loss through his partner Weinert. In the conversation with Sonduck, according to the appellant, it was stated that De Vries would point out the property. Appellant disclaimed any arrangement with De Vries, or conspiracy, or knowledge that the pipe was stolen.

The evidence showed that the bills of lading to Sanders were so drawn that the railroad company would deliver the property to the holder of the bills of lading.

[3] As stated above, Sonduck did not testify, nor did Sanders, and there was evidence introduced that the bill of lading was obtained by Sonduck, he using the name of Sanders. The possession of the bill of lading put the property under the control of the appellant, and unless under our statute the manual possession of it was required, he, in receiving the bill of lading, received the property. Manual possession is declared unnecessary by many authorities. See *Bishop's New Criminal Law*, vol. 2, p. 1139; *Cyc. of Law & Proc.* vol. 34, p. 517; *Huggins v. State*, 41 Ala. 399; *State v. Stroud*, 95 N. C. 626.

[4] The appellant having been found in possession of the property in the manner

stated, and having explained the means by which he obtained it, the conclusion of the jury, implied by the verdict that he was a receiver of the property after it was stolen, and not an accomplice or principal in the original taking, is not unauthorized. Likewise, in our opinion, the jury's finding that, while the appellant was not connected with the original taking, he was aware of the fact that the property was stolen by De Vries, is supported by the evidence.

There was conflict between the appellant's testimony and that of De Vries touching appellant's connection with the original taking. Considering the discrediting evidence against De Vries and the necessity under the law for his corroboration, the rejection of that part of it which connected appellant with the original taking was not unwarranted. Appellant's possession of the bills of lading was conceded. Other circumstances, notably the disparity between the amount of money with which the appellant actually parted and the value of the property, and the knowledge that appellant obtained through other transactions with De Vries that the latter was a thief, were sufficient to justify the jury in concluding that appellant's declaration that he was unaware of the fact that the property was stolen was not true.

[5, 6] The indictment having been presented by a grand jury composed of 12 men legally impaneled was not rendered void by the mistake of the clerk in omitting from the record the names of three of the grand jurors. This defect in the record was properly corrected by the order *nunc pro tunc*. *Burnett v. State*, 14 Tex. 455, 65 Am. Dec. 131; *Rhodes v. State*, 29 Tex. 188; *Bennett v. State*, 80 Tex. Cr. R. 662, 194 S. W. 145, 148; *Barnes v. State*, 230 S. W. 986; *Wichita Valley Co. v. Peery*, 88 Tex. 832, 31 S. W. 619; *Chestnutt v. Pollard*, 77 Tex. 86, 13 S. W. 852.

[7, 8] No error is disclosed by the bill complaining of the refusal of the court to postpone the trial to secure the attendance of witnesses to his good reputation for truth and veracity and honesty and fair dealing, it appearing from the qualification thereof, and from the record, that his good reputation in these respects was established by several witnesses, among them a district judge, without controversy. It appearing from the same bill that appellant was given ample time to converse with the state's witnesses before they testified, the fact that their names are not indorsed upon the indictment was not material. *Polk v. State*, 69 Tex. Cr. R. 53, 152 S. W. 907; *Branch's Tex. Ann. Penal Code*, § 514, and cases listed; *Fehr v. State*, 36 Tex. Cr. R. 96, 35 S. W. 381, 650; *Skipworth v. State*, 8 Tex. App. 135; *English v. State*, 85 Tex. Cr. R. 450, 213 S. W. 632.

[9] There is no merit in the bill complaining of the introduction in evidence against ap-

pellant of the indictment charging him with theft in another transaction, he having antecedent thereto, in this case, testified as a witness in his own behalf. Admissibility of indictments in such cases for other felonies on the issue of credibility of the accused as a witness has been asserted in numerous occasions in the opinions of this court. *Lights v. State*, 21 Tex. App. 313, 17 S. W. 428; *Bratton v. State*, 34 Tex. Cr. R. 477, 31 S. W. 379; *Lee v. State*, 45 Tex. Cr. R. 52, 73 S. W. 407; *Branch's Ann. Tex. Penal Code*, § 167.

[10] One of the bills discloses upon the trial a colloquy of some length between the judge presiding and one of the defendant's attorneys, in the course of which the judge made remarks which are complained of. These were set out in great length in several bills of exceptions, stress being laid upon a statement in these words:

"I want to say to counsel that he has a great many strictures against the court, that the court is going to give all his clients a fair trial."

The use of the word "strictures" is particularly emphasized as prejudicial. Our statutes forbid the trial judge, upon ruling upon evidence, to comment upon its weight, and adds:

"Nor shall he, at any state of the proceedings, previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case."

Explaining the bill, the court said, in substance, that throughout the trial the counsel had persistently interposed trivial objections to the introduction of evidence obviously admissible, thereby materially obstructing the progress of the trial, portraying by the tone of his voice and facial expressions and mannerisms feeling against the court. While the colloquy revealed by the record added nothing to the dignity and decorum of the trial, the remarks of the judge were not, in our judgment, violative of the statute mentioned, nor were they calculated to prejudicially affect the case of the accused. *McGee v. State*, 37 Tex. Cr. R. 668, 40 S. W. 967; *Harrell v. State*, 39 Tex. Cr. R. 204, 45 S. W. 581. Even when the court makes a comment inhibited by the statute, if it is not harmful to the accused, it does not justify a reversal of the judgment. *English v. State*, 85 Tex. Cr. R. 457, 213 S. W. 632; *Williams v. State*, 61 Tex. Cr. R. 287, 148 S. W. 768.

[11] In Bill No. 7, complaint is made of the refusal of the court to instruct the jury to disregard the remarks of one of the counsel—

"wherein he discussed the alleged taking of 62 joints of casing from the Madding lease and 54 joints of casing from the Barnes lease, and



indictment therefor as the defendant was not on trial for those transactions."

It appears that two indictments were introduced against the appellant, in each of which he was charged with the theft and of fraudulent receiving of oil well casing.

There was also verbal testimony, to the effect that, at about the same time that the offense under investigation was committed, the appellant received two other cars of stolen casing. In a general charge the jury was instructed that the indictments could be considered alone upon the credibility of the accused, and that the evidence of receiving other property was limited to the question of guilty knowledge in the instant case. Appellant insists that the expressions in the case of *Whitfill v. State*, 75 Tex. Cr. R. 1, 169 S. W. 682, support his contention that error requiring reversal was disclosed. *Whitfill* was convicted of burglary. He testified as a witness in his own behalf, and the state introduced an indictment for theft on the issue of his credibility. Counsel for the state, commenting upon this indictment for another offense, said: "It is a strong circumstance to show his guilt in this case." Counsel for the appellant at the time mentioned privately to the judge his objection to this argument, but declined to interrupt the attorney for the prosecution and make the objection in an open manner. The court, in that case, as in this one, charged the jury that the indictments must be considered upon the issue of credibility alone. *Whitfill's* Case was affirmed, though the court said it regarded the argument as improper, but considered the failure of the appellant to make an open objection to it inadequate to require the court to take notice of it.

[12] In the case before us, it does not appear that any objection was made to the argument, but that the special charge mentioned was requested. In so far as the special charge was applicable, its substance was apparently embraced in the main charge wherein the jury was instructed that the indictments in evidence were unable alone upon the appellant's credibility as a witness, and that the evidence of receipt of other stolen property was to be confined to the issue of intent and guilty knowledge. The fact that the property was stolen and shipped, and the bills of lading put in possession of the appellant, was conceded. The crucial question in the case related to the intent and knowledge with which the appellant acted. In his declaration and testimony, he disclaimed any guilty knowledge or intent. The burden was primarily upon the state to establish the fact that he knew the property was stolen. In discharging this burden the evidence of other similar transactions between the same parties and near the same time was available. It was original evidence

upon the issue of guilty knowledge. *Wharton's Crim. Evidence*, vol. 1, p. 135; *Fry v. State*, 88 Tex. Cr. R. 507, 203 S. W. 1096; *Hogg v. State*, 66 Tex. Cr. R. 252, 146 S. W. 196; *Morgan v. State*, 81 Tex. Cr. R. 9, 18 S. W. 647; *Henderson v. State*, 76 Tex. Cr. R. 66, 172 S. W. 794; *Hanks v. State*, 55 Tex. Cr. R. 451, 117 S. W. 151.

Via, a state's witness, after testifying to a conversation with appellant, admitting his possession of the bills of lading to the stolen property, was, on cross-examination, asked various questions which in his qualification of the bills of exceptions relating thereto the trial judge interpreted as an attempt upon the part of the defense to show that the witness had sought a bribe from the appellant. In the course of the cross-examination it was shown that the witness had seen the appellant and his wife on certain occasions, and had a conversation with the appellant in the presence of his wife, and in the development of this evidence, among others, these questions were asked:

"Didn't you ask Mr. Glasser, in the presence of his wife, how much money he could raise if he could get you out of this scrape? What did you go there for if it was not for that?"

"Q. Did you talk there about a man named De Voe? A. Yes, sir.

"Q. And you told him you had seen De Voe once and was to see him again? A. No, sir."

And further inquiry on cross-examination developed that in the presence of appellant's wife the witness had told the appellant that De Voe had offered the witness first \$300, and then \$1,000, to release the appellant. He was then asked:

"You told him to bring the \$1,000 next Sunday, and in case he did that there would be nothing of the whole case?"

"Q. Was this conversation in the presence of his wife? A. Yes, sir; his wife was pleading all the time for her husband."

[13, 14] On redirect examination the witness was asked to repeat the entire conversation with reference to the transaction with De Voe. Responding, the witness said that appellant asked if the witness had seen De Voe and what De Voe offered him, and that he told appellant that he offered him first \$300 and then \$1,000; that the wife then interposed, and said that it would kill her if her husband should go to the penitentiary, and asked the witness if he could not do something, and she said: "Mr. De Voe has been to see you, as you say. How much did he offer you?" To which the witness replied: "First \$300 and then \$1,000." She said: "You wouldn't take it?" The basis of the appellant's objection, as disclosed by the bill, was that the declarations of the wife were hearsay, and that her part in the conversation was a violation of the statute inhibiting the use of the

wife as a witness against her husband. In our opinion, the appellant, having introduced a part of the conversation, is not in a position to complain if the whole conversation was developed by the state. The statute (article 811 of the Code of Criminal Procedure) declares that:

"When part of [the] \* \* \* declaration or conversation \* \* \* is given in evidence by one party, the whole on the same subject may be inquired into by the other."

The procedure seems to have been within the terms of this statute.

The appellant, by his cross-examination of Via, manifestly sought to discredit him and to lay predicate for his impeachment. By the inquiries made and the answers solicited, he developed the fact that at the conversation his wife was present and participated. What she said under these circumstances, being in the presence of a third party, was not privileged. *Cole v. State*, 51 Tex. Cr. R. 93, 101 S. W. 218; *Richards v. State*, 55 Tex. Cr. R. 278, 116 S. W. 587; *Hampton v. State*, 78 Tex. Cr. R. 639, 183 S. W. 890. The materiality of the whole conversation, as bearing upon any discrediting influence that the cross-examination may have had, appears obvious, and it being material and within the statute mentioned, the fact that the wife participated did not require its exclusion.

[15, 16] The foreman of the jury, after it had been in retirement some 24 hours, sent to the court a written statement advising the court that they were divided 9 to 3, and that an agreement was not possible, and requested a discharge. At the same time one of the jurors sent an individual request to be permitted to go home at night that he might be present with his wife and her two children, she having no one else to stay with. When these communications were delivered, the trial judge remarked to the officer that he might tell the jury that it was unnecessary to communicate with him further unless they reached the verdict or were called for. The bills complaining of this matter did not affirmatively show whether the message was communicated to the jury or not. The court, in explaining the bill, said that the jury, in his opinion, had not sufficiently deliberated upon the case to justify their release. It was the duty of the trial judge to keep the jury together for such reasonable time as, in his discretion, was necessary to complete their deliberations. His refusal to discharge them, in the instant case, manifested no abuse of his discretion, and suggests no effort to coerce them. We cannot assume, in the absence of an affirmative showing to that effect in the bill, that the message of the court was delivered to the jury. Even if the contrary were true,

we discern in it nothing subversive of appellant's rights. *Dow v. State*, 31 Tex. Cr. R. 278, 20 S. W. 583; *Carlisle v. State*, 56 S. W. 366; *State v. Place*, 11 Ann. Cas. note p. 1135; *Brady v. State*, 74 S. W. 771.

No errors appearing, the judgment is affirmed.

#### FRANCIS v. STATE. (No. 5775.)

(Court of Criminal Appeals of Texas. June 8, 1921. Rehearing Denied Oct. 12, 1921.)

1. Gaming  $\S$  63(3)—Statute making offense misdemeanor held not repealed by later statute making it felony.

Article 572, Pen. Code 1911, enacted in 1881, providing that any person permitting gambling games to be played upon his premises, being a public place or appurtenances of public place, shall be fined not less than \$25 or more than \$100, is not repealed by article 559, Pen. Code 1911, enacted in 1907, providing that a person renting premises or interested in keeping premises used in gambling games shall be guilty of felony, and be punished by confinement in penitentiary not less than two or more than four years.

2. Statutes  $\S$  146—Statute held not inadvertently incorporated in revision.

Article 572, Pen. Code 1911, making it a misdemeanor for any person to permit gambling on his premises or premises under his control, being a public place or appurtenance of public place, having been brought forward in the revision of 1911, together with an annotation of a decision of the Court of Criminal Appeals that it was not repealed by article 559, it was not incorporated in the revision inadvertently, in view of Acts 30th Leg. (1907) c. 180, §§ 1-5 (2 Gammel's Laws, N. S. p. 377), providing for commissioners to revise the laws, section 2 of which provides that they shall adopt such of the revised laws as shall not have been repealed or amended.

3. Statutes  $\S$  231—Re-enactment of statute after judicial construction is an adoption of that construction.

When the statutes are revised by the Legislature without changing a statute which had been judicially construed, the revision without change is an adoption of the judicial construction.

4. Gaming  $\S$  76—Statute distinguishes in punishment between person permitting gambling on premises and one running premises for purpose of gambling.

The purpose of article 572, Pen. Code 1911, is to punish with a fine persons who permit gambling to be carried on on their premises, while the purpose of article 559 is to punish persons interested in premises who run them for the purpose of promoting and encouraging gambling games.

**5. Criminal law §27—Gaming §106—Offense alleged held to be misdemeanor.**

An indictment alleging that the accused unlawfully and knowingly permitted property and premises to be used as a place for gambling charges a misdemeanor, and will not support conviction for felony under Pen. Code 1911, art. 572.

**6. Gaming §92—Indictment for permitting gambling held insufficient, in failing to charge that the premises were appurtenant to public place.**

Under article 572, Pen. Code 1911, providing that a person who permits a gambling game to be played upon premises under his control, being appurtenant to a public place, shall be fined not less than \$25 nor more than \$100, an indictment charging that defendant permitted premises to be used for gambling, omitting an allegation that the premises were appurtenant to a public place, does not support conviction for a misdemeanor.

**7. Gaming §63(2)—Statutes held conflicting.**

In Pen. Code 1911, art. 551, making the keeping or exhibiting of gambling tables a misdemeanor, conflicts with article 558, declaring the same acts a felony; and article 573, prescribing a misdemeanor penalty for renting a house for the purpose of being used for place for gaming is irreconcilable with article 559.

Appeal from District Court, Smith County;  
J. R. Warren, Judge.

Jerry Francis was convicted of permitting premises to be used for gaming, and appeals. Reversed and prosecution dismissed as to one count in indictment.

Simpson, Lasseter & Gentry and Johnson & Edwards, all of Tyler, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, P. J. [1] Appellant was convicted for violation of the gaming law; punishment fixed at confinement in the penitentiary for two years. The count in the indictment upon which the conviction rests contains the following:

"\* \* \* Did then and there unlawfully and knowingly permit property and premises there situate and then and there under his control to be used as a place to bet and wager and to gamble at games played with cards then and there played, and did then and there unlawfully and knowingly permit said property and premises to be used as a place where people resorted to gamble, bet, and wager upon games and then and there played with cards."

From the charge we quote the following:

"Our law provides that, if any person shall knowingly permit property or premises of which he is owner, or which is under his control, to be used as a place to bet or wager or to gamble with cards, or as a place where people resort to gamble, bet, or wager upon anything whatever, shall, upon conviction, be punished by

confinement in the penitentiary not less than 2 nor more than 4 years."

The statute upon which the conviction purports to rest is article 559, which reads thus:

"If any person shall rent to another, or shall keep or be in any manner interested in keeping, any premises, building, room or place for the purpose of being used as a place to bet or wager, or to gamble with cards, dice, dominoes, or to keep or exhibit for the purpose of gaming, any bank, table, alley, machine, wheel or device whatsoever or as a place where people resort to gamble, bet or wager upon anything whatever, or shall knowingly permit property or premises of which he is owner, or which is under his control, to be so used, shall be guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than four years, regardless of whether any of the above mentioned games, tables, banks, alleys, machines, wheels or devices, or things, are licensed by law or not; and any place or device shall be considered as used for gaming or to gamble with or for betting or wagering, if any fees, money, or anything of value is bet thereon, or if the same is resorted to for the purpose of gaming or betting."

We also quote article 572:

"If any person shall permit any game prohibited by the provisions of this chapter to be played in his house, or a house under his control, or upon his premises, or upon premises under his control, the said house being a public place, or the said premises being appurtenances to a public place, he shall be fined not less than twenty-five nor more than one hundred dollars."

Article 572 was first enacted in 1881; article 559 dates from 1907. In the revision of the Penal Code adopted in 1911 both are included. By a majority opinion, this court, in *Robertson v. State*, 70 Tex. Cr. R. 310, 159 S. W. 713, decided, in substance, that article 559, by implication, repealed article 572, and that in adopting the Revised Penal Code containing article 572 the Legislature acted inadvertently, and that in consequence thereof article 572 was not a part of the law. Notwithstanding the decision mentioned, appellant insists that article 572 is in force, and that thereby the acts with the commission of which he is charged and convicted are not felonies, but misdemeanors; that it was not the intent of the Legislature to denounce as a felony one who merely suffered the playing of a prohibited game in his house, but to become a felony the proof must show more than the mere sufferance or acquiescence in the gaming; that it must show that the premises were kept "for the purpose of being used as a place" to gamble or to exhibit a banking game where people resort to gambling. Sanction of this view is drawn from the language of article 559, which differs from that of article 572 by the inclusion of the

words quoted and italicized above. Reference is made to the case of *Walters v. State*, 58 Tex. Cr. R. 240, 125 S. W. 12, as giving support to the construction of the statutes contended. From the opinion of the court, written by Judge Ramsey, in that case, we take the following quotations:

"In this connection it should be stated that the prosecution in this case was under article 388f (Acts 30th Leg. p. 109), which article reads as follows: 'If any person shall go into or remain in any gambling house, knowing the same to be such, or shall remain in any place where any of the games prohibited by this act are within his knowledge being played, dealt or exhibited, he shall be punished by a fine of not less than twenty-five nor more than fifty dollars. Gambling house and gaming house, as used in this act, is meant any place where people resort for the purpose of gaming, betting or wagering.' \* \* \*

"We think that from the language of the act \* \* \* referred to, 'If any person shall go into or remain in any gambling house, or remain in any place where any of the games prohibited by this act are within his knowledge being played,' taken in connection with the language 'gambling house and gaming house,' is meant any place where people resort for the purpose of gaming, betting, or wagering, and that it was intended to make it an offense for persons to frequent gambling halls where people resorted, and where the same are conducted, in a sense, continuously. The evils the Legislature had in mind were no doubt to prevent patronage and frequenting of such places by persons who might be tempted into evil conduct, or where in such centers of vice the idle, the vicious, and the corrupt might become a menace to society, and be provoked to breaches and violations of the law. In this case the house was a private residence. The evidence does not show it was a gaming house, in the sense in which that term is used. True, a private residence may become a gambling house, if continuously or even frequently resorted to for this purpose; but the house here is not made to appear by the evidence to be such a place. It was not intended, we think, by the Legislature, to make it an offense for one who either as a guest, visitor, or inmate of a house failed to flee from same as from a scourge, because without his knowledge and probably without his consent other inmates or persons were for the time being engaged in gaming. The whole tenor of the act above quoted manifestly bears this construction."

This view was also considered and rejected by the majority court in *Robertson v. State*, supra. It cannot be denied that the language adopted is not the same, and that article 559 is susceptible of the construction that the "permitting" therein referred to was "for the purpose of being used as a place," etc. To hold that the acts charged in the indictment are punishable as felonies, and not as misdemeanors, it becomes necessary to decide: First, that in the adoption of article 559, article 572 was repealed by implication; second, that in re-enacting article 572 in the

Revised Penal Code of 1911, the Legislature did so unconsciously, and with no intent that that article should have a vital place in the law. It may be conceded that there are instances in which repealed statutes, having been re-enacted in revision, have been held inoperative upon the theory that their re-enactment was inadvertent. *Sutherland on Statutory Construction* (2d. Ed.) vol. 1, § 281, and vol. 2, § 451; *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258; *Olsen v. Haritwen*, 57 Fed. 849, 6 C. C. A. 608; *Bank v. Patty* (D. C.) 16 Fed. 751. To apply this principle to article 572, it is necessary first to inquire whether article 572 was, in fact, repealed by implication by the enactment of article 559. Upon this the decision of this court in *Simons v. State*, 58 Tex. Cr. R. 339, 120 S. W. 208, has a direct and definite bearing. *Simons* was charged with the offense of "permitting gambling" in his house. The indictment was drawn under article 572, supra, and he was charged and convicted of a misdemeanor. Upon appeal he assailed the judgment upon the ground that article 572 was repealed by the enactment of article 559. The members of the court were unanimous against this contention. Judge Ramsey, in writing the opinion, thus expressed the conclusion of the court:

"It is elementary that repeals by implication are not favored. The act of the Thirtieth Legislature does not in terms repeal the act on which this prosecution was based, nor does it do so by any reasonable or fair inference, and that it was not the intention so to do we think it is so manifest and clear as to admit of no doubt."

[2] In deciding the *Robertson Case*, supra, the majority of the court held that the previous opinion rendered in the *Simons Case*, supra, was unsound, and overruled it. If all question as to the accuracy of that holding be waived, the inquiry whether in re-enacting article 572 the Legislature acted advisably or inadvertently cannot be overlooked. Bearing upon that question, we refer to the act of the Legislature passed in 1907, in which a revision of the Penal Code was directed and provided for. Acts of the 30th Legislature, c. 180; *Gammel's Laws*, New Series, vol. 2, p. 377.

Section 1 makes it the duty of the Governor to appoint commissioners to "revise and digest laws—civil and criminal." From section 2 we quote:

"Said commissioners shall adopt such of the revised statutes, civil and criminal, as have been repealed or amended."

Section 4 we quote:

"Said commissioners shall embody the result of their labors in two bills; one containing the entire body of the civil statutes and the other the entire body of the statutes relating to criminal law, both properly indexed, which bills said commissioners shall report to the Gov-

error on or before the meeting of the Thirty-first Legislature; and it shall be the duty of the Governor upon the receipt of said bills and report to cause five hundred copies of the same to be printed at the expense of the state, \* \* \* which said copies shall be delivered to the Secretary of State for use of said Legislature."

Section 5 provides for the supervision and printing by the Commissioners and their compensation therefor. Pursuant thereto the commissioners were appointed, and presented a bill, which was enacted by the Legislature, and from which we quote section 1:

"Be it enacted by the Legislature of the state of Texas, that the following titles, chapters and articles shall hereafter constitute the Penal Code of the state of Texas."

Section 3 reads thus:

"It is provided, however, that the annotations under the several articles of the Penal Code and the Code of Criminal Procedure shall not be construed to be any part of either of said Codes."

Included in this bill under article 572 is the annotation reading thus:

"This article was not repealed either in terms or by implication by the Acts of the Thirtieth Legislature, page 107." *Simons v. State*, 58 Tex. Cr. R. 339, 120 S. W. 208.

It is thus made manifest that, in the operation of revising and codifying the criminal laws by the commissioners, who were learned and distinguished citizens of the state, the preparation of the bill for adoption, the supervision of the printing, and the passage by the legislative branch of the government, article 572 was not only brought forward as an unrepealed law, but the decision of this court judicially determining that it was not repealed by implication or otherwise in the passage of article 559, supra, was considered and brought to the attention of all concerned. In the light of its history, we are unable to persuade ourselves that before the adoption of the Revised Statutes of 1911, article 572 had been repealed, or that it was incorporated in the revision by inadvertence.

That part of the case of *Robertson v. State*, supra, holding that it was repealed and re-adopted by inadvertence, apparently proceeds in accord with a presumption at variance with the obvious facts. That the Legislature, in which there were many eminent lawyers, in performing so important a duty as the re-enactment of the Penal Code, were unconscious of the fact that two years before the court of last resort in the state held article 572 was not repealed, is a presumption which is not to be made in the absence of convincing facts. Especially is this true when, under the article in question, as contained in the revision, there was noted the fact, indorsed by the codifiers, that the status of

the article had been judicially determined. The Legislature, in the bill providing for a codification, carefully prohibited the bringing forward of repealed laws. The incorporation of article 572 in the revision implies that the codifiers regarded the article as a vital part of the law, and this being emphasized by reference to a decision of the court passing directly upon it, we think the more reasonable and fair conclusion is that the article was by the Legislature consciously left in the statute with the intention that it should receive the interpretation which had been given it by the court.

[3] Granting that it was consciously re-enacted, its effect is not difficult of ascertainment. Mr. Black, in his work on the Interpretation of Laws, p. 369, said:

"When the Legislature revises the statutes of the state, after a particular statute has been judicially construed, without changing that statute, it is presumed that the Legislature intended that the same construction should continue to be applied to that statute."

This principle has often received the sanction, notably in the case of *Gulf, etc., Ry. v. Fort Worth, etc., Ry.*, 68 Tex. 98, 2 S. W. 199, 3 S. W. 564, and of this court in *Lewis v. State*, 58 Tex. Cr. R. 361, 127 S. W. 808, 21 Ann. Cas. 656. In the last-named case, there is quoted from *Sutherland on Statutory Construction* the following quotation:

"In the interpretation of re-enacted statutes the court will follow the construction which they received when previously in force. The Legislature will be presumed to know the effect which such statutes originally had, and by re-enactment to intend that they should again have the same effect."

[4] The construction given the statute in *Simons v. State*, supra, is consistent with that previously given a part of the same law in the *Walters Case*, supra, in that, by accepting the view that under article 572, it was intended to punish one who merely suffered a prohibited game to be played on his premises by a fine, and not to put him on a parity with one who maintained his premises "for the purpose of being used as a place to bet," which was made a felony by article 559. That the Legislature should have regarded one who merely permitted a game played on his premises as worthy of a milder punishment than that imposed on the keeper of a gambling house or the maintainer of a place kept for the purpose of gambling seems in consonance with the policy reflected by the criminal laws of this state of classifying the offense and grading the punishment of the offenders in accord with the act committed, and not to make those guilty of the less culpable act—the one least offending against the good order of society—amenable to the same punishment as that prescribed for the worst. Such was the in-

tent imputed to the Legislature in the interpretation of the law by this court in *Simons v. State*, the accuracy of which had not been questioned when article 572 was afterwards incorporated in the revision of the Code, and such is the construction which, upon established principles controlling the interpretation of laws, must be presumed to have been within the minds of the Legislature when it adopted the Code of 1911.

[5, 6] In accord with this view, we are constrained to hold that the offense charged in the indictment upon which the conviction rests is not a felony but merely a misdemeanor; that it will not support the conviction for felony. The above count in the indictment is also inadequate to support a conviction for misdemeanor, for the reason that it omits an essential part of the statute, namely, that part of it which limits the operation of the statute to a house which is a public place or premises appurtenant to a public place.

[7] In passing, we deem it not inappropriate to say that there are provisions of the law against gaming as contained in chapter 4, tit. 11, of the Revised Penal Code of 1911, which are obviously in conflict with each other. Among these may be mentioned article 551, which denounces the offense of "keeping or exhibiting gaming tables, etc.," as a misdemeanor, and article 558, which declares the same acts a felony, and article 573, which prescribes a misdemeanor penalty for the offense of renting a house "for the purpose of being used as a place for gaming," which is also irreconcilable with article 559. Both articles 551 and 573 were in the old gaming law, and it was held in the case of *Robertson v. State*, supra, and *Stevens v. State*, 70 Tex. Cr. R. 565, 159 S. W. 505, that these articles were repealed by implication in the passage of Acts of the 30th Legislature, c. 49. The status of the articles mentioned is distinguished from article 572 in that the latter is not in such conflict with any of the provisions of chapter 49, Acts of the 30th Legislature, supra, as would necessarily imply its repeal upon the passage of that act, and the fact that its consistency with that chapter had been judicially determined at the time it was embraced in the revised edition of the Code.

Concerning the other articles mentioned, articles 551 and 573, they are not, in the present case, in question, but the confusion resulting from their inclusion in the revision of the Code, and from the marked difference of opinion touching the effect of so bringing them forward as manifested in the majority and dissenting opinions in the cases of *Robertson v. State* and *Stevens v. State*, supra, we believe that the elimination of the perplexity is a fit subject for the attention of the Legislature.

For the reasons stated, it is ordered that the judgment of the trial court be reversed, and the prosecution, so far as it relates to the count in the indictment mentioned, dismissed.

### DEISHER v. STATE. (No. 6093.)

(Court of Criminal Appeals of Texas. June 8, 1921.)

1. Gaming  $\S$ 98(6)—Evidence necessary for conviction for permitting use of premises for gambling stated.

Under Pen. Code 1911, art. 559, making it a felony for one to rent or be interested in keeping premises or knowingly permit premises which he owns or which are under his control to be used in gaming, if the charge is for permitting, the proof must show that accused was the owner of property or premises and had them under his control; that it was being used to bank or wager or gamble with cards, dice, or dominoes; or that it was used as a place to gamble or exhibit for the purpose of gaming a bank, etc.; or that it was being used as a place where people resorted to gamble, etc.; that the accused knew it was being so used, and knowingly permitted the use for that purpose.

2. Gaming  $\S$ 98(5)—Evidence necessary for conviction for renting premises to be used in gambling stated.

In prosecution under article 559, Pen. Code 1911, making it a felony to rent or be interested in the keeping, etc., of premises used for the purpose of gaming, if the charge is for renting, the proof must show that accused rented the premises for the purpose of being used as a place to bet or gamble with cards, dice, or dominoes or for the purpose of being used as a place in which to keep or exhibit for purpose of gaming a bank, table, alley, machine, etc., or for the purpose of being used as a place where people resorted to gamble or wager upon anything whatever.

3. Criminal law  $\S$ 178—Defendant cannot be prosecuted on subsequent trial on a count abandoned.

Where the second count in an indictment was abandoned, and the court submitted only the first count, defendant cannot, on a subsequent trial, be prosecuted on the abandoned count.

4. Gaming  $\S$ 92—Count for renting must allege premises were appurtenant to a public place.

A count failing to charge that the premises alleged to have been rented were "appurtenant to a public place" is insufficient under Pen. Code 1911, art. 572.

Appeal from District Court, Erath County; J. B. Keith, Judge.

John Deisher was convicted of permitting the use of property under his control for gambling, and appeals. Reversed and dismissed.

Grisham Bros., of Eastland, for appellant.  
C. M. Cureton, Atty. Gen., for the State.

**HAWKINS, J.** Conviction was for knowingly permitting property under control of appellant to be used for gambling purposes. Punishment was assessed at two years' confinement in the penitentiary.

The first count in the indictment under which appellant was convicted, and the only one submitted to the jury, omitting the formal parts, is as follows:

Did "knowingly permit property and premises there situated, and then and there under his control, the same being then and there not a private residence occupied by a family, to be used as a place to bet and wager and to gamble with cards then and there played, and did then and there knowingly permit said property and premises to be used as a place where people resorted to to gamble, bet, and wager upon games then and there played with cards."

Under authority of the case of *Jerry Francis* (No. 5775) 233 S. W. 974, this day decided, this case must be reversed. It is not necessary to review the authorities, nor to discuss the reasons, because they have been fully set out by the court in the *Francis* opinion, in which we have held that article 572 (389) and article 559 (388b) are both in effect, and not in conflict. In so far as *Robertson v. State*, 70 Tex. Cr. R. 307, 159 S. W. 713, and *Stevens v. State*, 70 Tex. Cr. R. 565, 159 S. W. 505, hold contrary views, we disapprove the same, and reaffirm *Simons v. State*, 56 Tex. Cr. R. 339, 120 S. W. 208.

[1] Before a conviction for a felony under article 559 (388b) Pen. Code 1911, can be sustained, if the charge be for "permitting," the proof must show that accused was the owner of property or premises, or had the same under his control; that it was being used as a place to bet or wager, or to gamble with cards, dice, or dominoes; or that it was being used as a place in which to keep or exhibit for the purpose of gaming a bank, etc.; or that it was being used as a place where people resorted to gamble, etc.; that the accused knew it was being so used, and knowingly permitted it to be used for that purpose.

[2] If the charge be for "renting," the proof must show that accused rented to another certain premises, building, room, or place for the purpose of being used as a place to bet, or wager, or to gamble with cards, dice, or dominoes, or for the purpose of being used as a place in which to keep or exhibit for the purpose of gaming a bank, table, alley, machine, wheel or device, or, for the purpose of being used as a place where people resort to gamble, bet, or wager upon anything whatever.

It being necessary to make the proof as indicated, of course there must be proper allegations in the indictment to support it. It

is not intended by the foregoing to suggest a form of indictment, but only to express our views in an effort to analyze and simplify the statute in question. The offenses defined in said article now being felonies, some particularity is required in drawing indictments that questions of duplicity may not arise, or that different offenses may not be embraced in one count.

[3, 4] The second count in the indictment, which was not submitted to the jury, perhaps charges an offense under article 559, according to the suggestions heretofore made in this opinion; but that count having been abandoned when the court submitted only the first count, the appellant cannot on a subsequent trial be prosecuted on the abandoned count. See *Branch's Anno. Pen. Code*, § 628, p. 318, for collation of authorities. The first count fails to charge that the premises alleged to have been rented were "appurtenances to a public place," which seems to be necessary under article 572.

It therefore becomes necessary to reverse the judgment of the trial court, and order the prosecution dismissed under this indictment.

#### FRIDGE v. STATE. (No. 5934.)

(Court of Criminal Appeals of Texas. June 8, 1921. Rehearing Denied Oct. 12, 1921.)

1. Criminal law §27—Indictment held to charge felony.

An indictment charging that defendant kept and was interested in keeping a house and room not a private residence occupied by a family, for the purpose of being used as a place to bet and wager and gamble with cards, and as a place where people did bet and wager upon games played with cards, charges a felony under article 559, *Vernon's Ann. Pen. Code* 1916.

2. Gaming §63(2)—Statutes not in such conflict as to effect repeal.

*Vernon's Ann. Pen. Code* 1916, art. 559, is not in such conflict with *Pen. Code* 1911, art. 572, as to repeal it.

3. Criminal law §1151—Refusal of continuance, unless it shows an abuse of discretion, is not grounds for reversal.

The truth or merit of any application for continuance is addressed to the trial court and unless discretion in refusing the continuance was abused the case will not be reversed.

4. Criminal law §614(1)—Refusal of second continuance because of absence of witness held not an abuse of discretion.

Where evidence showed that a witness had absconded, and could not be found, and where the evidence was overwhelmingly contradictory of facts expected to be proved by the witness, the refusal of the trial court to grant

a second continuance because of his absence was not an abuse of discretion.

5. Criminal law §595(10)—Refusal of continuance held not error where expected evidence would inculpate absent witness.

Where a witness was in defendant's employ in running gambling games, and had been indicted for the same offense with defendant, but the accusation against him was dismissed, a refusal of a continuance to permit defendant to compel his attendance was not error, since the evidence defendant expected him to give was that the witness was concerned in running the gambling house, and could not have been obtained by legal means.

6. Witnesses §297—Witness cannot be compelled to incriminate himself.

One implicated in an offense cannot be compelled to give evidence criminatory of himself.

7. Witnesses §48(4)—Refusal of state's witness to tell whether he had been convicted of felony held no error.

Where a state witness stated that he had not been confined in penitentiary within 10 years, his refusal to tell whether he had ever been convicted of a felony was not error, not forming a sufficient predicate for objection of incompetency as unpardoned convict.

8. Witnesses §78—Burden of showing incompetence of witness is on objector.

In any case, the burden to show existence of a ground of alleged incompetence of a witness is on the objector.

9. Witnesses §345(1)—Refusal to answer whether witness had ever been convicted of felony held immaterial.

Where a witness stated on cross-examination that he had not been confined in penitentiary within the last 10 years, his refusal to answer whether he had ever been convicted of felony was immaterial on his credibility.

10. Criminal law §1169(1)—Admission of evidence that a charter of a club was obtained by negroes held not prejudicial.

In prosecution for keeping or being interested in a gambling house, where the defense offered in evidence a certified copy of a charter granted to parties to operate a "Trinity Club," the admission of evidence that the incorporators were negroes held not prejudicial.

11. Gaming §97(1)—Whether witness knew of good men who played cards properly held immaterial.

In prosecution for running gambling house, whether witness knew of good men who played cards was immaterial.

Appeal from Criminal District Court, Tarrant County; Geo. E. Hosey, Judge.

Hub Fridge was convicted of keeping and being interested in keeping a gambling house, and appeals. Affirmed.

John Baskin, Simpson & Moore, W. B. Ammerman, and W. E. Myres, all of Fort Worth, for appellant.

Jesse M. Brown, Cr. Dist. Atty., of Fort Worth, and Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the criminal district court of Tarrant county of keeping and being interested in keeping a gambling house, and his punishment fixed at confinement in the penitentiary for two years.

Prior to 1907 our statute books contained many articles forbidding the various phases of gaming and running gambling houses, all of the things forbidden being misdemeanors. By the provisions of chapter 49, Acts Regular Session 30th Legislature, article 388 of the Penal Code was amended by rewriting said article and adding thereto numerous subdivisions, under the terms of which many acts theretofore defined and punished as misdemeanors were made felonies. The bill enacting into law said amendment contained no repealing clause, and many of the provisions of said act appeared in conflict with existing laws on the same subject for which different punishments were prescribed. These matters of apparent conflict were in part considered by this court in *Walters v. State*, 58 Tex. Cr. R. 240, 125 S. W. 12, and *Simons v. State*, 56 Tex. Cr. R. 339, 120 S. W. 208, in which cases this court held that, as to those parts of the law directly involved, the conflicts were apparent, but not real. In this condition of the statutes and decisions, the codifiers appointed in 1907, and duly commissioned to revise and digest the laws of this state, reported to the Legislature in 1911 for its adoption a Penal Code which embraced in chapter 4, title 11 thereof, the laws against gaming existent prior to 1907, as well as those enacted on said subject during said year by the Thirtieth Legislature. In said chapter 4, and as explanatory of their act in so including statutes in seeming conflict with each other, said codifiers, in terms, referred to and mentioned the case of *Simons v. State*, supra, and thereafter, with full knowledge of such facts, a bill was passed by the Thirty-Second Legislature enacting into law, and as the Penal Code of this state, the said reported revision and codification. Thereafter, by a divided court in *Robertson v. State*, 70 Tex. Cr. R. 307, 159 S. W. 713, the *Simons* Case, supra, was overruled, and the majority of this court held that many of the articles brought forward by the codifiers, and so adopted as the Penal Code of Texas by the Thirty-Second Legislature in 1911, had been repealed in 1907 by implication, they being in conflict with the enactment of 1907 upon the same subjects.

This condition of conflict and necessary confusion continued. The personnel of this court has changed several times since the



decision in the Robertson Case. Much effort seems to have been put forth to decide correctly the present status of the gaming laws, and what were those acts which were felonies, and those, if any, which were misdemeanors. This court has had before it several cases involving these questions, which have given us no small amount of trouble. Many authorities have been examined. The apparent conflict of statutes and decisions was called to the attention of members of the Thirty-Seventh Legislature in the hope that by legislative action such statutory conflict might be removed, but the limited time and the stress of important matters prevented legislative reconciliation of such apparent conflict. Many of these matters appear in the opinions in the cases of *Francis v. State*, 233 S. W. 974, and *Deisher v. State*, 233 S. W. 978, this day decided, in which we held that the only characteristic of each place mentioned in article 559, Vernon's P. O., which must be alleged in order to charge a felony under said article, is that it was for the purpose of being used as a place to bet, wager, etc., or do the other things forbidden; that is, if it be sought to charge a renting, it must be alleged that the house or premises were rented for the purpose of being used as a place for, etc.; if keeping be the offense sought to be charged, it must be alleged that such keeping was for the purpose of being used as a place for, etc.; if it be sought to charge the property as a resort, it must be alleged that such place was rented or kept, as the case might be, for the purpose of being used as a place where people resorted to gamble, etc.; if permitting be sought to be charged, it must be alleged that the accused permitted his property or premises to be rented or kept, etc., for the purpose of being used as a place to bet, wager, etc.

If the accused was not sought to be charged as renting or keeping, or permitting his property to be used for the purpose, etc., but as one at which a casual or isolated game forbidden by law was allowed or permitted, then the allegation of such fact, and the omission of any charge that the property or premises was kept for the purpose of gaming, might charge a misdemeanor, and be prosecuted under article 572 of the Penal Code of 1911. To our minds the degree of criminality between permitting a casual game on one's premises, and that of permitting premises to be kept for the purpose of gaming, is apparent and real, and that one may well be a misdemeanor by legislative act and the other a felony.

[1] In the instant case the charging part of the indictment is as follows:

"Hub Fridge, on the — day of December, 1919, did keep and was interested in keeping a house and room situated in said county, the same being then and there not a private

residence occupied by a family, for the purpose of being used as a place to bet and wager and to gamble with cards, and as a place where people did then and there resort to gamble, bet, and wager upon games played with cards."

[2] Without further discussing any question of conflict between article 559, Vernon's P. C., under which this prosecution was brought, and article 572 of the Penal Code of 1911, we have concluded that the indictment herein charged a felony, and that said article 559 will be upheld as not in such conflict with said article 572, or any other article of said Penal Code so as to be destructive thereof.

[3,4] Appellant asked a continuance for Nip Rogers, who was alleged to be temporarily in Oklahoma. It was a second application. It appears that said Rogers was the witness or one of the witnesses for whom the first continuance was granted. It was stated in said application that, at the time appellant procured his original process for said Rogers, the residence of said witness was unknown, but had been ascertained by appellant after the cause had been continued, and but recently before the making of the instant application. It was here alleged that said witness was at Holdenville, Okl., and that interrogatories had been filed under the statute to take his deposition. The bill of exceptions to the overruling of this application was qualified by the trial court. It appears that said application was controverted by the state and evidence heard by the court as to diligence. It is made to appear that Rogers disappeared from his room in Fort Worth about the time of the return of the indictment herein, and that he had not been seen or heard of since, notwithstanding the fact that his room rent was paid up in advance to a time subsequent to that of his leaving. It was further shown in said qualification that all the subpoenas issued to Tarrant county by appellant had stated that the residence of said witness was at the place from which it appeared he had fled. It was further shown that an officer had gone to Holdenville, Okl., with a warrant for said witness, had inquired of all peace officers, the hotel keepers, and boarding house keepers of said town, as well as many other persons, none of whom had heard of such a person in that vicinity. The truth and merit of any application for a continuance is primarily addressed to the trial court, and unless it appears to us that his discretion in the refusal of such continuance had been abused, this court would not reverse a case for such refusal. We think the trial court in the instant case justified in concluding that diligence had not been used, and that a postponement would not likely procure the testimony of said Rogers. We are further of opinion from an examination of the record that the action of the court was strengthened

by the fact that the evidence appeared so overwhelmingly contradictory of the facts stated to be expectant from said Rogers as to justify the trial court in concluding either that said witness would not likely testify as stated, or that his testimony, if so given, would not likely have been true.

[5, 6] It appears from the record that one Brooks was indicted for the same offense charged against appellant, and that appellant asked for a severance, and that Brooks be placed upon trial first. Thereupon, the state dismissed its case against Brooks, and appellant asked that he be called for the purpose of having him sworn as a witness in his behalf. Brooks failed to respond, and appellant asked a postponement of his case until he could procure the issuance and service upon Brooks of process, or secure his attendance as a witness. The refusal of such postponement by the court is here complained of. We are of opinion that no error was committed. One implicated in an offense cannot be compelled to give evidence criminatory of himself. It appears from the testimony of numerous witnesses that Brooks was in the employ of appellant, and dealing a game of cards in the house which appellant is charged to have kept as a gambling house. By no means known to us could appellant have obtained from Brooks the testimony which he states he expected; that is, that Brooks would swear that he and state witness Crowder ran said gambling house, and that appellant did not so run the same. Especially do we think this true in view of the fact that various witnesses testified that appellant was in control of said place, rented same, himself dealt games of stud poker and other cards in said house, collected money from frequenters of the place, and other criminating facts. We think the trial court did not err in refusing the postponement asked.

[7-9] That a witness for the state while on the stand refused to answer the question propounded by appellant's attorney as to whether he had ever been convicted of a felony would not seem to be error. His refusal to so answer could not form a sufficient predicate for the objection that such witness was incompetent because an unpardoned convict. The burden is upon the objector in any case to show the existence of the ground of alleged incompetence on the part of the witness. The form of the question asked, appearing to extend back for an unlimited time, would make same subject to a proper objection because of its lack of materiality. However, we observe that said witness stated on cross-examination that he had not been confined in the penitentiary within the last 10 years. This would appear to make the matter sought by appellant from said witness in order to affect his credibility to be objectionable, as immaterial.

[10] As a matter of defense appellant offered in evidence in certified copy of a charter granted to certain parties in 1910 to operate "The Trinity Club." Thereafter the state was allowed to prove by the attorney who procured said charter that the incorporators were negroes. We are unable to agree with appellant that proof of such fact was harmful or prejudicial to his case. We see no greater objection to proof of the fact, if such be true, that appellant acquired a charter from negroes, than proof of the fact that he acquired same from persons of any other race. The matter of said charter appears one of immateriality in any event. Numerous witnesses testified that gambling was going on in the room rented by appellant, and none testified to the carrying on of any conduct in said premises which would appear to be part of the legitimate operation of a club, other than that a domino and a pool table were kept in said room. We further observe that appellant's relation to said charter nowhere appears, and it would not be available as a defense, under the facts shown in this record.

[11] Appellant's question to various witnesses as to whether or not they knew of good men who played cards was properly held objectionable. It would be no justification or mitigation to appellant that other good men did things which under some circumstances might be provable as acts of crime.

We have carefully examined all of appellant's contentions, and are of opinion that none of them are sound, and that under the facts in this case it is made to appear that the evidence supported the conviction, and an affirmance is ordered.

#### SANCHEZ v. STATE. (No. 6352.)

(Court of Criminal Appeals of Texas.  
June 22, 1921. Rehearing Denied  
Oct. 12, 1921.)

1. Indictment and information  $\S$  203—Conviction on two counts sustained where one count is good.

A conviction on two counts, the first of which was sufficient, will be sustained, though the second was insufficient in alleging venue.

2. Indictment and information  $\S$  86(2)—Allegation of venue held sufficient.

In prosecution under article 559, Vernon's Ann. Pen. Code 1916, for unlawfully keeping or being interested in keeping a gambling house, a count of the indictment alleging that in the county of Bexar, state of Texas, defendant did unlawfully keep and was then and there interested in keeping a building, etc., sufficiently states venue.

3. Gaming  $\S$ 91—In prosecution for keeping a place for gambling, allegation that persons gambled there is not necessary.

In prosecution under article 559, Vernon's Ann. Pen. Code 1916, prohibiting keeping of place for the purpose of being used as a place to bet and wager, an allegation that persons did bet and wager at games played with cards or dice is not necessary.

4. Gaming  $\S$ 91—In prosecution for keeping a place for gaming, indictment need not allege that the place was not a private residence.

In prosecution under article 559, Vernon's Ann. Pen. Code 1911, prohibiting keeping of place for the purpose of being used to bet or wager, the indictment need not allege that the place was not a private residence.

5. Gaming  $\S$ 91—Allegation of how or by what means defendant held or obtained interest in gambling house unnecessary.

In prosecution under article 559, Vernon's Ann. Pen. Code 1916, prohibiting keeping of a place for the purpose of being used as a place to bet or wager, the indictment need not allege how or by what means defendant held or obtained an interest in the place.

6. Criminal law  $\S$ 1091(10)—Bill of exception defective in not showing objections to questions to witness before answer.

In prosecution for keeping place for the purpose of being used as a place to bet and wager, bill of exceptions stating objection to the admission of testimony, "to which questions and answers defendant objected," was defective in that it did not show the questions were objected to before answer, or what objections were made to the questions referred to.

7. Criminal law  $\S$ 695(2)—Objection to testimony held insufficient.

In a prosecution for gambling, an objection "to anything in reference to the tables or games" is without merit.

8. Gaming  $\S$ 97(2)—Evidence that monte table was operated held admissible.

In prosecution under Vernon's Ann. Pen. Code 1916, art. 559, for keeping a gambling house, where the indictment alleged that the games were with cards and dice, evidence that a monte table was operated is admissible as showing the purpose for which the house was kept.

9. Gaming  $\S$ 97(1)—In prosecution for keeping gambling house, admission of evidence that defendant had interest in gambling house held not error.

In prosecution under Vernon's Ann. Pen. Code 1916, art. 559, for keeping a gambling house, the admission of evidence of the extent of defendant's interest in the house was not error.

10. Gaming  $\S$ 97(1)—Evidence that defendant played certain games and bet on them held admissible.

In prosecution under Vernon's Ann. Pen. Code 1916, art. 559, for keeping or being interested in keeping a gambling house, evidence

that defendant played certain games and bet on them, and that he dealt or kept banking games, is admissible.

11. Gaming  $\S$ 102—Refusal of charge that it must be proved that defendant owned or had a lease on premises, or some interest therein, was not error.

In prosecution under Vernon's Ann. Pen. Code 1916, art. 559, for keeping and being interested in keeping a gambling house, it was not error to refuse to charge that defendant must be proved to have owned or have held a lease on property, or to own some interest therein, where it was shown that accused was overseeing, dealing and taking part in the games, and was an officer of a club, and as such kept and was interested in keeping the house for gambling.

On Motion for Rehearing.

12. Criminal law  $\S$ 365(1), 673(5)—Testimony as to other offenses held part of the res gestæ, and need not be limited by instruction.

In a prosecution for keeping a gambling house, testimony that when the officers and others entered defendant was present, and was connected with a game then being conducted, was but the development of the res gestæ, and it was not necessary that an instruction be given that it could not be the basis for conviction.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Planton Sanchez was convicted of keeping a place for the purpose of being used as a place to bet, wager, and gamble with cards and dice, and appeals. Affirmed.

Chambers, Watson & Johnson, of San Antonio, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the Thirty-Seventh district court of Bexar county of keeping a place for the purpose of being used as a place to bet, wager, and gamble with cards and dice, and his punishment fixed at two years in the penitentiary.

[1, 2] a motion to quash, appellant insisted that the allegation that the house in question was situated in Bexar county was not sufficient. There were two counts in the indictment submitted to the jury which are an exact copy of those set out in *Razor v. State*, 57 Tex. Cr. R. 10, 121 S. W. 512. If either of said counts be sufficient, the judgment of conviction would be upheld under said good count. We are of opinion that the second of said counts would be insufficient to charge a felony under the recent case of *Francis v. State*, 233 S. W. 974, decided at the present term, but we are also of opinion that the first count is sufficient. In *De*

*Los Santos v. State*, 65 Tex. Cr. R. 518, 146 S. W. 919, in which the allegations of venue were somewhat similar to those in the instant case, though hardly as clear, we upheld the allegation of venue, and this case seems to have been followed since. Reverting to that part of the first count in said indictment in which is presented the matter now under consideration, we observe that it is alleged as follows:

"In the county of Bexar, and state of Texas, Planton Sanchez did unlawfully keep, and was then and there interested in keeping, a building, room, and place for the purpose of being used as a place to bet, wager, and gamble with cards, and did then and there keep and was then and there interested in keeping said building, room," etc.

This so plainly alleges that the appellant in the county of Bexar and state of Texas, did keep a building, etc., for purposes forbidden by statute, as to leave no room for doubt. It is clear that all the allegations with reference to keeping and being interested in keeping, etc., refer to the same building and room, and it being charged that in said county and state he kept same, we have no hesitation in overruling the motion to quash on this ground.

[3] It was also urged against said indictment that it did not allege that persons did bet and wager at games played with cards or dice. This is not necessary, and has been so held. Article 559, Vernon's P. C., prohibits the keeping of a place for the purpose of being used as a place to bet or wager; and an offense would be committed by one who kept said place for such purpose, regardless of whether the purpose had been carried into actual execution and the place used for the purposes intended, or not. Illustrating this: One might fit his house with paraphernalia for gambling, and advertise its purpose, attempt to induce patronage, and be found guilty of keeping, etc., though no one had yet engaged in actual games therein.

[4] It was also urged against the indictment that it was bad for its failure to allege that said place was not a private residence. This is sufficiently answered by the statement that, if appellant kept his place for the purpose of being used as a place for betting and wagering, and to which people resorted for the purpose of so doing, it would be no defense that it was a private residence, and hence no necessity existed for negating that same was such residence. We further observe that the offense defined by article 559, *supra*, may be committed regardless of whether the place be a private residence or not, there being a definition in said statute of what constitutes the place therein referred to.

[5] It was not necessary to allege how or in what manner appellant held or obtained

any interest in said house, etc. The other matters urged against the indictment, involving the constitutionality of the law and the method and manner of its passage, have all been passed upon by this court adversely to appellant's contention. A discussion of the authorities cited by appellant might be interesting, but we have examined and considered same and believe nothing could be gained by presenting our views of the several cases cited.

[6-8] By his bill of exceptions No. 4 appellant complains that witness Stevens was allowed to testify that there was a monte table in the room in question on which was money, and actual betting was in progress, and that appellant was dealing. The bill is entirely defective. The objections stated are as follows:

"To which questions and answers the defendant objected, and objected to anything in reference to the tables or games, because the games they have alleged here is with cards and dice; it is not alleged any monte games, but a monte table is a special table, defined by the statute as a 'gaming table;' that the defendant is charged with playing with cards and dice."

The court properly overruled such objections. It is not shown whether there was any objection made to the questions asked before they were answered, nor does it appear what objections were made to the questions referred to. An objection which is stated as follows: "To anything in reference to the tables or games" would be without merit. Inquiry as to the games played in said house at the time would be entirely proper. However, if the objections which appeared to be intended were properly before us, we would hold the evidence admissible as showing the purpose for which said room was being used. There was evidence that at the time Mr. Stevens went into said room a game of poker was being played at which money was being bet, and as affecting the question of whether or not the offense committed was a felony, under the authority of the cases of *Francis v. State*, 233 S. W. 974, *Deisber v. State*, 233 S. W. 978, and *Fridge v. State*, 233 S. W. 979, recently rendered by this court, it would be necessary to show the purpose for which said room was being kept—that is, that it was kept for the purpose of being used as a place to bet and wager, etc.—and as bearing upon this issue, and showing the character, surroundings, and use of said room, evidence that other games were in progress besides said poker game was admissible.

[9] Objection was made to one Munoz, a witness for appellant, being allowed to testify that appellant had an interest of \$150 per month in this gambling house. There is nothing in the bill of exceptions presenting

this matter which shows any error. The interest of appellant in said house was an issue. Munoz said he had the interest above stated. We are unable to gather from any of the contents of said bill why the facts stated were not admissible. If Munoz knew such fact he could state it. Neither his means of knowledge nor the method of making same known is attacked in said bill of exceptions.

[10] Appellant asked a special charge to the effect that evidence that he played at certain games and bet on same in said premises could not constitute a basis for a conviction for keeping and being interested in such keeping. The refusal of this charge is assigned as error. The case of *Bell v. State*, 84 Tex. Cr. R. 197, 206 S. W. 516, is cited as authority. As we understand that case, it holds directly the opposite to appellant's contention. In said case proof was made of playing games by the accused. He was charged as the keeper. This court said in that opinion:

"His connection, if any, as keeper, is largely dependent upon the fact that he was in and about said house, and knew that gaming was carried on, and indulged in such gaming."

It was thus apparently held that the acts of the accused in playing games might be evidence against him when charged as keeper of the house. What we have above said also substantially disposes of appellant's requested charge that the fact that he dealt or kept banking games could not constitute a basis for conviction herein.

[11] Complaint is made that the court refused to charge the jury that it must be shown that appellant owned or held a lease on the property in question, or owned some interest therein. We cannot agree to this proposition. *Davis v. State*, 68 Tex. Cr. R. 259, 151 S. W. 313. Examining the testimony of Senor Munoz as given on appellant's behalf, we find that he says with regard to said room:

"I was not there the night Stevens was there; \* \* \* Planton Sanchez (appellant) was there that night; he had charge of the house there."

In his further testimony this witness proceeds:

"I had a club over there; \* \* \* the club got the rake-off; \* \* \* the club is all the members; he was interested in it; \* \* \* I was treasurer and Planton Sanchez was president; \* \* \* he got his part of the money; each man would get his part every month; \* \* \* Planton and I got our part each month."

As we view the matter it would be difficult to make plainer the proposition that a gaming house was being run on the premises in question; that games of cards were being there played, and money bet on same; also

that banking games were being conducted in said premises; that said house was conducted for profit, and that all the members of the so-called club participated in the division of the profits, and especially Munoz and Sanchez, who were not only personally overseeing, dealing, and taking part in said games, but were the titular officers of said club, and as such unquestionably kept and were interested in keeping the said house for the purposes set out in the indictment.

Finding no error in the record, the judgment will be affirmed.

#### On Motion for Rehearing.

Appellant insists that the trial court should have given his special charges Nos. 1 and 2, the substance of which was that the evidence showing that he played and bet at certain games, and that he dealt or kept monte games in the premises charged to have been conducted as a gambling house could not constitute a basis for his conviction for keeping or being interested in keeping said premises as a gambling house.

[12] The evidence of the officers and parties who entered the alleged gaming house on the occasion charged showed that at the time appellant was dealing a monte game, and that another monte game and poker games were running in said house and that 75 or 100 men were up there gambling, and that appellant told them that he was the owner of the place and was running the house. That appellant was present, and was connected with a game then being conducted, was but the development of the *res gestæ*. Testimony which is a part of the *res gestæ* need not be limited. *Serop v. State*, 154 S. W. 557; *Davis v. State*, 154 S. W. 552. Also, *Davis v. State*, 143 S. W. 1161; *Ryan v. State*, 64 Tex. Cr. R. 623, 142 S. W. 881; *Jenkins v. State*, 59 Tex. Cr. R. 478, 128 S. W. 1113; *Long v. State*, 55 Tex. Cr. R. 55, 114 S. W. 632; *Roma v. State*, 55 Tex. Cr. R. 344, 116 S. W. 598; *Leeper v. State*, 29 Tex. App. 69, 14 S. W. 398.

Mr. Branch, on page 121 of his work on Criminal Law, states numerous authorities supporting the proposition that, when the testimony in question is admissible to prove the main issue, it is not necessary for the court to limit or restrict the purpose for which same is admitted. It is again urged that the *Bell Case*, supra, supports the appellant's position. In that case we held that under its facts a charge similar to that under consideration was proper. The *Bell Case* seems to have been reversed on its facts. An examination of same shows there was no direct testimony connecting Bell with the running of the house in question, and practically the only evidence against him was the fact that he had formerly rent-

ed the premises, and had given the house up, and it had been rented by another party. It being further shown that about the time in question Bell had played at games on said premises, we held that to refuse the charge mentioned was improper. The facts in the instant case are entirely dissimilar; and it appearing without controversy that appellant was running the house in question, and was interested in keeping the same for the purpose of being used as a gambling house, we do not think it possible that the jury could have considered the evidence of his dealing monte or playing at games in said house in a hurtful way, or that he could have suffered injury by the failure of the court to limit the purpose of said evidence in his charge.

It seems to us beyond question that the case is entirely free from possible danger of appellant having been convicted of keeping and being interested in keeping a gambling house because of the fact that he played at or dealt said games.

The motion for rehearing will be overruled.

#### SULLIVAN v. STATE. (No. 6284.)

(Court of Criminal Appeals of Texas. June 8, 1921. Rehearing Denied Oct. 19, 1921.)

1. Intoxicating liquors  $\S$ 216 — Indictment charging unlawful possession of liquor need not describe liquor as requiring federal tax.

Indictment charging defendant with having possession of intoxicating liquor not for medicinal, scientific, sacramental, or mechanical purposes in violation of the Dean Law,  $\S$  1, 2, need not describe the liquor as being such as required a federal tax as a beverage, notwithstanding section 4, providing that the liquor described in sections 1 and 2 should be construed to include certain named liquors and all liquors requiring a federal tax as a beverage, such statute having reference merely to matters of proof.

2. Criminal law  $\S$ 854(9) — That juror remained momentarily behind after jury had been called from its room held not ground for reversal.

That one juror remained momentarily behind in a toilet after jury had been called from its room into court held not ground for reversal, in view of showing that he rejoined other jurors within a minute without having spoken or been spoken to by any person.

3. Criminal law  $\S$ 1166½(4)—Admission of evidence in defendant's absence reintroduced in his presence not ground for reversal.

The admission of evidence in defendant's absence held not ground for reversal under Vernon's Ann. Code Cr. Proc. 1916, arts. 755, 756, requiring the defendant's presence during

the trial, where on discovery of defendant's absence the proceeding was stopped until his return, and where after his return the same evidence was reintroduced in his presence.

4. Criminal law  $\S$ 475—Witness experienced in handling intoxicants may testify that whisky in defendant's possession was new whisky.

In prosecution for having possession of liquor in violation of the Dean Law, in which defendant claimed to have had such possession before the law went into effect, witness experienced in handling intoxicating liquor, who testified that he could tell new whisky from old whisky, was properly permitted to testify that the liquor found in defendant's possession was new whisky.

5. Intoxicating liquors  $\S$ 233(2)—Officers' testimony that they had searched defendant's premises without finding intoxicating liquor admissible.

In prosecution for having possession of intoxicating liquor in which defendant claimed to have had possession of the liquor from a time prior to when the law forbidding the possession took effect, testimony of officers that they had frequently searched defendant's premises for intoxicating liquor, since the law had taken effect, without finding such liquor, held admissible to rebut such contention.

6. Criminal law  $\S$ 1036(2), 1044, 1170½(1)—Voluntary statement not responsive to question held not ground for reversal.

In prosecution for having possession of intoxicating liquor claimed to have been possessed since before the prohibition law took effect, voluntary statement of witness who had testified to searching defendant's premises without finding such liquor that he had found a drink or two of liquor in a bottle, which the officers had not considered important, not made in response to the question asked, held not ground for reversal, where the liquor in such bottle was not relied on to convict and there was no separate objection nor motion to exclude the statement.

7. Intoxicating liquors  $\S$ 239(1)—Charge held to submit defense that defendant had had possession since before the law prohibiting possession took effect.

In prosecution for having possession of intoxicating liquor, court's charge held sufficient to submit defense that defendant had had possession of the liquor since before the law prohibiting such possession had taken effect.

Appeal from District Court, Grayson County; Silas Hare, Judge.

Frank Sullivan was convicted of having in his possession intoxicating liquor not for medicinal, scientific, sacramental, or mechanical purposes, and he appeals. Affirmed.

B. F. Gafford, of Sherman, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of having in his possession intoxicating liq-

uor, not for medicinal, scientific, sacramental, or mechanical purposes, and his punishment fixed at confinement in the penitentiary for one year.

[1] We do not think it necessary that in the indictment the liquor which appellant was charged with possessing should have been further described as being such as required a federal tax as a beverage. The statement in section 4 of what is known as the Dean Law (Acts First and Second Called Session, 36th Legislature, c. 78) that the liquor described in sections 1 and 2 of said act should be construed to include certain named liquors, and "all \* \* \* liquors \* \* \* which require a federal tax as a beverage," has reference to matters of proof. The specific purpose of said section 4 seems to be to obviate the necessity for alleging any of the descriptives therein mentioned, and to make it plain that the descriptions of sections 1 and 2 may be met by proof of possessing, manufacturing, etc., the liquors described in said section 4.

[2] We think there was no such separation of the jury during the instant trial as constitutes misconduct. Upon the state's controversy of this part of appellant's motion for new trial evidence was heard, and the facts show that at some stage of said trial, while the jury was in its room, they were called to come into court, and one of the jurors remained momentarily behind in a toilet. This juror testified that within a minute he went into the courtroom and rejoined his fellows without having spoken to or been spoken to by any person. A deputy sheriff testified that he saw said juror come out of the jury room and rejoin the other jurors in the box, and that he spoke to no one and no one spoke to him. Injury was thus entirely negated by the state.

[3] During the taking of testimony the appellant absented himself from the courtroom while a witness was testifying. At once, upon the discovery by the court of his absence, the proceeding was stopped until appellant's return. It appears that while he was absent a witness identified certain jars of liquor as being that found in appellant's possession. After appellant returned the same evidence was reintroduced in his presence. The question has been fully discussed by this court before. *Cason v. State*, 52 Tex. Cr. R. 224, 106 S. W. 337.

[4] A witness who testified that he had had much experience handling intoxicating liquor, and had seen "a right smart liquor" made in Georgia, and that he could tell new whisky from old whisky, was permitted over appellant's objection to state that in his judgment the liquor found in appellant's possession was new whisky. We know of no rule or authority which would exclude such testimony of a witness whose experience appeared to qualify him, even if the matter be such as

to require some degree of expertness in order to enable the witness to testify. The objection would seem rather to go to the weight of the testimony than to its admissibility.

[5, 6] Appellant claimed that he had possessed the liquor in question from a time prior to the taking effect of the law forbidding such possession. As tending to refute his claim in this regard, the state was allowed to introduce testimony of officers who stated that they had frequently searched his premises for intoxicating liquor, since the taking effect of said law, and that they had found no such liquor as that charged in the instant case. We think the effect of such testimony was to sustain the state's contention of illegal possession, and to rebut that character of possession relied upon by appellant. The fact that one of said witnesses stated that at the time of such search he found a drink or two of liquor in a bottle, which they did not consider to amount to anything, would not seem to be reversible error. The fact that such liquor was in said bottle was not relied on to convict, and there was no separate objection made to such testimony which appeared to be a voluntary statement of said witness, and not in response to the question asked. No motion to exclude was made by appellant, and we think no reversible error appears.

[7] Complaint is made that the charge of the court did not affirmatively state to the jury the theory of appellant's defense on the ground of his possession of said liquor prior to the taking effect of the Dean Act. An examination of the main charge discloses the fact that said theory was submitted, and both affirmatively and negatively by the trial court, in that he instructed the jury that they must believe that appellant's possession was not from a time prior to the taking effect of said law, before they could convict; and also instructed them that, if they had a reasonable doubt as to whether such possession had so extended, they should acquit.

Objection was made to certain statements of the prosecuting attorney in his argument to the jury. The record discloses that no written request was presented asking an instruction that the jury not consider such argument. This has ordinarily been held necessary unless the character of the argument be such as that injury appear probable. We do not think the argument in the instant case such as to make it reversible error in the absence of such request.

Finding no error in the record, the judgment will be affirmed.

#### On Motion for Rehearing.

In his motion for rehearing appellant insists again that the reception of part of the evidence of Sheriff Craig in the absence of the accused, should be held reversible error. The facts appear to be that when the court

adjourned at noon he adjourned to meet at 1:30 o'clock p. m., and apparently when that hour was reached proceedings in the trial were resumed, and the witness Craig was called to the stand and asked and answered several questions pertaining to certain jars then in the presence of the jury. Some one called attention to the fact that appellant was not present, and the proceedings were halted, and in a few moments he came in. Thereupon the identical evidence given during his absence was introduced from said witness Craig, and appellant through his counsel cross-examined said witness at length. Appellant's counsel appears to have been present all the time. The matter was complained of in appellant's motion for new trial, and a bill of exceptions was taken to the refusal of the new trial upon this ground. Reliance is now had upon *Hill v. State*, 54 Tex. Cr. R. 646, 114 S. W. 117, and *Bell v. State*, 82 Tex. Cr. R. 436, 24 S. W. 418. Appellant refers to the *Cason Case*, cited in our original opinion, and calls attention to the fact that, after the rendition of the opinion in the *Cason Case* and, before the *Hill Case* was handed down, the Thirtieth Legislature passed an act (Acts 30th Leg. [1907] c. 19) requiring the personal presence of the accused in a felony case at the trial. This part of the act mentioned has been the law of this state for many years prior to the rendition of the *Cason Case*. Rev. St. 1879, art. 596; White's Ann. O. P. art. 633. We are in accord with both the *Hill* and *Bell Cases* on their facts.

In the *Hill Case* certain evidence of witnesses was reproduced at the request of the jury and while the defendant was absent, his presence having been expressly waived by his attorneys. This court has held in numerous cases that the presence of the accused, which is specifically required by the statute in such case (see articles 755, 756, Vernon's Crim. Proc.), cannot be waived by the attorneys for the accused. *Shipp v. State*, 11 Tex. App. 46; *Mapes v. State*, 13 Tex. App. 85; *Granger v. State*, 11 Tex. App. 454. The error of the court in the *Hill Case* was not the result of inadvertence or lack of knowledge of the absence of the accused, but was the intentional and deliberate act of the court and counsel for the defendant. In the *Bell Case*, supra, the accused was not on bond, but was in the custody of the sheriff, and was carried by the officers from the courtroom, and during his absence material testimony was introduced, and the accused was at no time confronted with said witnesses as required by our Constitution, and was given no opportunity to examine such witnesses, and the testimony was at no time reproduced or offered in the presence of the defendant. The statutory requirement that the accused be present at the trial, in cases in which it is apparent that no possible injury could have resulted to the accused, has never been given an

ironclad construction by this court. In *O'Toole v. State*, 40 Tex. Cr. R. 578, 51 S. W. 244, the accused was absent from the courtroom while the jury were being impaneled, sworn, and the indictment read to them. His absence seemed to have been without the knowledge of the court. Upon his return the trial court asked him if he waived the going over of the proceedings had in his absence, and he answered that he did. This court, through Judge Henderson, held that, if appellant had refused to agree to such waiver, the court could have immediately rectified the matter—by which we take this court to mean that the trial court would have proceeded to have the indictment reread and the jury sworn, etc. Notwithstanding the proceedings that were had out of the presence of the accused, this court held no error shown, and the cause was affirmed.

In *Killman's Case*, 53 Tex. Cr. R. 570, 112 S. W. 92, this court, through Judge Davidson, held that the voluntary retirement of the accused from the courtroom for five or six minutes during the argument would not vitiate the conviction. True, the case was a misdemeanor, but one in which the punishment was by imprisonment, and it thus comes within the rule. In *Whitehead v. State*, 66 Tex. Cr. R. 482, 147 S. W. 533, the accused absented himself from the courtroom during argument from 3 to 10 minutes in a felony case. This court held it no cause for reversal, and discussed at length many authorities. In *Fry's Case*, 78 Tex. Cr. R. 435, 182 S. W. 331, the accused was on bond, and shown not to have been present at an extended colloquy between the trial judge and the jury. In passing upon his contention that what was done in his absence was error, this court held that, being on bond, it was the duty of the appellant to remain in attendance on the court while the jury were out considering his case, and, having absented himself, and it appearing that the matters that transpired in his absence were not such as could have injured him, no reversible error was shown. In many cases cited and discussed in Ann. Cas. 1913C, p. 1147, note, in most of which the doctrine seems to be adhered to that, where the accused is on bond, bound by the terms of such bail to be before the court, if he chooses to absent himself during part of the trial, unless it be of some particular hurt and violative of some special statute, he has no cause for complaint. We are not now called upon to decide that question, but content ourselves with saying that on the facts in the instant case we are of opinion that the accused was confronted with the witnesses against him, and given every opportunity to cross-examine and preserve any rights due him, and that he was present at his trial within the contemplation of our statute.

The motion for rehearing is overruled.



## MANN v. JONES et al. (No. 1837.)

(Court of Civil Appeals of Texas. Amarillo. June 22, 1921. Rehearing Denied Oct. 5, 1921. Second Rehearing Denied Oct. 26, 1921.)

**1. Brokers ⇨66—Subagent could not secure agency direct from owner without notice to agent.**

A real estate agent, having agreed to represent another agent who had land listed, could not, without reasonable notice to such agent, secure an agency from the owner of the listed land direct for the sale of the property, since to do so would be a breach of good faith, which the law does not tolerate.

**2. Brokers ⇨66—One accepting position of subagent must abide by agreement and divide commissions.**

One who has accepted the position of subagent of one having land listed under an agreement to personally procure purchaser and divide the commissions must abide by his agreement, and divide the commissions, though the first agent had no exclusive agency, and did not actively interest himself in the negotiations resulting in a sale of the property, notwithstanding that the subagent, without notice to the first agent, procured agency direct with the owner of the listed land.

Appeal from District Court, Lubbock County; W. R. Spencer, Judge.

Action by C. W. Jones against Ed. F. Mann and another. From an adverse judgment, defendant Mann appeals. Affirmed.

Bean & Klett and Vickers & Campbell, all of Lubbock, for appellant.

W. H. Bledsoe, of Lubbock, and G. E. Lockhart, of Tahoka, for appellees.

HALL, J. The appellee Jones sued J. S. Johnson and appellant, Mann, for the recovery of 25 cents per acre commissions on the sale of four leagues of land in Hockley county. It is alleged that the property belonged to Johnson, who agreed with appellee Jones that the latter should sell said land; that no definite amount of commissions was agreed upon but that the usual and customary commission was 50 cents per acre, and that he was entitled to one-half thereof; that he agreed with Mann to allow him one-half of the commissions earned; that Johnson listed the lands with him at \$16 per acre, and that soon thereafter he employed Mann to procure purchasers therefor, with the understanding that they would divide the commissions to be paid by Johnson; that Mann accepted said employment, took a list of the lands, and in December or January of the following year consummated a deal with J. C. Whaley and A. F. Jones; that said deal had been in all things closed, and that the commission was then due. He further alleg-

ed that Mann and Johnson had made some sort of an agreement, contrary to the original agreement, which was not binding on him.

Appellee Johnson answered by demurrer and general denial, and pleaded specially that he listed the lands for sale with Mann individually, who sold the same to Whaley & Jones, and that there was due him as commissions the sum of \$3,480, of which amount he had paid the sum of \$1,255.25, and that he held the balance subject to the orders of the court, offering and tendering the same to the party entitled to receive it. Mann answered by general demurrer, general denial of the allegations in appellee's pleadings, and, by cross-action against Johnson, his codefendant, alleged that the lands had been listed with him; that he had sold them to Whaley & Jones and was entitled to the balance of the commissions then due. A trial before a jury resulted in a judgment in favor of appellee Jones for one-half of the commissions and in favor of Mann for the remainder. The case was submitted upon special issue, in reply to which the jury found: That Jones furnished Mann a list of the lands and requested him to offer the same to Whaley & Jones under an agreement between Mann and appellee Jones that they should divide the commissions if a sale was effected; that Mann accepted appellee's proposition, and that at the time of the sale C. W. Jones had the lands listed with him for sale.

[1] There are five assignments of error presented in appellant's brief, which, under the view we take of the case, it will not be necessary for us to consider in detail. The evidence is conflicting upon the issues submitted to the jury, but is amply sufficient to support the findings. Johnson had listed the land with appellee Jones, and according to the evidence and the findings had not canceled the listing contract, and Jones was still his agent at the time of the sale. As to Johnson, Mann occupied the position of a subagent, but under the contract between C. W. Jones and Mann the former was the principal, and this relation, according to the record, existed up to the time of the sale. Having agreed to represent Jones as his agent, Mann could not, without reasonable notice to Jones, secure an agency from Johnson direct for the sale of the property. His position is analogous to that of a tenant, who attempts to deny the title of a landlord. He must first notify his principal of his purpose to terminate the agency before he can acquire rights adverse to his principal in the prosecution of the work for which the agency was created. If he had notified Jones, the latter could, and doubtless would, have made an effort to procure another purchaser. Securing the right from Johnson direct to sell the land was an attempt to violate his contract with Jones, and was

such a breach of good faith as the law does not tolerate.

[2] It is contended that Jones did nothing toward procuring a purchaser, and that it was through Mann's efforts alone that Whaley & Jones were induced to buy it. A sufficient answer to this contention is that, under the contract between appellee Jones and Mann, it was not contemplated that the former should actively interest himself in the negotiations. He had the land listed with him, and, while it is not shown to be an exclusive agency, when Mann accepted the position of subagent under an agreement to procure the purchaser and divide the commissions, appellee was entitled to his share thereof, by virtue of the contract between them. *Bauer et al. v. Crow*, 110 Tex. 538, 221 S. W. 936; *Id.*, 171 S. W. 296.

The judgment is affirmed.

#### On Motion for Rehearing.

Appellant moves the court for additional findings of fact. In response to said motion, we find that in November, 1918, the owner of the land listed it with appellant and agreed to pay him a commission of 20 cents per acre in the event of a sale; that such listing with Mann was by the owner upon his own initiative, and not at the solicitation of Mann. Mann did not negotiate with the purchasers until after the owner had listed the land with him in person. We are further requested to find that Mann sold the land under his contract with the owner, that he was the owner's agent when the sale was negotiated, and that the owner did not know the appellee in the sale made by Mann. We cannot find these facts as stated. As we understand the law, Mann could not, during the existence of his contract with appellee, in virtue of which he agreed to act as a subagent, make a new and independent contract with the owner to sell on his own account without first notifying the appellee and terminating the relationship of agent and subagent. *Kohn v. Jacobs*, 4 Misc. Rep. 285, 23 N. Y. Supp. 1033; *Madler v. Pozorski*, 124 Wis. 477, 102 N. W. 892.

We further find that appellee had no exclusive agency from the owner to sell the land. In the motion for rehearing the same questions are presented which have been considered in disposing of the matter originally. The appellant insists that, since appellee could not have sold the lands to Whaley & Jones, and because the record does not show that Mann had gained any advantage over appellee, or had derived any profit or benefit by virtue of the contract of subagency, he should not be required to divide the commissions with appellee. We think these facts have been shown, or at least are inferable from the record. Under the contract appellee had the right to expect that the

sale would be made to Whaley & Jones by his subagent, and for their mutual benefit. With this expectation he would naturally make no effort to dispose of them to any other purchaser. If Mann had informed him of the fact that he had accepted an agency directly from the owner, and had abrogated the contract of subagency, he would be in a position to contend that no injustice had been done appellee; and this is the turning point of the case.

We think the controversy has been correctly and justly disposed of, and the motion for rehearing is overruled.

#### BURKE et ux. v. BURKE. (No. 701.)

(Court of Civil Appeals of Texas. Beaumont. July 2, 1921. Rehearing Denied Oct. 12, 1921.)

1. Evidence  $\S$  471(5)—Witnesses  $\S$  248(2)—Testimony as to effect of conversation held responsive to question, and not a conclusion of witness.

In wife's action against parents of deceased husband for proceeds of insurance policies, on theory that husband before his death had instructed his father to have policies changed so as to make wife beneficiary, testimony in answer to question as to the effect of husband's conversation with witness as to whether he intended to change the beneficiary as to all of his policies that "he stated \* \* \* that his intentions were to the effect that his wife should receive all his insurance" held properly received as against contention that it was not responsive and was a conclusion of the witness.

2. Appeal and error  $\S$  1050(1)—Admission of evidence held harmless in view of other testimony.

In wife's action against parents of deceased husband for proceeds of insurance policies, in which she claimed that the husband had instructed his father to change the policies so as to make her beneficiary, the admission of testimony by witness who had been questioned as to the effect of his conversation with the husband as to husband's intention to change the beneficiary in all of his policies that the husband had stated to witness that his intentions were to the effect that his wife should receive all his insurance, if error, was harmless, in view of further testimony of witness that husband was to name wife as beneficiary in all his policies.

3. Evidence  $\S$  215(3) — Excerpt from letter held admissible as an admission against interest.

In wife's action against parents of deceased husband for proceeds of insurance policies on theory that husband had instructed father to change policies so as to make wife beneficiary, excerpt from father's letter to the wife stating that the husband had written him to have the insurance changed held admissible as admission against interest.

4. Evidence  $\S$  155(8)—Portions of instrument from which excerpt has been offered by one party are admissible only where explanatory of portion first offered.

The rule that, where a portion of an instrument is offered by one party, the whole may be offered by the other, is applicable only to those portions of the instrument that bear immediately upon and are explanatory of the portion first offered.

5. Evidence  $\S$  155(8)—Admission of excerpt from letter did not warrant admission of other portions which were argumentative, self-serving, immaterial, and irrelevant.

In surviving wife's action against parents of deceased husband for proceeds of insurance policies on theory that the father failed to follow husband's instructions to make the wife beneficiary, admission in evidence of excerpt from father's letter to the wife stating that the husband had instructed him to change the insurance did not warrant admission of other portions in which the father merely sought to testify to his acts in collecting and retaining the proceeds; such portions having no bearing upon the excerpt admitted, and being argumentative, self-serving, immaterial, and irrelevant.

Appeal from District Court, Falls County; Prentice Oltoof, Judge.

Suit by Hazel Marsh Burke against W. Z. Burke and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Spirvey, Bartlett & Carter, of Marlin, for appellants.

J. D. Williamson, of Waco, for appellee.

O'QUINN, J. Hazel Marsh Burke sued W. Z. Burke and Isabella C. Burke, her father-in-law and mother-in-law, in two separate suits to recover the proceeds of two life insurance policies. Judgment for plaintiff and defendants appeal.

Walter K. Burke was a son of W. Z. Burke and Isabella C. Burke, and while a single man took out two life insurance policies, one in the Woodmen of the World, for \$2,000, naming his father as beneficiary, and the other in the Sam Houston Life Insurance Company, later taken over and assumed by the Southland Life Insurance Company, for \$2,000, naming his mother as beneficiary. He joined the army in 1917, and while stationed at Camp Travis, on May 27, 1918, married plaintiff, Hazel Marsh Burke, to whom he had been engaged for some two years. Before leaving for France, while in Camp Travis, in June, 1918, he wrote his father, W. Z. Burke, requesting him to have the insurance policies changed so as to make his wife, Hazel Marsh Burke, the beneficiary therein. His said father, W. Z. Burke, had possession of the said policies and had same locked up in a bank in Reagan, Tex. W. Z. Burke did not have the change made in the policies as requested by his son, but kept the policies locked up in his private lock box

in the said bank. About August 25, 1918, Walter K. Burke was killed in France, and W. Z. Burke and Isabella C. Burke made proof of his death and collected and appropriated to their own use the proceeds of both of said policies.

The two cases were by agreement of the parties tried together, and were submitted to the jury upon two special issues, to wit:

"First issue: Did Walter K. Burke make a gift of his Woodmen of the World and Southland Life Insurance Company policies to W. Z. Burke and Mrs. Isabella C. Burke, the persons respectively named therein as beneficiaries? In this connection you are charged that in order to constitute a gift of such policies there must have been a delivery of same by said Walter K. Burke to the said W. Z. Burke with the purpose and intention on the part of said Walter K. Burke to pass the title thereto and to relinquish in favor of such persons all future right and dominion over said policies. The burden of proof rests upon the defendants to establish by a preponderance of the evidence the affirmative of this issue. Answer: To which the jury answered 'No.'

"If you have answered 'Yes' to this issue, you need not answer the second issue, but if you have answered 'No' to the first, then you will answer the following:

"Second issue: When Walter K. Burke, deceased, wrote the letter to W. Z. Burke in which he directed his insurance to be changed for the benefit of his wife, did the said Walter K. Burke mean and intend that his Woodmen of the World and Southland Life Insurance Company policies should be so changed? The burden of proof rests upon the plaintiff to establish by a preponderance of the evidence the affirmative of this issue. Answer: To which the jury answered 'Yes.'"

Upon the verdict of the jury judgments were entered in said cases, respectively, in favor of the plaintiff, Hazel Marsh Burke, against the respective defendants, for the amounts of such insurance. Motions for new trial were overruled, and the case is before us for review.

By their first assignment of error appellants complain of the court's admitting in evidence part of the witness Stallworth's answer to the fifth cross-interrogatory propounded to him by appellants, but offered by appellee. The witness was testifying by deposition. He was a soldier in the same division with deceased, Walter K. Burke. The witness, before joining the army, had been in the life insurance business. He first met Walter K. Burke at Camp Travis in June, 1918. He was testifying to conversations he had had with the deceased relative to deceased's having his insurance policies changed so as to make his wife, appellee, beneficiary. The cross-interrogatory reads:

"Cross-interrogatory No. 5: If you say that he (meaning Sergeant Walter K. Burke) spoke of more policies than the large one, the war

risk insurance, then do you undertake to state at this late date that he said he was going to have all of them changed? Or rather, as to the two small policies, did you and he not talk of them to the effect that they could be changed, or that he might change them?"

The answer was:

"I am positive that he stated that he would have the beneficiaries changed in all of his policies, naming his wife in all of his policies, in the two small policies as well as in the war risk policy, and that his intentions were to the effect that his wife should receive all of his insurance."

[1, 2] The appellants (defendants) did not offer in evidence said interrogatory and its answer, but appellee (plaintiff) did, and appellants objected to the last clause, "and that his intentions were to the effect that his wife should receive all of his insurance," on the grounds that same was not responsive to the question, and was a conclusion of the witness. The court did not err. The answer, including the portion objected to, was responsive to the question, was competent, relevant, and material. The question called for the "effect" of Walter K. Burke's conversation as to whether he intended to change the beneficiary in all of his insurance policies, and the answer stated the effect. The language complained of was but the statement of the witness' best recollection of what deceased said. If it was error, we cannot conceive how it could possibly have been hurtful, and was therefore harmless error.

[3] The second assignment is overruled. The evidence was clearly admissible. The evidence complained of was an excerpt from a letter written by W. Z. Burke to Hazel Marsh Burke on January 27, 1919, relative to the subject-matter of the suit, in which he used the expression, "He wrote me from San Antonio to have the insurance changed." When offered in evidence, this was objected to because, being only a portion of a sentence, it was not intelligible, and, standing alone, conveyed an erroneous impression of the idea intended to be conveyed by the writer, was misleading and prejudicial to the rights of the defendants. The subject of correspondence was the insurance policies constituting the matter in dispute herein, and the person referred to as "he" was well known and understood by all the parties, and the question in dispute was whether "he," Walter K. Burke, had in writing changed the beneficiary in said policies. The excerpt was an admission against the interest of appellants, was material and relevant, and appellants, if they desired, could offer the remainder of the letter, or such portions of same as would bear upon or explain that portion offered and to which objection was made, and which right they exercised later,

[4, 5] The third and fourth assignments of error complain that the court would not permit appellants to read in evidence to the jury the balance of the letter from which the portion offered by appellee mentioned in the second assignment was taken, invoking the rule that, where a portion of an instrument is offered by one party, the whole may be offered by the other. The letter out of which the statement was taken that was offered by appellee was written by appellant W. Z. Burke to appellee, and the portion admitted was an admission against his interest, and, under the rule invoked, only those portions of the letter that bear immediately upon and are explanatory of the portion offered are admissible. A careful inspection of the letter shows that the court permitted appellants to read in evidence so much of the letter as came within the rule. The portion refused was argumentative, self-serving, immaterial, and irrelevant, simply an effort on the part of the writer to justify his acts in collecting and retaining the insurance money. *Heard v. Clegg*, 144 S. W. 1147; *Robertson v. Russell*, 51 Tex. Civ. App. 257, 111 S. W. 209.

The fifth assignment of error is:

"The verdict of the jury and the judgment in said cause was contrary to, and not supported by, the evidence."

Appellee objects to our considering this assignment for the reason that same is too general. The objection is sustained. *Smith v. Jones*, 192 S. W. 799; *Ackerman v. Huff*, 71 Tex. 319, 9 S. W. 238. But, if the assignment had been such as to require our consideration, it nevertheless must be overruled, for the reason, in the language of counsel for appellee:

"A special verdict, found under articles 1984 and 1985, of the Revised Statutes, is conclusive as to the facts found, and under article 1986 and article 1990 a party cannot complain of a judgment conforming to a special verdict as unsupported by the evidence where he did not assign error to the refusal of the court to set aside such verdict."

"In the motion for new trial there was no error assigned to the answers of the jury to special issues as submitted, and there was no motion to set aside the verdict of the jury on such special issues, and there was no error assigned in the motion for new trial to the refusal of the court to set aside the verdict and enter judgment thereon." *Blackwell v. Vaughn*, 176 S. W. 912; *Scott v. F. & M. Bank*, 66 S. W. 485.

However, in any event, the assignment would have to be overruled, for the evidence abundantly supports the verdict of the jury.

There being no error shown in the record, the judgment is affirmed.

**LEWIS v. KELLY. (No. 8571.)**

(Court of Civil Appeals of Texas. Dallas.  
June 25, 1921. Rehearing Denied  
Oct. 15, 1921.)

**1. Pleading  $\S$  11 — Employee's petition for share of profits held sufficient without alleging evidentiary facts.**

In employee's action for share of profits, petition alleging the gross profits, net profits, and expenses of employer, and stating that employer's books of accounts in employer's possession showed the profits and expenses to be in the amounts so alleged, held sufficient on special exceptions that allegations of net profits were mere conclusions, and that debits and credits should have been pleaded, since the detailed entries in the books were not matters to be pleaded, but were mere evidence tending to prove the facts alleged, and since the allegation as to details being shown by books in defendant's possession excused plaintiff from showing them in detailed form in the petition.

**2. Pleading  $\S$  11—Need not contain evidentiary facts.**

A pleading should not contain the evidentiary facts, but merely the ultimate facts, with such detail of statement as is necessary to apprise adversary of the facts he will be required to meet.

**3. Master and servant  $\S$  80(1) — Employee claiming share in profits not required to sue on stated account or for accounting.**

An employee entitled under his contract to share in profits was not required to sue on a stated account or for an accounting, but could bring action for specified amount due him.

**4. Appeal and error  $\S$  994(2), 1003—Weight of evidence and credibility of witnesses within sole province of jury.**

The court on appeal will not consider the weight of evidence and credibility of witnesses; such matters being within the sole province of the jury.

**5. Appeal and error  $\S$  1001(1) — Findings supported by evidence not disturbed.**

Where there is evidence to sustain findings of fact, they will not be disturbed on appeal.

Appeal from District Court, Dallas County; W. F. Whitehurst. Judge.

Suit by T. S. Kelly against A. S. Lewis. Judgment for plaintiff, and defendant appeals. Affirmed.

Short & Field, of Dallas, for appellant.

M. W. Townsend and Louis H. Porter, both of Dallas, for appellee.

**HAMILTON, J.** In June, 1917, appellee began to work for appellant in a partnership business conducted in the firm name of Lewis & Knight, under a contract providing that appellee should receive \$150 per month salary and 10 per cent. of the net profits of the business. On the 30th of October, 1917, the part-

nership was dissolved, Lewis purchasing Knight's interest, and thereafter until March 1, 1918, appellee was in the service of appellant in the same capacity, but under a contract providing for a salary of \$175 per month and 25 per cent. of the net profits of the business, which was conducted under the name of A. S. Lewis Grain Company.

Relations were severed between the parties on February 7, 1918, and on March 1, 1918, appellee, who had kept the books of the business continuously from the beginning of the employment, presented to appellant a statement of the business during the term of his contract, both original and amended, showing net profits from June 1, 1917, to October 30, 1917, to be \$12,908.48, and showing net profits from October 30, 1917, to March 1, 1918, to be \$11,908.86.

Appellee demanded payment of 10 per cent. of the alleged net profits during the period between June 1, 1917, and October 30, 1917, and 25 per cent. of the alleged net profits during the period between October 30, 1917, and March 1, 1918, after allowing a credit thereon of \$560.60.

Appellant declined to comply with the demand, and appellee sued.

The case was submitted to a jury upon special issues, and, the special issues being answered in appellee's favor, judgment in accordance with such findings was entered that appellee recover of appellant the sum of \$3,652.26. From this judgment appellant appeals.

The allegations of the petition material to a consideration of this appeal are substantially as follows:

"Plaintiff shows unto the court that during the aforesaid period beginning June 1, 1917, and ending October 30, 1917, the gross earnings of said firm of Lewis & Knight amounted to the sum of \$25,103.36; that salaries paid by said firm during said period amounted to \$2,987.65, and that all other expense, including taxes of said firm during said period, amounted to \$3,758.39, and that the net profits earned by said firm during said period amounted to \$12,908.48, and by reason of the facts alleged the said firm of Lewis & Knight promised and became liable to pay the plaintiff 10 per cent. of said net profits, such 10 per cent. amounting to \$1,290.84; that the defendant is in the exclusive possession of the books of said firm, which will better show the aforesaid gross earnings, expenses, and net profits, and notice is here given the defendant to produce all of said books upon the trial of this cause.

"The defendant, during the period beginning November 1, 1917, and ending March 1, 1918, earned and derived from his said business gross earnings amounting to \$16,753.41; that the salary account of said business during said period amounted to \$2,700.55, and that all other expenses, including taxes, amounted to \$2,244.00, and the net profits earned and derived from his said business during said

period aggregated \$11,908.86, and by reason of the facts above alleged the defendant promised and became liable to pay the plaintiff 25 per cent. of said net profits, said 25 per cent. amounting to \$2,977.21.

"Plaintiff's salary was paid each month, and the defendant has paid plaintiff on the amount owing him as a credit on the net profits of the business the sum of \$560.60, leaving a balance owing to the plaintiff by the defendant of \$3,707.45, for which plaintiff sues.

"Although said indebtedness is long since past due, the defendant, though often requested so to do, has failed and refused and still fails and refuses to pay the same or any part thereof, to plaintiff's great damage.

"The allegation herein that the profits of said firm from June 1 to October 30, 1917, amounted to \$12,908.48 does not take into consideration a loss of \$2,955 sustained by the firm of Lewis & Knight on the purchase and sale of something over 5,000 bushels of wheat purchased by the same firm before the United States government fixed the price of wheat, and sold by said firm after said government fixed the price of wheat. Said loss is not taken into consideration and is not deducted from the aggregate profits, because, when the defendant proposed to purchase said wheat, the plaintiff opposed said purchase because he told defendant he would quit if the same was made, at which time, and when said wheat was sold for a loss after the government fixed the price of same, the defendant promised the plaintiff that, if plaintiff would stay in his employ, the loss so sustained would come entirely out of his share of the profits of said business, and the plaintiff would not share in said loss, and for said consideration of the plaintiff remaining in the employ of the firm of Lewis & Knight it was agreed that plaintiff should not bear any part of such loss, and that the same should not be taken into consideration in determining the amount of plaintiff's share of the net profits of said business.

"Said statement of profits does not take into consideration items aggregating \$900 credited to the defendant as salary upon the books of Lewis & Knight, because it was agreed between the plaintiff and the said firm that said salary account should not be taken into consideration in determining the plaintiff's share in the profits of said business."

Appellant answered by general demurrer, and also by special exceptions to the effect that the allegations of net profits were mere conclusions of the pleader; there being no allegations of items of credits and debits and no allegation that an accounting between the parties had been had. Subject to these demurrers, he answered, joining issue upon the contention asserted, and also by cross-action alleged that appellee owed him \$560, which had been paid appellee under the mistaken belief that a profit had accrued from the operation of the business.

The appellant assigns as error the ruling of the court upon each of the demurrers above mentioned.

That the general demurrer ought to have been overruled, as it was we think is appar-

ent, and the statement of this view without discussion is considered sufficient.

[1] We do not think there was error in the ruling upon the special exceptions, as contended by appellant. The averment was contained in the petition that the books showed the amounts of gross profits, net profits, and expenses to be as alleged; and the allegation that the books from which these alleged facts were derived were in appellant's possession and contained the evidential matter showing such facts, we think, rendered the allegations good against the special exception.

[2] The detailed entries in the books were not matters to be pleaded, but were rather only the evidence to establish the facts alleged. In no case should evidentiary facts be pleaded. The requirement the pleader is called upon to meet is to deduce from the details of evidence the ultimate facts to be proved by the evidence and use as the allegations of the pleading only such ultimate facts, resorting to such detail of statement as is necessary to apprise his adversary of the facts he will be required to meet. *Wells v. Fairbank*, 5 Tex. 585; *Tippett v. Gates*, 223 S. W. 705; *Townes on Texas Pleading*, 384. In the case of *Wells v. Fairbank*, supra, this language on the subject is found:

"The rule that the pleader must state the facts on which he intends to rely, as constituting his cause of action or ground of defense, is universal in its application in our pleadings, with the single exception of the plea of 'not guilty,' in the action of trespass to try title. But, although a statement of the facts is indispensable, it is not necessary to state such circumstances as constitute merely the evidence of those facts. The simple allegation of the fact is sufficient, without detailing a variety of minute circumstances which merely conduce to prove the truth of it. To acquire all those circumstances which constitute but the evidence of facts to be stated would lead to inconvenient detail and intolerable prolixity in pleading, and it would be to require that which must often be impracticable, and, if attempted, hazardous to the rights of the party; for it is not always possible for the pleader to know in advance precisely what his evidence will be; and a variance might be fatal to his cause. Hence the necessity of adhering to the rule that what is merely the evidence of facts need not be stated."

Granting, however, that this test is not met in appellant's allegations of amounts of profits, etc., yet the further allegation that the facts are better shown by the books in appellant's possession advises appellant that he has in his own exclusive keeping the evidence of the facts to be established, and in such relative situations of the parties the fullness which must ordinarily characterize a plaintiff's allegations is not required. Plaintiff's allegation that the facts are thus already in his adversary's exclusive possession excuses him from delineating them in

detailed form in the petition. Townes' Texas Pleading, 423.

[3] Nor do we think it was necessary in this character of suit to allege a stated account or else sue for an accounting. The relation between the parties was that of employer and employé, and not that of partnership. This relation had terminated, and appellee according to his allegations, had already exactly ascertained from the books of the business the amount due him for services, and for that amount he sued. Appellant has cited no decision or other authority holding that suits of this nature must either allege a stated or definitely agreed amount to be due or call for an accounting, and we do not think those cases in which parties have been required to seek an accounting are in point.

The following special issues were submitted to the jury, and answered as indicated:

"Special issue No. 1: Did the firm of Lewis & Knight make any net profits in the operation of its business at Dallas from June 1, 1917, to the dissolution of said firm? Answer 'Yes' or 'No.' Answer: Yes.

"Special issue No. 2: If you have answered the foregoing issue in the affirmative, then you will state what was the amount of net profits said firm made during said period in which plaintiff was to share? Answer: \$11,308.

"Special issue No. 3: Did A. S. Lewis Grain Company make any net profits from the operation of its business from the dissolution of Lewis & Knight to the retirement of plaintiff from the service of said company in which plaintiff was to share? Answer this question 'Yes' or 'No.' Answer: Yes.

"Special issue No. 4: If you have answered the foregoing special issue 'Yes,' then you will answer this question, but, if you have answered 'No,' then you need not answer this question: What was the amount of the net profits of the said A. L. Lewis Grain Company during said period in which plaintiff was to share? Answer: \$10,560.

"Special issue No. 5: If you have answered special issue No. 3 'No,' then you will answer this question: What was the amount of net loss of said business of A. S. Lewis Grain Company during said period? Answer: \$——.

"Special issue No. 6: What amount, if any, of the net profits, if any, do you find to be due and owing to plaintiff, T. S. Kelly, under his contract for 10 per cent. of the net profits of said business. Answer: \$1,130.

"Special issue No. 7: What amount, if any, of the net profits, if any, do you find to be due and owing to plaintiff, T. S. Kelly, under his contract for 25 per cent. of the net profits of said business? Answer: \$2,640."

Counsel for appellant vigorously insists that the foregoing answers are contrary to the evidence.

The record as here presented contains a mass of figures taken from the books of the business by appellee and another taken from the books by an accountant employed by appellant to ascertain what condition with reference to profits and losses was reflected

by the books. Certain items of loss are charged against the business by appellant which are not charged against it by appellee. The loss on a single grain transaction referred to in appellee's petition was omitted from the deductions against gross profits made by appellee. He swore, in conformity with his allegations, that a special agreement between him and Lewis, attending the transaction by which the latter made this deal, was that it was to be entirely independent of the business in which appellee was employed, and that the appellant would alone sustain whatever loss might arise in the transaction. Appellee is corroborated in this by W. M. Croithwaite, another employé of appellant's. On the other hand, appellant denies that such agreement was ever made, and contends that this item of loss is a proper charge against the business.

Appellant also contends that certain transactions relating to the purchase of oil interests in land and oil royalties in Louisiana are to be charged as losses against the business. This is disputed by appellee, who asserts that only the grain and feed business regularly conducted through the Dallas office was alone to be considered in estimating his share of the profits. There are conflicts and variances between the evidence on appellant's behalf and that for appellee as to items of loss and gain in freight claims, losses in weight, etc. Certain deductions for taxes, it appears, were not made by appellee in his estimate of the amount he claims and sues for. The amount of deduction for taxes was established by the evidence on appellant's behalf.

[4, 5] From the various items of proof, including variations and conflicts between the evidence for appellant and that for appellee, the jury has arrived at specific and definite findings of net profits, of which appellee is entitled to the alleged agreed shares. We are not prepared to say that the findings are unsupported by substantial evidence. The weight of evidence and credibility of witnesses were matters within the sole province of the jury. They chose to find that the special contract as to the 5,000 bushels grain deal was as claimed by appellee, and refused to believe the denial interposed by appellant against it. They chose to believe appellee's testimony to the effect that the Louisiana business and oil transactions were not to be figured in the estimate of the net profits upon which the percentage payments were to be made, although appellant testified to the contrary. And they chose to make all together such deductions from the amounts alleged by appellant as would leave the amounts which they found to be the net profits for the respective periods. We cannot assert that the record contains no evidence sufficient to sustain all the findings. This being so, the findings are conclusive. In such cir-

cumstances we are not warranted to disturb the conclusions of fact into which the jury resolved the evidence.

We will therefore affirm the judgment.  
Affirmed.

**RUSSELL REALTY CO. et al. v. HALL et al.**  
(No. 8554.)

(Court of Civil Appeals of Texas. Dallas.  
July 2, 1921. Rehearing Denied  
Oct. 15, 1921.)

**1. Injunction** ¶58—Restrictive covenants enforced at instance of individual purchasers of lots.

Compliance with restrictive covenants imposed upon the sale of lots in a subdivision for the purpose of prescribing and preserving the residential character of the property will be enforced by injunction at the instance of individual purchasers of lots.

**2. Covenants** ¶51(2)—Covenant prohibiting construction at less than certain cost not avoided by constructing portion of building with intent to add in future.

Owner of lot could not avoid restrictive covenant prohibiting construction of residence thereon at less than a certain cost, by constructing merely a portion of a residence at a cost of less than the specified amount, with the intention at some future date to build additions which would finally make the cost conform with the requirements.

**3. Covenants** ¶77—When one not a party to a restrictive covenant can enforce it.

Whether a person not a party to a restrictive covenant has the right to enforce it depends upon the intention of the parties, to be ascertained from the language of the deed itself, construed in connection with the circumstances existing at the time the deed was executed.

**4. Covenants** ¶51(2)—Compliance with covenant as to cost of construction dependent on actual expenditure.

Compliance with restrictive covenant as to cost of construction of dwelling depends on amount actually expended in the construction of the building, and does not require the construction of a house which would have cost required amount at the time the subdivision was laid out, and the general building plan, pursuant to which such restrictive covenants were incorporated in the deeds, was originally formulated.

**5. Covenants** ¶79(3)—Purchasers of lots in subdivision by deeds containing building covenants could not enforce covenants relating to lots in other subdivision.

Purchasers of lots in a subdivision by deeds containing restrictive covenants pursuant to a general building plan could not enforce restrictive covenants relating to lots in other subdivision subsequently platted by same owners.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Suit by E. K. Hall and others against the Russell Realty Company, J. A. Heiskell, Frank Smith, and others. Judgment for plaintiffs, and defendants appeal. Judgment affirmed as to defendant Frank Smith, affirmed in part and reversed in part as to defendant Heiskell, and reversed and rendered as to other defendants.

George T. Burgess, of Dallas, for appellants.

Parks & Hall, of Dallas, for appellees.

**HAMILTON, J.** This suit was instituted by appellees against appellants to enjoin the construction by appellants of any residence in a certain alleged restricted district at a cost of less than \$1,000 on the basis of the cost of material and labor in 1912. That is, appellees sought to restrain the building of a residence by appellants, or any of them, in said described district, except such as would have cost at least \$1,000 in 1912, and also asked the court to require appellants to remove within 60 days any dwelling house already constructed in whole or in part at a cost of less than that above indicated or constructed, in violation of any other applicable restrictive provision.

It was alleged that Russell Realty Company, on the 1st day of June, 1912, and thereafter, owned what is known as Russell Realty Company's Melrose addition in Dallas, Tex., and was interested in the matter of laying out, platting, and selling all the various residential lots therein; that as an inducement to the public, as well as to the plaintiffs, to buy such lots and for the general purpose of enhancing the value of the respective lots in this addition, Russell Realty Company and those under whom they claim entered upon a general building scheme to make the lots more attractive for residential purposes, and in carrying out the scheme caused to be inserted in deeds to all purchasers, or the majority of purchasers, a restrictive clause, containing substantially this language:

"And also provided and conditioned that no buildings or improvements shall be erected or placed on said property except dwelling houses and outhouses, and no dwelling house costing less than \$1,000 shall be erected or placed on said property. Houses to be built not less than twenty-five (25) feet from the front property line. These covenants to run with this property forever."

It was alleged that defendants all began to violate this restriction in 1920 by building and permitting to be built upon certain lots in Melrose addition small and unsightly structures to be used as dwelling houses, and costing much less than \$1,000; and it was also alleged that certain of defendants were either offering lots for sale in Melrose addition with the proposal that the above



copied restrictive clause should be omitted from the deed of conveyance, or were selling lots containing such clause, and at the same time were urging the purchasers to violate it.

Appellees alleged that they owned lots in Melrose addition, which lots they had bought relying upon the above restrictive clause contained in deeds made to them by Russell Realty Company, and in the belief that said general building plan adopted, as alleged, would be kept and carried out in good faith. They further alleged that under the influence of such inducements they had constructed residences upon the lots purchased by them, and were residing with their respective families in their homes thus acquired. They alleged that the structures already erected by appellees and those about to be erected in violation of the aforesaid restrictive covenant written in deeds, as evidencing the general plan, would be occupied by people undesirable to them for neighbors; that the effect would be to render uncomfortable their surroundings; impose upon them annoyance and inconvenience; and probably force them to abandon their homes. It was alleged that since this covenant was originally inserted in the first deeds executed in conveying lots situated in said addition the cost of building houses had doubled, and that therefore the spirit and intention of the restrictive covenants in existing deeds and the general building plan originally formulated could not be given effect unless the owners of improved lots inserted in their deeds to purchasers a clause requiring the construction of dwellings thereon at a cost of at least \$2,000. It was also alleged that appellants had never waived any right with reference to any covenant or adopted plan under which they purchased their homes.

The appellants answered, saying, in effect, that the general plan existed, and that the restrictive covenants were contained in all deeds, with reference to a portion of 45½ acres of land platted by Russell Realty Company on June 28, 1912, under the name of Melrose addition; and appellants, substantially and in effect, admitted the existing binding force of the restriction alleged by appellees as to this particular plat, which was recorded in the records of Dallas county. But they alleged that subsequently on July 3, 1914, Russell Realty Company had subdivided another portion of the 45½-acre tract under the name of second section of Melrose addition, and had filed a map of this part of the tract; that the plat of it embraced all the portion of the 45½ acres lying south of Burleson boulevard; and that when this plat was filed Russell Realty Company had no general plan or intention of making restrictions which would apply to the property embraced by it, and that therefore there was no agreement or understanding with purchasers of lots in the portion

first platted that restrictions would be inserted in deeds to purchasers in the last portion platted, or that any particular requirements as to a general plan of building would be enforced. It was alleged that three of appellants, John Ellis, F. S. Brittain, and Albert Inskeep, were purchasers of lots according to the second plat. The answer alleged that Russell Realty Company had not violated any restriction existing with reference to the first Melrose addition, and that it had no intention of attempting to violate any such restriction; but that no general plan existed whereby building in the second Melrose addition should be restricted; that no such plan with reference to it had been formulated; and that there was no intention of devising a general building plan therein or executing deeds to lots therein containing restrictions like those applicable to buildings in the first Melrose addition.

It was alleged in behalf of Inskeep that he had erected an outhouse on the extreme back end of his lot, which was not prohibited by his deed. It was alleged on behalf of Brittain that he had started the erection of a house on his lot which had cost him \$625.75, and that it was his intention "to erect rooms on the front end of the present structure which will complete a dwelling house, which, when done, will exceed the cost of \$1,000, as provided in the deed." It was alleged in Ellis' behalf that he had begun the erection of a dwelling house, but had not completed it; that he had already expended on it more than \$800; that he had placed it 50 feet from the front property line of the lot so as to allow space to build in front of the present structure a 16-foot room and an 8-foot porch; that when this is done the total improvements will exceed in cost \$1,000; that he is living in the completed part of the house, and as fast as he can accumulate the money for the purchase of lumber he is going to complete the house, which he expects to do not later than October 1, 1920. The defendants Frank Smith and J. A. Heiskell admitted that they had erected buildings in the first Melrose addition on lots owned by them, and were living in these houses with their families. But they alleged the houses to be in the nature of outhouses. Appellants filed a motion to dissolve a temporary injunction previously granted.

The case was tried by the court without a jury. The court by its judgment found that the appellants Heiskell and Smith had erected houses in the Melrose addition, costing less than \$1,000 at the present price of labor and material, and that appellants Ellis, Brittain, and Inskeep each had erected a house in the second section of Melrose addition costing less than \$1,000 at the present price of labor and material. The court also found that Heiskell had constructed still another house in the first Melrose addition which cost \$1,-

000 at the present price of material, but construed the restriction in the deed to Heiskell to require the construction of a house of the character which would have cost not less than \$1,000 in 1912. The motion to dissolve was overruled, the injunction was made perpetual, and each of the appellees was ordered to remove within 90 days the house erected by him, unless within that period he should make such house conform to the restrictive provision as to cost of \$1,000.

[1] It is well settled that the owner of a tract of land, which he intends to sell for residential purposes, may validly impose restrictive covenants upon the sales of lots for the purpose of prescribing and preserving the residential character of the property, and that compliance with such restrictions will be enforced by injunction at the instance of individual purchasers of lots out of the tract to which the restrictions are made to apply. *Hooper v. Lottman*, 171 S. W. 270; *Wilson Co. v. Gordon*, 224 S. W. 703. This proposition is not questioned in this case. The contention involves a controversy only as to whether or not the restrictive covenant conceded to apply to lots in the first Melrose addition has been violated by appellants, and whether or not any restrictive covenant based upon a general plan with reference to lots in the second Melrose addition ever existed to be violated. These are questions of fact to be disposed of under the evidence. However, intermixed with them are presented questions of law as to the construction of the restriction requiring dwelling houses to cost at least \$1,000, written into deeds to lots in the tract platted in 1912, and also as to the right of appellees (all of whom own lots in the first section of Melrose addition, platted in 1912, and none in the second section thereof, platted in 1914), to enforce restrictive covenants inserted in deeds to lots in the second section of the addition, conceding that such restrictive covenants were made under a general plan applicable to the second section, platted in 1914.

The court found as a fact that appellant J. A. Heiskell had erected a dwelling upon lot No. 18, block No. 3, in the first section of Melrose addition, at an actual cost of less than \$1,000, and that appellant Frank Smith had erected on lot No. 16, block 3, of said addition a house at an actual cost of less than \$1,000.

The court found that the appellants F. S. Brittain, Albert Inskip, and John Ellis had erected upon their lots in the second Melrose addition houses which, in each instance, actually cost less than \$1,000.

The court found that J. A. Heiskell had erected a house on lot No. 18, block No. 2, in the first section of Melrose addition, at a cost of \$1,000 at the present cost of labor and material. But the court, being of the opinion that the restriction in the deed to

this lot providing for the construction of a dwelling at a cost of not less than \$1,000 meant the character of house it would cost \$1,000 to construct in 1912, held that the \$1,000 structure on the lot did not meet the requirements, and the order of injunction and for removal was made to apply to this house as well as to all the others constructed by the several respective appellants.

The judgment of the court against Heiskell with reference to lot No. 18 in block 3, Melrose addition, and also against Smith with reference to lot No. 16 in block 3 of said addition will be sustained. But the judgment against Heiskell with reference to lot No. 18 in block No. 2 and the judgment as against the appellants Russell Realty Company, Inskip, Brittain, and Ellis we do not think is warranted under the law and facts of the case.

[2, 3] The evidence was sufficient, we think, to justify the court's conclusion that the houses erected by Heiskell and Smith at a cost of less than \$1,000 each in the first division of Melrose addition were built for dwelling houses, and in deliberate violation of the restrictions generally written into deeds in carrying out the general building plan for that addition. The proof showed that in each instance houses had been built which were being occupied as homes, and that they cost less than \$1,000. The evidence in each instance is such as may support the conclusion that the houses were not intended as outhouses, but as dwelling houses for the owners. That the general building scheme exists as enforceable in this particular addition is not at all controverted, either in the appellants' pleadings or their evidence. Appellants could not avoid enforcement of the restriction by declaring that, although the houses which they had built and were occupying did not conform to the restriction, they intended at some future date to build additions which would finally make the cost \$1,000, in conformity with the requirements.

"Whether a person not a party to a restrictive covenant has the right to enforce it depends upon the intention of the parties in imposing it. This intention is to be ascertained from the language of the deed itself, construed in connection with the circumstances existing at the time it was executed. The vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including the nature of the restrictions. If the general observance of the restriction is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restriction for the benefit of all the lots. The most familiar cases in which courts of equity have upheld the right of owners of land to enforce covenants to which they were not parties are those in which it has appeared that a general building scheme or plan for the development of a tract of land has been adopted, designed to make it more attractive for residen-

tial purposes by reason of certain restrictions to be imposed on each of the separate lots sold. This forms an inducement to each purchaser to buy, and it may be assumed that he pays an enhanced price for the property purchased. The agreement therefore enters into and becomes a part of the consideration. The buyer submits to a burden upon his own land because of the fact that a like burden imposed on his neighbor's lot will be beneficial to both lots. The covenant or agreement between the original owner and each purchaser is therefore mutual. The equity in this particular class of action is dependent as much on the existence of the general scheme of improvement or development as on the covenant, and restrictions which contemplate a general building plan for the common benefit of purchasers of lots are recognized and enforced by courts of equity at the instance of the original grantor or subsequent purchasers. So the general rule may be safely stated to be that where there is a general plan or scheme adopted by the owner of a tract, for the development and improvement of the property, by which it is divided into streets and lots, and which contemplates a restriction as to the uses to which lots may be put, or the character and location of improvements thereon, to be secured by a covenant embodying the restriction to be inserted in the deeds to purchasers, and it appears from the language of the deed itself, construed in the light of the surrounding circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject thereto, and to have the benefit thereof, and such covenants are inserted in all the deeds for lots sold in pursuance of the plan, a purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with actual or constructive knowledge of the scheme, and the covenant was part of the subject-matter of his purchase. *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 338; *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628." *Hooper v. Lottman*, supra.

The proof was insufficient to establish Russell Realty Company's connection with any act which supplied a basis for any character of relief against it.

[4] There is nothing in the language of the restrictive covenant inserted in Heiskell's deed to lot No. 18 in block No. 2, or any other deeds, to warrant the conclusion that the parties to the transaction meant that the relative values of a dollar in 1912 and in future years should be ascertained in prospect of constructing a house and the construction cost so computed as to cause the expenditure of whatever number of dollars might be required to match the purchasing power of \$1,000 in 1912. To give this effect to the covenant would be to read into the provision a meaning different from that ordinarily understood to be embodied in such language, and would tend to inconvenience, confusion, and impracticability. Such construction is not only a most unusual one, but is also a most unnatural one. We construe the provision to express the understanding that, whenever a building should be erected

on the lot, it should require the expenditure of at least \$1,000 upon construction at the time of building. Ordinarily, when an agreement is made for the expenditure of a given amount of money at a future date, the amount is considered only in a quantitative sense with reference to the dollar as a unit, and not in the exclusive sense of the buying power of a dollar at the time of the transaction. It is expected that the undertaking will be satisfied when the stated amount of money is expended. Such intention will be presumed unless a different one is expressed in the stipulation which reflects the agreement. We therefore think the court was in error in ordering the removal of Heiskell's house from lot No. 18, in block No. 2, or requiring the expenditure of any more money upon the house. The provision will be held to mean that the actual cost at the time of construction should be at least \$1,000, and not an amount equivalent in buying power to the buying power of \$1,000 in 1912.

[5] The proof showing without conflict that all the appellees lived in the section of Melrose addition platted and laid out in 1912, and that the appellants Brittain, Inskeep, and Ellis had constructed their houses in the section platted and laid out in 1914, we do not perceive how any of appellees' legal rights or interests could justify their interfering or complaining of violations of restrictive covenants in deeds conveying lots in a tract platted two years after the plat with reference to which their lots were sold by deeds containing restrictions under a general building plan. The covenant under which they bought extended only to lots in the first Melrose addition. As to all lots in this section the restrictive covenant is mutually binding between all purchasers and between each of them and the original owners who sold to them with reference to the general building scheme. But purchasers' rights under restrictive covenants relating to lots in this first plat cannot be extended beyond its borders. They are circumscribed and confined by the territorial limits of the plat with reference to which the purchasers bought, and purchasers cannot be granted relief against the construction of buildings of an obnoxious kind in an adjoining section, even though such buildings are constructed in violation of restrictive covenants, which apply to the adjoining territory. We do not deem it necessary to dispose of the contention as to whether or not appellants Ellis, Inskeep, and Brittain are bound by restrictive covenants relating to a general building plan in the second section of Melrose addition. But in this connection, we will say that the evidence upon which appellees rely to show the existence of such binding restrictions seem to be so frail, vague, and indefinite that we would not be willing to

permit a judgment based upon it to stand, in view of the positive evidence in the record that no scheme or plan for the restriction of this section had been inaugurated.

In conformity with the views expressed the judgment of the court below against J. A. Heiskell as to lot No. 18, in block 3, Melrose addition, is affirmed; and the judgment against Frank Smith as to lot No. 16, in block No. 3 of said Melrose addition is affirmed.

The judgment against J. A. Heiskell as to lot No. 18 in block No. 2 of Melrose addition is reversed, and judgment is rendered denying all the relief prayed for with reference to the building on this lot.

The judgment against the appellants Russell Realty Company, F. S. Brittain, John Ellis, and Albert Inskeep is reversed, and judgment is rendered, denying all the relief sought against each of them.

It is accordingly so ordered.

### STEPHENSON v. NELSON et al. (No. 8574.)

(Court of Civil Appeals of Texas, Dallas.  
June 25, 1921. Rehearing Denied  
Oct. 15, 1921.)

1. Pleading  $\S$  192(6) — Demurrer sustained only because of defect in pleading demurred to.

A demurrer to the petition can only be sustained because of some defect appearing therein, and not because of any matter set out in the demurrer.

2. Principal and surety  $\S$  101(1)—Surety released by material alteration in contract.

If a contract, to secure the performance of which a bond was given, was materially altered and changed after the execution of the bond, the surety was released from liability.

3. Principal and surety  $\S$  101(1)—Held that there was no alteration in contract secured by bond.

Where plaintiff signed order for restaurant equipment for \$4,985, \$1,985 to be paid in cash on delivery of equipment, but order was subject to approval, and seller did not approve the order, but required the \$1,985 installment to be paid in cash with the order, and offered to execute a bond for \$2,000 to secure performance of its contract to deliver the equipment, and such offer was accepted and bond sent to bank and approved, and contract thereby completed, held that the requirement of immediate payment of the first installment was not an alteration of a completed contract which would release surety on the bond, but a mere step in the negotiations, a counter offer, leading up to a contract completed only when such counter offer was accepted.

Appeal from District Court, Dallas County;  
W. F. Whitehurst, Judge.

Suit by Nick Nelson against J. B. Stephenson and others. From judgment for plaintiff, the named defendant appeals. Affirmed.

J. L. Goggans, of Breckenridge, and B. O. Baker, of Dallas, for appellant.

Albert Walker and D. A. Eldridge, both of Dallas, for appellees.

**TALBOT, J.** The appellee Nelson sued the appellant, J. B. Stephenson, and the Hygro Company of Texas, and H. Grossman, alleging, in substance, that the Hygro Company of Texas was engaged in the business of selling and installing soda fountains and restaurant fixtures, etc., and that its agent secured from appellee a certain written order dated August 7, 1918, for certain fixtures to be constructed and installed in accordance with specifications therein stated, for which he was to pay \$4,985 as follows: \$1,985 upon the arrival of the goods at destination and the balance in 12 equal monthly installments; that said fixtures were to be installed within six weeks from August 11, 1918, and deferred payments to be evidenced by notes to be executed by plaintiff on tender and delivery of the goods, the order subject to the approval of the Hygro Company of Texas at Dallas, Tex.; that upon receipt of said order on August 9, 1918, the Hygro Company of Texas wired plaintiff that it could not accept the contract without \$1,985 cash with order, as fixtures would have to be specially built, and that it would furnish acceptable bond guaranteeing delivery of the goods according to specifications; that plaintiff replied to this telegram by wire, in which he requested the Hygro Company of Texas to send the bond to the Merchants' State Bank & Trust Company of Laredo, Tex., and, if satisfactory, the bank would transfer the money; that upon receipt of such telegram from plaintiff the Hygro Company of Texas did, on August 12, 1918, execute and forward a bond as requested, which bond was signed by the Hygro Company of Texas as principal, and M. Murphy and J. B. Stephenson as sureties; that said bond was for \$2,000; that the bond provided, among other things, that the Hygro Company of Texas had entered into a contract with plaintiff for the furnishing and installation of certain restaurant and kitchen equipment as per contract and specifications attached to said bond, and that if the Hygro Company of Texas did all the things required of them by the contract, then the bond to be void, otherwise to remain in full force and effect; that the bond was received by the bank at Laredo, and the bank sent a wire approving said bond, and authorizing the Hygro Company of Texas to draw on it for \$1,985, which draft was duly drawn and paid; that the contract was never complied with, and plaintiff demanded the return of the \$1,985, which was refused; that demand

was also made of the sureties, and that one of the sureties, M. Murphy, pursuant to said demand, paid \$1,000 and was released of all liability, with the understanding that the release of him by the appellee on account of said payment did not release the appellant from liability on the bond. Plaintiff prayed for judgment for \$1,000 against Stephenson. Defendants the Hygro Company of Texas and Grossman filed general demurrers and general denials.

The appellant, Stephenson, pleaded a general demurrer, special exceptions, a general denial and specially, that before the execution of the bond by Stephenson, plaintiff and the Hygro Company of Texas changed and altered the terms of the original contract between them and the method of payment to be made thereunder, and that plaintiff, under the terms of such altered contract, paid the Hygro Company of Texas \$1,985 without first requiring the goods to be shipped, and without requiring any bill of lading to be attached to the draft, and that all of the changes and alterations were made without the knowledge or consent of Stephenson, and that by reason thereof he was released from any and all obligations under said bond.

The case was tried June 23, 1920. The appellant's demurrers were overruled, and at the conclusion of the evidence the court instructed the jury to return a verdict in favor of the appellee Nelson against the Hygro Company of Texas, H. Grossman, and the appellant, Stephenson, for the sum of \$985, with interest thereon at the rate of 6 per cent. per annum from January 1, 1919. Verdict in accordance with the court's instructions was returned, and judgment entered upon the same. Appellant made a motion for a new trial, which was overruled, and he perfected an appeal to this court.

[1] The first, second, and third assignments of error complain respectively of the court's action in overruling the appellants' second, ninth, and tenth special exceptions to the appellee's petition. These assignments will be overruled. While the appellee's petition shows on its face that the appellant was only a surety on the bond sued on, it does not so show, as we view it, that the terms of the contract which were guaranteed by the bond were, after the date the contract was executed, materially altered and changed by the parties to the contract. This being true, no matter what the facts may be in reference to the alleged change of the contract guaranteed by the bond the exception to the petition on that ground was properly overruled. It is too clear for argument that a demurrer to a petition can only be sustained because of some defect appearing therein, and not because of any matter set out in the demurrer. *Conley v. Railway Co.*, 44 Tex. 579. In discussing these assignments, counsel for the appellant refers, in support thereof, to matters which they claim are disclosed by the state-

ments of facts, but such matters are not apparent upon the face of the petition, and could only be made available, if at all, by proof. The contract made and to secure the performance of which the bond sued on was given is fully set forth in the petition, and it does not appear from any allegation in the petition, as we understand it, that the contract actually entered into between the parties was in any particular changed after the bond was executed.

[2] The assignments of error from 4 to 10, inclusive, assert that the trial court erred in overruling the objections urged by the appellant to the giving of a peremptory instruction in favor of the appellee. The controlling question presented for decision is whether or not the evidence was sufficient to authorize a finding that the contract, to secure the performance of which the bond in question was given, was materially altered and changed by the appellee and the Hygro Company of Texas after the same was signed by the appellant. If it was, then appellant is not liable on the bond, and the court erred in giving the peremptory instruction. If not, such instruction was proper, and the appellant has no cause of complaint thereat. The question then is: Does the evidence show that, after the signing of the bond sued on, the parties to the contract for the performance of which it was given materially changed the terms of said contract? We have reached the conclusion that the question must be answered in the negative. The contention of the appellant is, in effect, that the contract as originally made provided that the price to be paid for the property ordered by said contract, to wit, \$4,985, should be paid as follows: \$1,985 upon the arrival of said goods at destination upon draft attached to shipper's order bill of lading, and the balance in 12 equal monthly installments; while the one upon which plaintiff relies in this suit provided, in substance, that a large payment, to wit, the sum of \$1,985, should be made in cash with the order and before any of the equipment called for therein was actually shipped, which payment the evidence in this cause shows was in fact so made without the knowledge or consent of this defendant. The written order secured by the Hygro Company's agent from the appellee was dated August 7, 1918, and requested that company to ship the equipment and merchandise therein specified, at the price of \$4,985, of which amount \$1,985 was to be paid upon the arrival of the goods at destination upon draft attached to shipper's order, bill of lading, and the balance in 12 equal installments, as before stated. It was stipulated in the order that it was given subject to the approval of the company, and should not be binding until accepted by the company at Dallas, Tex., and this stipulation was known to the appellant before he signed the bond. Upon the receipt of the or-

der the Hygro Company, on the 9th day of August, 1918, telegraphed to the appellee:

"Impossible to accept contract without \$1,985 cash with order. All fixtures are special built. Will furnish you acceptable bond, guaranteeing delivery of goods according to specifications. Wire answer."

Upon receipt of this telegram, appellee on same date wired Hygro Company:

"Yours to-day, send bond to Merchants' State Bank & Trust Company. If satisfactory this bank will transfer to you the money."

Upon receipt of this telegram the Hygro Company forwarded to said bank its bond, dated August 12, 1918, with appellant and M. Murphy, as sureties, payable to appellee, in the sum of \$2,000. The bond recited:

"The condition of the above obligation is such that the Hygro Company of Texas has entered into a certain written contract with the said Nick Nelson, covering the furnishing and installing of certain restaurant and kitchen equipment, as per contract and specifications hereto attached and referred to herein. Now, therefore, if the said Hygro Company shall do all things required of them by said contract, and shall honestly and faithfully comply with and fulfill all of the terms and conditions of the contract, and shall promptly make payments to persons supplying them with labor and materials in the prosecution of the work contracted for, then this obligation shall be null and void."

Upon receipt of this bond, the said bank telegraphed the Hygro Company, August 14, 1918:

"Bond favor Nick Nelson approved. You may draw on us for \$1,985."

Whereupon the Hygro Company drew its draft upon said bank on August 14, 1918, as follows:

"In accordance with telegram of to-day, pay to the order American Exchange National Bank \$1,985 and charge the same to account of the Hygro Company of Texas"

—which draft was paid. The Hygro Company of Texas never complied with its contract with the appellee in any particular, and upon demand refused to comply with the same, and refused to return to appellee the \$1,985 paid. Appellant's cosurety on the bond, M. Murphy, paid \$1,000 thereon, and was released from further liability, with the understanding of all parties that such release by the appellee on account of said payment should not operate as a release of the appellant from liability on the bond. There is not contention that the appellant was absolved from liability because of the release of his cosurety. His contention is that he never became bound as surety or guarantor upon any contract between the appellee Nelson and the Hygro Company of Texas, except the contract as evidenced by a copy thereof, attached as an exhibit to the ap-

pellant's petition. The reference in the bond to the contract is:

"That the Hygro Company of Texas has entered into a certain contract with the said Nick Nelson, covering the furnishing and installing of certain restaurant and kitchen equipment as per contract and specification hereto attached and referred to herein."

The contract referred to by the bond was the written order for the restaurant fixtures attached as an exhibit to plaintiff's petition, which contained a description of the fixtures and the specifications according to which they were to be built; and the bond was given, guaranteeing that they would be built according to those specifications, and no change whatever was ever made in the specifications. There was no pleading by the appellant to the effect that any other contract was executed by Nelson with the Hygro Company, for which he had given a bond guaranteeing its performance. Appellant testified that he executed the bond solely upon the solicitation and promise of his cosurety, M. Murphy, and that he had never had any communication with appellee until he came to Dallas to see him, after the bond had been executed and the Hygro Company had breached the contract for which the bond was given.

[3] The appellant treats the written order given by the appellee for the goods as the contract for the faithful performance of which the bond sued on was given. This is not warranted by the facts, and, proceeding upon such false premise, the appellant reached the erroneous conclusion that there was a material change made in the contract secured by the bond by reason of the Hygro Company's demand by telegram that \$1,985 be paid cash instead of upon the arrival of the goods at destination and the appellee's compliance with that demand. "A mere offer or promise, not accepted, involves no concurrence of wills, and it can never constitute a contract." As has been well said:

"To constitute a contract the minds of the parties must come into complete accord, and one consenting to exactly the same thing to which the other does."

An offer to sell or to buy does not become a contract until it is approved or accepted unconditionally upon the exact terms by the other party. So that "an order for goods subject to approval at your office," as was the case in the present instance, does not constitute a contract. That the minds of the appellee and the Hygro Company of Texas did not "come into complete accord" in reference to the terms embodied in the written order referred to is apparent. As said by counsel for appellee: Appellee signed a written order for certain goods to be shipped, for which he agreed in the order to pay a part of the price in cash, upon the arrival of the goods with draft attached. The order itself contained a stipulation that it was not to be

binding until it was accepted. When the order was received, it was not accepted by the company, and appellee was advised that it would not accept his offer unless he paid the cash in advance, as the goods would be specially built, but it would give a bond guaranteeing that the goods would be built according to the specifications as contained in the order. This counter proposition was accepted by the appellee, upon the condition that the bond would meet with the approval of the bank at Laredo, Tex. The bond was then furnished, which was approved by the said bank, and the contract was then completed, the minds of the parties coming into complete accord, the one consenting to exactly the same thing to which the other does. After the making of this contract, no change whatever was made in any of its terms. The Hygro Company of Texas, principal of said bond, did not perform the contract, and by reason thereof appellant became liable to appellee upon his bond. There was but one contract made, and the bond sued upon was given to guarantee the performance of that contract. Appellant in his pleading asserted that the contract of which the bond spoke as being attached and referred to was the Exhibit A to appellee's petition. This Exhibit A was the written order for the goods, the first preliminary step in the making of the contract. This bond was given to guarantee that the goods called for would be built according to the specifications therein contained. Appellant did not allege that there was any other contract between the appellees and the Hygro Company, which he guaranteed performance of, nor did he attempt to prove that there was any other contract. Neither did the appellant plead that he was induced to sign this bond upon any fraudulent misrepresentation upon the part of appellee.

What has been said disposes of the appellant's eleventh assignment of error against his contention, and need not be stated and specifically discussed.

Believing the proper judgment has been rendered, it is affirmed.

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**ELMORE et al. v. SAULNIER et al.**  
(No. 585.)

(Court of Civil Appeals of Texas. Beaumont.  
July 2, 1921. Rehearing Denied Oct. 12,  
1921.)

1. Husband and wife  $\S$ 267(8)—Presumption property acquired during coverture is community property not rebuttable by parol evidence.

Under a deed conveying a life estate in lands with remainder in fee to grantee's children, two of whom were married women, there

being nothing in the deed to indicate that the grantees of the fee were not citizens of Texas, holding under the marital laws thereof, the presumption that the remainder in fee so acquired during coverture was community property cannot be rebutted by parol evidence in an action against bona fide purchasers from their husbands.

2. Vendor and purchaser  $\S$ 224—Deed held not a quitclaim as respects claim of innocent purchase.

A covenant in a deed that grantors "have a good right to sell and convey," since it evidences the parties' intention to convey the land itself, and not merely grantors' title, must prevail over words in the granting clause that grantors "do hereby quitclaim \* \* \* all their right, title, claim, and interest," the use of term "quitclaim" not being conclusive; hence the contention that the deed was a mere quitclaim and did not sustain the claim of innocent purchase by grantees was untenable.

Appeal from District Court, Harris County; Lewis R. Bryan, Special Judge.

Action by Harriett Ann Elmore and others against Ada O. Saulnier and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Pritchett Harvey and M. G. Fakes, both of Houston, for appellants.

B. F. Louis, Sam, Bradley & Fogle, E. P. & Otis K. Hamblen, Tharp & Tharp, and C. C. Highsmith, all of Houston, for appellees.

WALKER, J. This was a suit in trespass to try title. The appellants, plaintiffs below, claimed the land in controversy as the heirs of one Julia Elmore. The appellees, defendants below, claimed that they and those under whom they hold were bona fide purchasers for a valuable consideration without notice of the claim of appellants, if any they had. On a trial to the court without a jury judgment was rendered for appellees. We have before us the trial court's conclusions of fact and law, but no statement of facts. The land in controversy was patented by the state of Texas to Ashbel Smith on the 15th day of December, 1845. On December 12, 1846, he conveyed it by the following deed:

"Ashbel Smith, for the consideration of three hundred dollars paid in hand and being a part of the price of the slave, Abram, sold to him, doth bargain, sell, and convey to Mary Emmerson and Joseph Emmerson, her husband, the following described tract of land situated in Harris county, in Texas, at the head of the east fork of White Oak bayou, about five miles north of the city of Houston: [Then follows field notes.] To have and to hold said land and its appurtenances to said Mary and Joseph Emmerson for and during their joint lives, and upon the death of said Mary, then the said land is to accrue to and be vested in, and is hereby bargained, sold, and conveyed unto, Julia Elmore, wife of William Elmore, Cath-

erine Ward, wife of Thomas Ward, Lewis H. Cannon, John Q. Cannon, Samuel Cannon and Joseph J. J. Weaver, their heirs and assigns, forever in fee simple absolute; and the said Ashbel Smith will warrant and forever defend the said land and appurtenances against the right, title, claim, and demand of all and singular persons whatsoever.

"Witness my hand and seal this 12th day of December, A. D. 1846.

"Ashbel Smith. [Seal.]"

After the death of Mary Emmerson and her husband, the remaining grantees, who were her children, conveyed the land to J. J. J. Weaver, who was a tenant in common with them under the Smith deed, by the following deed:

"This indenture made and entered into this the 3d day of March, one thousand eight hundred and seventy, between W. E. Elmore and Julia F. Elmore, of the county of Obion and state of Tennessee, Thomas M. Ward, Mary C. Ward, Lewis H. Cannon, J. Q. Cannon, and Samuel Cannon, of the county of Shelby and state of Tennessee, of the first part, and Joseph J. J. Weaver, of the county of Shelby and state of Tennessee, of the second part, witnesseth: That the parties of the first part, for the consideration of one dollar to them in hand paid, the receipt of which is hereby acknowledged, do hereby quitclaim to the party of the second part, his heirs and assigns forever, all their right, title, claim and interest of whatsoever nature in and to the following described tract of land, situated and being in the county of Harris, state of Texas, at the head of the east fork of White Oak bayou, about five (5) miles north of the city of Houston, described as follows, to wit: [Here follows field notes.] To have and to hold to him, the said party of the second part, his heirs and representatives, forever; and we, the said parties of the first part, do covenant to and with the party of the second part that we have a good right to sell and convey the same to him.

"In testimony whereof the parties of the first part have hereunto set their hands and affixed their seals the day and year above written."

[1] This deed was duly acknowledged by all the men who signed it, but the acknowledgments of the married women were fatally defective. Hence it did not pass their separate interest in this land, if any they had. This is the contention of appellants, who, as we have said, claim as heirs of Julia Elmore. Some of the acknowledgments to this deed refer to it as a "quitclaim." Appellants contend that Julia Elmore and Catherine Ward held the interest in the land conveyed to them by Ashbel Smith as their separate property, and that the facts found by the court show conclusively that it was their separate property. We shall not review the facts on that issue; for, as we construe the deeds above set out, the presumption that it was the community property of Julia Elmore and

Catherine Ward and their husbands cannot be rebutted by parol evidence. We believe that this presumption arises on the terms of the Ashbel Smith deed. Julia Elmore and Catherine Ward were married at the time this deed was executed and delivered to them. There is nothing in the deed to indicate that the grantees were not citizens of Texas. There is nothing in this deed to give notice to a subsequent purchaser that they were not holding this land under the marital laws of Texas, making it a part of the community estate of these women and their husbands. As said by our Supreme Court in *Wallace & Co. v. Campbell*, 54 Tex. 87:

"It has long been settled by this court that property acquired during coverture, by purchase or apparent onerous title, whether the conveyance be in the name of the husband or wife, or both, will be presumed to be community property, and that as to bona fide purchasers from the husband for a valuable consideration, without notice, this presumption cannot be rebutted by parol evidence that it is the separate property of the wife."

[2] The defendants deraign their title through J. J. J. Weaver, and as to Weaver's grantees the trial court found that they held under warranty deeds and were bona fide purchasers for a valuable consideration and without notice of the claim now asserted by appellees.

The correctness of this conclusion of the trial court rests on the character of the deed executed to J. J. J. Weaver by his cotenants. If it is a deed conveying him the land, and not a mere conveyance of the title of the grantor, the presumption that the land was a part of the community property of Julia Elmore and Catherine Ward and their husbands is conclusive. Of course, if this instrument is a mere quitclaim deed, it cannot sustain the defense of innocent purchaser, and the appellants should be permitted to show the actual status of the property.

The proper construction of this deed has been a matter of deep concern to us. After a careful examination of all available authorities, we have concluded that it is a deed, and that it was the purpose of the grantors to convey the land itself, and not merely their title to the land. We recognize that it has many of the characteristics of a quitclaim deed, but none of the terms used are conclusive of that construction. In *Moore v. Swift*, 29 Tex. Civ. App. 51, 67 S. W. 1065, Judge Gill thus discussed a granting clause very similar to this one:

"Against this is the fact that in the conveying clause the grantors undertook to convey only their right, title, and interest. But this does not necessarily militate against the construction adopted by the trial court. To the instrument in question there were six grantors. They



conveyed as heirs of the decedent, Jane Mast. Their interests were doubtless undivided, and it was not especially significant of a purpose to convey only a chance of title that they used the words 'all our and each of our right, title, claim, and interest,' etc.

In *Cook v. Smith*, 107 Tex. 119, 174 S. W. 1094, 3 A. L. R. 940, Judge Phillips said:

"The use of the term 'quitclaim' is not, of itself, a conclusive test of its character. It may make use of that term and yet have the effect of a conveyance of the property."

So in construing this deed, as all other written instruments, we must examine it in its entirety and give it that construction which, as a whole, its terms import. The concluding covenant, "and we, the said parties of the first part, do covenant to and with the party of the second part that we have a good right to sell and convey the same to him," was deliberately used by the grantors. Unless it enlarges the granting clause, we must reject it as surplusage, thus convicting the parties to this deed of doing an idle thing. If we give the clause its plain import, it is an express covenant on the part of the grantors that they had a good right to sell and convey this land to Weaver. This could only mean that they owned the land and were selling it to him. This declaration on their part must prevail over a technical construction of the words, used in the granting clause. It evidences the intention of the parties to convey the land itself, and not merely their title to the land, and, when that intention has been ascertained, it must prevail and determine the character of the instrument.

Discussing a similar covenant, in *Barton Peck v. Hensley*, 20 Tex. 673, to wit:

"We hereby declare that we have good and full power so to sell and dispose of said tract of land, as aforesaid"

—our Supreme Court said:

"Looking to the intention of the parties, as manifested by the words of the deed, I am inclined to the opinion that it was the intention of the grantors to do more than give a mere quitclaim deed in this instance, and to covenant, as the words import, that they had good right to convey the land described in the deed."

What we have said in our discussion of the two deeds above copied disposes of all of appellants' assignments of error, except those attacking the findings on limitation in favor of some of the defendants. If we are correct in our construction of these deeds, these findings become immaterial.

Believing that the trial court gave these deeds their proper construction, this case is in all things affirmed.

## HUNTER et al. v. HALE. (No. 620.)

(Court of Civil Appeals of Texas. Beaumont.  
July 2, 1921. Rehearing Denied  
Oct. 12, 1921.)

1. Vendor and purchaser  $\S$ 257—Superior legal title in vendor where deed reserves lien.

A deed to vendee reserving a vendor's lien is an executory contract, and the superior legal title remains in the vendor.

2. Deeds  $\S$ 183—Vendor and purchaser  $\S$ 85—Where unrecorded deed reserving vendor's lien was redelivered and notes canceled, contract was rescinded, and title reconveyed.

Where deed reserving vendor's lien for balance of purchase price had not been recorded, it was an executory contract, and was rescinded by the return of the deed to the vendor and the vendor's cancellation of notes for the purchase price pursuant to the parties' understanding that the transaction should constitute a rescission; the transaction having the effect, in equity, to reconvey to the vendor all right, title, and interest that the deed had vested in the purchaser.

3. Trespass to try title  $\S$ 40(4)—No error in exclusion of deed by plaintiff to third party who never accepted it.

In an action of trespass to try title, though defendant may prove the existence of an outstanding title superior to plaintiff's, the court did not err in refusing to admit in evidence a deed by plaintiff to a third party who, the evidence showed, never accepted it.

4. Vendor and purchaser  $\S$ 232(5,6)—Innocent purchaser may recover where defendants' deed to predecessor in title properly recorded, though defendants remained in possession.

Where plaintiff, before purchasing, was assured by an attorney that title to the land was good in defendants, by whom it was subsequently conveyed to plaintiff's predecessor in title, and plaintiff did not know that such deed was intended only as a mortgage, and at the time he bought such deed, as well as that from the grantee thereunder to plaintiff's immediate grantor, was duly recorded, plaintiff was entitled to protection as an innocent purchaser, though defendants remained in possession; for a purchaser from a vendee whose vendor remains in possession is not bound to inquire further as to the title when he finds recorded in the proper county a deed from such vendor properly proved and registered.

5. Courts  $\S$ 91(1) — Decisions of Supreme Court binding on Court of Civil Appeals despite contrary decisions of other such courts.

Decisions of the Supreme Court settling a question of law are binding on the Court of Civil Appeals despite contrary decisions by other Courts of Civil Appeals.

Error from District Court, San Jacinto County; J. L. Manry, Judge.

Action by W. B. Hale against William Hunter and another. Judgment for plaintiff, and defendants bring error. Affirmed.

J. V. Lea and Jacob C. Baldwin, both of Houston, for plaintiffs in error.

E. W. Love, of Cleveland, and J. F. Stevens, of Houston, for defendant in error.

HIGHTOWER, C. J. This case comes here by writ of error, but the parties will be referred to hereinafter as the appellants and appellee.

The suit was filed by the appellee, W. B. Hale, against Wm. Hunter and Ed Hunter, the appellants, in form of trespass to try title to approximately 88 acres of land in San Jacinto county. Appellants answered by plea of not guilty, by special plea of title in themselves by purchase from one J. M. Hansbro, and further alleged that certain muniments of title relied upon by appellee, in the form of absolute deeds, were intended merely as mortgages and were void, etc.; and they further raised issues which are unnecessary here to mention, in view of the disposition we have concluded to make of the case.

The case proceeded to trial in the lower court without a jury, and resulted in a judgment in favor of the appellee, Hale, against both appellants, for all the land claimed by the appellee. The trial judge prepared and filed findings of fact and conclusions of law, and the findings of fact are sufficiently full to clearly indicate and serve as a statement of the nature, etc., of the case. These findings are as follows:

#### "Findings of Fact.

"I find, according to the agreement of the parties, that common source of title is de-raigned from J. M. Hansbro, who owned the land in controversy prior to the 1st day of November, 1897, when he executed to the defendant William Hunter a deed conveying 59 acres of land off of the east end of the 88-acre tract in controversy in this cause, which deed contained an express reservation of a vendor's lien to pay certain purchase-money notes to the said J. M. Hansbro or order, to wit: \$60 to be paid on or before November 1, 1898; \$60 to be paid on or before November 1, 1899; \$60 to be paid on or before November 1, 1900; \$60 to be paid on or before November 1, 1901—together with 10 per cent. interest per annum. This conveyance recited a cash consideration of \$60. I find that the said deed was delivered by J. M. Hansbro to William Hunter, but was never placed of record, and that afterwards, to wit, about the 1st day of January, 1908, the said William Hunter having failed to pay any of the purchase-money notes or interest thereon executed as aforesaid to J. M. Hansbro, it was agreed between the said William Hunter and J. M. Hansbro that the sale be rescinded, and the deed securing the said vendor's lien was returned by the said William Hunter to the said J. M. Hansbro, and the latter canceled the said purchase-money notes of the said William Hunter; it being understood by the parties that the said J. M. Hansbro would reconvey to the defendant Ed Hunter the land in controversy, so as to in-

clude the 50 acres previously conveyed to William Hunter by the said J. M. Hansbro, and that on said 1st day of January, 1909, the said J. M. Hansbro, for a recited consideration of \$80 in cash and three promissory notes secured by vendor's lien in the sum of \$200 each, falling due respectively upon the 1st days of January, 1910, 1911, and 1912, with 8 per cent. per annum from date, conveyed said land to Ed Hunter by a deed reserving an express vendor's lien to secure the payment of said purchase-money note.

"II. I further find that J. M. Hansbro assigned the said vendor's lien notes, executed as aforesaid by Ed Hunter to J. M. Hansbro, to R. B. Love, and that after the said R. B. Love became the owner of said notes, on, to wit, the — day of February, 1913, Ed Hunter, without being joined by his wife, conveyed the property in controversy to R. B. Love by an instrument containing the following recital: 'For and in consideration of the sum of six hundred dollars (\$600.00) to me in hand paid by R. B. Love, and the surrender to me, canceled, of those three certain promissory notes dated February 1, 1909, in the sum of two hundred dollars (\$200.00) each, executed by me in the payment of the tract of land hereinafter described, and payable to J. M. Hansbro or order on or before the 1st day of January, A. D. 1910, 1911, and 1912, respectively, and which said notes are valid and subsisting and unsatisfied vendor's lien on the herein described land,' etc.—and that afterwards, to wit, on the same date, the said R. B. Love reconveyed the property in controversy to William Hunter and Ed Hunter by an instrument containing the following recital: 'For and in consideration of the sum of \$600.00 to me paid and to be paid by Wm. Hunter and Ed Hunter as follows, to wit: \$235.21 paid to me in cash, the receipt of which is hereby acknowledged; \$182.40 to be paid on or before the 1st day of February, A. D. 1913; \$182.40 to be paid on or before the 1st day of November, A. D. 1914, and is shown and evidenced by two certain promissory notes executed by the said William and Ed Hunter of even date with this deed, payable to R. B. Love or order with 10% interest from date until paid, and providing for 10% attorneys' fees, etc.' But express vendor's lien was retained in said deed to secure the payment of said notes.

"III. I further find that on the 29th day of August, 1915, the defendant Ed Hunter, without being joined by his wife, reconveyed the property in controversy to R. B. Love by an instrument containing the following recitals: 'That in consideration of the cancellation and satisfaction of one-half of the amount due on the two certain notes executed by myself and my father, Wm. Hunter, to R. B. Love, in purchase of the tract of land hereinafter described, said notes dated February 1, 1913, and being in the sum of \$182.40, conveyed and sold said property to said R. B. Love.'

"IV. I find that on the 20th day of September, A. D. 1915, the defendant William Hunter and his wife, Amenda Hunter, executed to J. C. Hogue a deed conveying to said Hogue their undivided interest to the land in controversy, and that this deed recited a cash consideration of \$319 and the assumption of the amount due by the grantors to R. B. Love, the vendor in-

the deed set forth in paragraph 2 of these conclusions of fact.

"V. I find that the said \$319 mentioned as the cash consideration in the deed from William Hunter and wife to J. C. Hogue represented a like amount which William Hunter owed to the Sheperd State Bank, for which amount the said J. C. Hogue had become surety, and it was understood between the parties to said deed that when William Hunter paid off and discharged the said note in the sum of \$319 that the said J. C. Hogue would reconvey the property to William Hunter.

"VI. I find that afterwards, to wit, on the 6th day of December, 1915, the said J. C. Hogue conveyed the property to R. B. Love by an instrument which recited a cash consideration in the sum of \$225.65, and that R. B. Love actually paid the said cash amount to J. C. Hogue, and that at the time of the conveyance from the said J. C. Hogue to R. B. Love the said R. B. Love had no knowledge or notice whatever that the transaction between William Hunter and wife and J. C. Hogue, at the time of the conveyance to the latter, contemplated that the land would be reconveyed to the said William Hunter when the note above set forth of \$319 was discharged by the said William Hunter.

"VII. I find that on the 27th day of July, 1918, the said R. B. Love conveyed the property in controversy to the plaintiff, W. B. Hale, for a consideration of \$2,000, which consideration was paid by two negotiable promissory notes of the said William B. Hale in the sum of \$1,000 each, bearing 8 per cent. interest per annum from date, and due respectively in one and two years from the date of said conveyance.

"VIII. I further find that the said W. B. Hale, at the time of the execution of said deed from R. B. Love and the execution of said notes, was solvent and is solvent at this time, and that said notes of W. B. Hale were, at the time of the execution of said deed, as negotiable paper upon the market, worth their face value.

"IX. I find that prior to the purchase of the land in controversy the said W. B. Hale made inquiry of a lawyer, who was understood to be familiar with the title of the land in controversy, as to the condition of the title, and that the lawyer advised the said Hale that the title was good, and that the said Hale, at the time he purchased the land from R. B. Love, had no notice or knowledge whatever that J. C. Hogue had agreed to reconvey the property to William Hunter, and that he relied upon the advice given him by the lawyer and upon the record title, and he had no notice whatever of any claims that might exist in favor of either of the defendants.

"X. That all deeds set forth in the foregoing paragraphs were duly recorded at the times of their respective executions upon the deed records of San Jacinto county, Tex., with the exception of the deed from J. M. Hansbro to William Hunter, which was returned to said J. M. Hansbro as above set forth.

"XI. That at the time of the execution of the deed by Ed Hunter to R. B. Love, of date the 29th day of August, A. D. 1915, the vendor's lien notes, together with the interest thereon, of date the 1st day of February, 1913, which had been executed by Ed Hunter to R.

B. Love, were still outstanding and unpaid, and that at the time of the execution of the deed from William Hunter and wife to J. C. Hogue on the 20th day of September, A. D. 1915, and at the time of the execution of the deed from J. C. Hogue to R. B. Love, on the 6th day of December, A. D. 1915, the said vendor's lien notes executed by William Hunter to R. B. Love on the 1st day of February, 1913, together with interest thereon, were outstanding and unpaid, and that the said Ed Hunter and William Hunter have never paid the purchase-money notes set forth in the deed from R. B. Love to William Hunter, of date the 1st day of February, 1913.

"XII. I further find that at the time of the execution of the aforesaid deeds by Ed Hunter to R. B. Love, and by William Hunter to J. C. Hogue, that the property in controversy constituted a part of the homestead of the defendants, Ed Hunter and William Hunter.

"XIII. I find that at the time of the execution of the deed by Ed Hunter to R. B. Love mentioned in the third paragraph of these conclusions of fact that the said R. B. Love was the owner and holder of the vendor's lien notes therein described, and that the said R. B. Love was the owner and holder of the vendor's lien notes which were executed by Ed Hunter and William Hunter to himself at the time of the conveyance by William Hunter and wife to J. C. Hogue mentioned in the fourth paragraph of the conclusions of fact, and that when J. C. Hogue conveyed the property to R. B. Love, as set forth in the sixth paragraph of these conclusions of fact, the said R. B. Love was still the owner and holder of the notes in so far as the obligation of William Hunter was concerned, and that the said notes were unpaid with the exception of the cancellation of the same at the time of the last conveyance from said Ed Hunter to said R. B. Love as to the part of said notes owed by the said Ed Hunter.

"XIV. I find that the property in controversy, at the time of the last conveyance by Ed Hunter to R. B. Love, constituted a part of his homestead, and at the time of the conveyance from William Hunter and wife to J. C. Hogue constituted a part of the homestead of William Hunter.

"XV. I find that William Hunter did not pay off the vendor's lien notes held by said R. B. Love, as alleged in the ninth paragraph of his amended answer.

"XVI. I find that R. B. Love did not agree to reconvey the property in controversy to Ed Hunter, as alleged in the eleventh paragraph of the said Hunter's amended answer."

The conclusions of law upon the foregoing findings of fact were as follows:

"I. From the foregoing findings of fact I find that when William Hunter delivered the deed to J. M. Hansbro in 1909, and the purchase-money notes executed by said William Hunter, then held by said J. M. Hansbro, were canceled, and the land was conveyed by said J. M. Hansbro to Ed Hunter, that the same operated as a rescission of the sale which J. M. Hansbro had made to William Hunter in 1897 for the 50 acres of land.

"II. I find that when Ed Hunter reconveyed his interest in the property in controversy to R. B. Love in 1913, the said R. B. Love being the then holder of the vendor's lien notes

which had been previously executed by Ed Hunter to J. M. Hansbro, and R. B. Love reconveyed the property to Ed Hunter and William Hunter, accepting new vendor's lien notes, that this transaction placed the superior title in R. B. Love to the land in controversy, irrespective of the fact that the wife of Ed Hunter did not join with her husband in the execution of said conveyance to R. B. Love.

"III. I find that when Ed Hunter reconveyed the property in 1915 to R. B. Love in cancellation of his part of the vendor's lien notes which had been previously executed to the said R. B. Love that such conveyance placed the title of Ed Hunter in R. B. Love, irrespective of the fact that his wife did not join in such conveyance.

"IV. I find that the act of William Hunter and wife in conveying their interest in the property in controversy to J. C. Hogue estops them from asserting title either against R. B. Love or the plaintiff, W. B. Hale, who were both innocent purchasers under J. C. Hogue of the William Hunter part of the property in controversy, and I further find that W. B. Hale is an innocent purchaser for value without notice of the property in controversy.

"V. I find that Ed Hunter is estopped by his deed to R. B. Love, reciting the cancellation of the vendor's lien notes, from asserting title to the property in controversy against the plaintiff, W. B. Hale.

"I finally conclude that judgment should be rendered providing that the plaintiff recover the property in controversy, together with his costs."

Whilst practically all material findings of fact made by the trial court, as above shown, are attacked by appellants, by proper assignments of error, as being unsupported by the evidence, yet, upon very careful consideration of the evidence found in the record relative to these assignments, we have concluded that none of such assignments can be sustained, except that which challenges the sixth finding of fact, and we adopt all such findings of fact as the findings of this court, with the exception of that portion of the sixth finding to the effect that at the time of the conveyance from J. C. Hogue to R. B. Love, Love had no knowledge or notice that the transaction between William Hunter and wife and Hogue at the time of the conveyance to the latter contemplated that the land would be reconveyed to the said William Hunter when the note of \$319 should be discharged by William Hunter. As to this finding of fact, we are of opinion that the trial court was clearly wrong, and that the evidence on that issue clearly preponderated against the finding of the trial court, if, indeed, it was not undisputed.

Our adoption of the court's findings of fact, as above shown, disposes of the third, fourth, fifth, sixth, seventh, eighth, ninth, and sixteenth assignments of error, and all such assignments are overruled, with the exception of the third, which relates to that portion of the sixth finding of fact in which, as we have stated, the court was in error.

The first assignment of error is as follows:

"The undisputed evidence in the case shows that W. B. Hale was not the owner of the property in controversy at the time of filing of the suit, or at the time of the trial, and the trial court erred in rendering judgment in favor of him, and should have rendered judgment in favor of the defendants."

[1, 2] This assignment is submitted as a proposition within itself. Treating the assignment as sufficient, under the rules, to require our consideration, over the objection of appellee, we have concluded that it cannot be sustained. The evidence shows very clearly, in fact without dispute, that William Hunter never paid to J. M. Hansbro more than \$60 for the 59 acres of land described in the deed from Hansbro to William Hunter in 1897, and that in 1909, by agreement of all parties concerned, William Hunter returned and redelivered to Hansbro the deed which Hansbro had made him for this 59 acres, and Hansbro thereupon canceled the notes which had been executed by William Hunter for the purchase money of the land. The evidence shows without dispute that the parties understood and agreed that this transaction between them should constitute a complete rescission of the contract by which Hansbro had agreed to convey William Hunter this 59 acres. The deed from Hansbro to Hunter was in the nature of an executory contract, in which an express vendor's lien was retained in the deed to secure Hansbro in the payment of the purchase money, and therefore the superior legal title remained in Hansbro and never passed to William Hunter, and the undisputed proof is that the deed from Hansbro to Hunter was never at any time recorded. The evidence also shows without dispute that Hansbro thereupon, by agreement between himself and William Hunter and Ed Hunter, conveyed the tract of land in controversy to Ed Hunter, and included in the deed, and as a part of the 88-acre tract in controversy was the original 59 acres which had been conveyed in 1897, as before stated, to William Hunter. The agreement between Hansbro and William Hunter to rescind the original contract or executory sale of the land between Hansbro and Hunter and their actual rescission of the contract, as before stated, had the effect, in equity, to reconvey to J. M. Hansbro all right, title, and interest that Hansbro's original deed to William Hunter had vested in him. It is well settled in this state that, where a vendor of land reserves an express lien to secure the purchase money, the contract is only executory; and in default of payment of the purchase money by the vendee the vendor may rescind the contract and recover the land, especially so where it would not be inequitable to permit such course. *Nass v. Chadwick*, 70 Tex. 157, 7 S. W. 828; *Summerhill v. Hanner*, 72 Tex. 224, 9 S. W.

881; *Pitts v. Elsler*, 87 Tex. 347, 28 S. W. 518. If the vendor has the legal right to rescind such an executory contract, then certainly he and his vendee, by agreement between themselves, which they carried into execution, may do so, and such agreement will have the effect to revest in the vendor whatever interest had theretofore been in the vendee under the executory contract. Such was the effect of the holding in the case of *Terhune v. First National Bank*, 24 Tex. Civ. App. 242, 60 S. W. 852. See, also, *Cadwallader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 666, 917.

[3] No outstanding title was shown by reason of the claimed deed from appellee, Hale, to Jack Love, as administrator of the estate of R. B. Love, deceased. It is true the court did not permit the introduction of this deed in evidence, and its action in that regard was objected to and, brought forward by assignment here; still the evidence was sufficient, if not undisputed, to warrant the trial court in holding that such deed claimed by appellants to have been executed by Hale and delivered to Jack Love was never, in fact, accepted by Jack Love, and therefore no outstanding title was shown against the appellee by reason of the execution of such claimed deed. No useful purpose would be served in discussing this assignment further, and it is overruled.

The second assignment complains of the refusal of the trial court to admit in evidence a deed from the appellee, Hale, to J. F. Love, dated December 11, 1919, purporting to convey the land in controversy to said Love. This deed was offered for the purpose of showing an outstanding title against appellee. Of course, it is always permissible for the defendant in an action of trespass to try title to prove, if he can, the existence of an outstanding title superior to that of the plaintiff, and thereby defeat the action. *Buckner et al. v. Van Cleave*, 84 Tex. Civ. App. 312, 78 S. W. 541; *Pool v. Unknown Heirs of Foster*, 49 S. W. 923; *Mann v. Hosack*, 96 S. W. 767. In this ruling, however, no prejudicial error is shown, for the reason that it was shown, without dispute, we think, that the claimed deed from the appellee to Jack Love, administrator of the estate of R. B. Love, was never accepted by him, and therefore an outstanding title by reason of that deed was shown or could have been shown if the court had admitted it in evidence.

The tenth assignment is overruled. As hereinabove stated, the facts in evidence showed beyond dispute that it was the intention of the parties—that is, Hansbro and William Hunter—to completely rescind and cancel, and they did rescind and cancel, the original executory contract of sale of the 50 acres of land by Hansbro to Hunter by Hunter agreeing to redeliver and return to

Hansbro the deed he held and Hansbro agreeing to cancel and having canceled the notes he held against Hunter, representing the purchase money for the land. Therefore the court did not err in concluding, as a matter of law, that there was a complete rescission and cancellation of the executory sale of this land from Hansbro to Hunter and in holding that the effect of this transaction was to revest the title in Hansbro.

The eleventh assignment raises practically the same question of law as the tenth, and it is therefore overruled.

The twelfth assignment challenges the fourth conclusion of law made by the trial court. That conclusion was that the conveyance by William Hunter and wife to J. C. Hogue estopped them from asserting title either against R. B. Love or the appellee, Hale, who, the court concluded, were both innocent purchasers from J. C. Hogue of the William Hunter interest in the property in controversy. It was therein further concluded that Hale, the appellee, was an innocent purchaser for value, without notice, etc. As to whether the court's conclusion that William Hunter and wife would be estopped to assert their title against Love or Hale, we do not find it necessary to determine, for the reason that we have concluded that under the findings of fact made by the trial court, in connection with the undisputed evidence on the point, the appellee, Hale, was an innocent purchaser, as we understand the authorities in this state on that point, and therefore it is unnecessary to determine the question of estoppel involved in this assignment; and it is also unnecessary to determine the point raised by the thirteenth assignment, which challenges the fifth conclusion of law made by the trial court to the effect that Ed Hunter was estopped by his deed to R. B. Love reciting the cancellation of the vendor's lien notes from asserting title to the property in controversy against the appellee, Hale. We say it is unnecessary to determine the point for the reason that the court found as a fact that the conveyance by Ed Hunter to Love was, in fact, intended to be just what the deed purported on its face to be, a straight conveyance of the land back to Love, in cancellation of the vendor's lien notes, and the evidence, as we have said, was sufficient to warrant that finding by the trial court. Therefore it was not necessary to invoke the principle of estoppel as against Ed Hunter. It is not claimed that there was any collusion between Ed Hunter and Love to in any manner defraud Ed Hunter and wife, and, in the absence of such a showing, Ed Hunter had a perfect legal right to reconvey the land to Love in discharge of the purchase-money notes owing by him.

The fourteenth assignment raises practi-

cally the same question as is raised by the thirteenth, and is therefore overruled.

[4] At a former day of this term this court announced from the bench its judgment in this case, which was that the judgment of the trial court should be affirmed in part and in part reversed, and the cause remanded, and such order was entered upon the docket, but a written opinion was never prepared and filed so disposing of the case. At the time the judgment was so announced we were of the opinion that the trial court was in error in not rendering judgment in favor of William Hunter and wife as to an undivided interest in the land in controversy, and had concluded that the cause should be remanded to the trial court with certain instructions in that connection. Our reason for so holding at the time was that, in our opinion, William Hunter's actual possession of the property, at the time R. B. Love conveyed the property to the appellee, W. B. Hale, was sufficient of itself to charge Hale with notice of whatever interest or right William Hunter and wife had in the property, and that Hale could not, therefore, be an innocent purchaser, because it was shown beyond dispute, and the court found, that the deed executed by William Hunter and wife to J. C. Hogue was intended merely as a mortgage between them, and, the property being the homestead of Hunter and wife, no lien was thereby created, and the instrument was absolutely null and void. But, upon further consideration of the point, we had doubts about the correctness of this view, and upon thorough and full consideration, we have concluded that we were in error in that view, and that the possession of William Hunter and wife of the property at the time Hale purchased from Love was not, of itself, sufficient to put Hale upon notice of the fact that the deed from Hunter and wife to Hogue was a mortgage only. The undisputed facts show that before Hale purchased he sought legal advice as to the status of the title to the land and was assured that the title to the land was good in the Hunters, and it was further shown by Hale's testimony, which was given credence by the trial judge, that he had no actual knowledge of the nature of the transaction between William Hunter and wife and J. C. Hogue, and did not know that the deed from Hunter and wife to Hogue was only intended to secure the payment of money; and the evidence is further undisputed that at the time Hale bought from Love, to whom Hogue had conveyed, the deed from Hunter and wife to Hogue was duly recorded in the deed records of San Jacinto county, as well as the deed from Hogue to Love. Such be-

ing the facts, and there being no actual knowledge on the part of Hale of the nature of the transaction between William Hunter and wife and Hogue, he was entitled to be protected as an innocent purchaser of the land as was concluded by the trial court, and therefore there was no error in the trial court's judgment in any respect, and we were in error in our first conclusion to the contrary. The point seems to be clearly settled by the Supreme Court of this state in the case of *Eylar v. Eylar*, 60 Tex. 315. It was there substantially held that a purchaser from a vendee, whose vendor remains in possession, is not bound to inquire further as to the title, when he finds on record in the proper county a deed from such vendor, purporting to convey title, properly proved up and registered. It was said, substantially, that to hold otherwise would be to strike at the very foundation of the policy on which registration laws rest. It was said that when inquiry as to title is prosecuted to the highest source, which affords evidence of the right, there could be no obligation to explore inferior and less reliable channels of information, and it was held that the record was the highest source which affords such evidence of right. The opinion in *Eylar v. Eylar* was written by one of the ablest jurists who has adorned the supreme bench of this state, Chief Justice Stayton. The rule there announced was expressly followed in *Hurt v. Cooper*, 63 Tex. 362, and also in *Love v. Breedlove*, 75 Tex. 652, 13 S. W. 222, and also reaffirmed in *Sanger Bros. v. Brooks*, 101 Tex. 115, 105 S. W. 37.

[5] We are not unmindful that some of the Courts of Civil Appeals of this state seem to have held contrary to these decisions on the point here under consideration, and it may be that expressions found in certain opinions of the Supreme Court in other cases were accepted as overruling the *Eylar* and other cases above mentioned on the point by implication. However this may be, the point is so clearly decided in the *Eylar* Case, and so firmly adhered to without modification in the other cases above mentioned, following the *Eylar* Case, that we do not hesitate to say that the question seems settled by the Supreme Court of this state, and such decisions are binding upon this court.

It follows from the foregoing that this court is of the opinion that its order heretofore entered on the trial docket, affirming in part and reversing and remanding in part this cause should be set aside, and it is here now set aside of the court's own motion, and instead the judgment will be affirmed in its entirety, and it will be so ordered.

LAKE et al. v. JONES LUMBER CO. et al.  
(No. 8533.)

(Court of Civil Appeals of Texas. Dallas.  
May 28, 1921. Rehearing Denied  
Oct. 8, 1921.)

## 1. Mechanics' liens §317—Materialman's petition against subcontractor's surety held sufficient.

Materialman's petition against subcontractor's surety alleging subcontractor's indebtedness to materialman for material furnished, and containing subcontractor's bond making all persons furnishing material obligees thereunder, held sufficient on demurrer.

## 2. Mechanics' liens §317—Contractor's petition against plastering contractor's surety held sufficient.

Contractor's petition in cross-action against plastering contractor and his surety alleging that plastering contractor in violation of his contract abandoned the work requiring the contractor to complete the work at an expenditure of more than the contract price, and setting out the bond, held sufficient on demurrer.

## 3. Appeal and error §690(4)—Admission of evidence not considered unless shown by statement of facts.

The Court of Civil Appeals will not review admission of evidence not shown by statement of facts, notwithstanding reference thereto in bill of exceptions.

## 4. Evidence §355(3)—Delivery receipts held competent to show delivery of building material.

In action for building material furnished, delivery receipts shown to have been made in the regular course of plaintiff's business by duly authorized employé at time of order and to be exact copies of other slips simultaneously made out, used as invoices and as journal sheets for subsequent posting in ledger, and signed by defendant or his agent on delivery of the material, held admissible to show delivery of the material.

## 5. Appeal and error §721(1)—Record equally binding upon both defendants where assignments of error have been jointly briefed.

On joint appeal by defendants, who have jointly briefed the assignments of error, the appellate court will not treat certain of the assignments as those of one of the appellants and others as assignments made exclusively of benefit of other appellant, but will consider the record equally binding upon both in all respects.

## 6. Appeal and error §882(10) — Appellant held estopped from complaining of exclusion of evidence by reason of testimony of other appellant with whom it had jointly briefed assignments of error.

In materialman's action against subcontractor and his surety, in which the surety alleged that it had been defrauded by collusion between subcontractor and materialman, and that the materialman was the subcontractor's undisclosed principal, the surety, having jointly appealed with the subcontractor from judgment

for materialman, was estopped, by subcontractor's testimony denying such collusion or relationship of undisclosed principal, from complaining of the exclusion of evidence thereof; the record containing such testimony by subcontractor being equally binding on the surety.

## 7. Evidence §376(9)—Testimony as to correctness of pay roll held sufficient to warrant admission of pay roll in evidence.

Testimony that witness signed checks for pay rolls and ascertained that they were correct held to warrant admission of pay roll in evidence as against contention that there was no proof of its correctness.

## 8. Mechanics' liens §315 — Subcontractor's surety held liable to contractor under subcontractor's bond notwithstanding provisions of subcontracts.

Subcontractor's surety was liable to contractor to the extent of the penalty recited in subcontractor's bond regardless of the provisions of the subcontract.

## 9. Appeal and error §733 — Assignment of error that judgment is contrary to law and is not supported by verdict too general.

Assignment of error that "the judgment of the court is contrary to the law and is not supported by the verdict of the jury" held too general for consideration.

## 10. Appeal and error §731(1)—Assignment of error that verdict is contrary to evidence too general for consideration.

Assignment of error complaining that the verdict of the jury on certain special issues designated by mere number is contrary to the preponderance of the evidence, and not supported by the evidence, without stating the issues themselves or indicating the answer, held too general for consideration.

## 11. Appeal and error §882(11)—Appellants estopped from denying sufficiency of evidence to support special findings requested by themselves.

Appellants are estopped from attacking the sufficiency of the evidence to support special findings requested by themselves.

## 12. Mechanics' liens §317 — Specific finding as to market value of material not indispensable to judgment for materialman against subcontractor and his surety.

In materialman's action against subcontractor and his surety for price of material, specific findings as to the reasonable market value of the material was not indispensable to the judgment for materialman.

## 13. Trial §356(5) — Answers by jury to questions calling for evidential facts not necessary.

Jury's failure to answer special interrogatories calling merely for evidential facts held not reversible error; such answer not being necessary to a rendition of a proper judgment.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Suit by the Jones Lumber Company against G. E. Lake, the American Surety Company of New York, the Security Mortgage & Investment Company, and the Watson Company in which the two last-named defendants brought a cross-action against the first two named defendants. Judgment for plaintiff and for last-named defendant against the first two named defendants, and the first two named defendants appeal. Affirmed.

Grover C. Adams and Adams & Stennis, all of Dallas, for appellants.

Spence, Haven & Smithdeal and Holloway & Holloway, all of Dallas, for appellees.

HAMILTON, J. This suit was instituted by the Jones Lumber Company against G. E. Lake and his surety, American Surety Company of New York, and also Security Mortgage & Investment Company and the Watson Company, for the recovery of the value of certain building material used in the construction of an addition to a building in Dallas owned by Security Mortgage & Investment Company. The Security Mortgage & Investment Company contracted with Watson Company for the construction of six additional stories upon the building. After the contract was thus made Watson Company subcontracted to G. E. Lake the plastering work on the building. The contracts were both in writing. Lake executed a bond with American Surety Company of New York as surety. By this bond Lake and American Surety Company contracted, among other stipulations, as follows:

"Know all men by these presents: That we, G. E. Lake, as principal, and American Bonding Company of New York, sureties, are held and firmly bound unto Watson Company, as well as all persons, firms, and corporations who may furnish material for or perform labor on the work, building, or improvements contemplated in the contract hereinafter mentioned, their heirs, executors, and administrators, jointly and severally, in the sum of five thousand dollars (\$5,000.00) lawful money of the United States of America, for which payment we, the principal and sureties herein, do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents. \* \* \*

"This bond is made for the use and benefit of all persons, firms, and corporations who may furnish any material or perform labor for or on account of said work, building, or improvement, and they and each of them are hereby made obligees hereunder the same as though their proper names were written herein as such, and they and each of them may sue hereon."

The work of the plastering was begun and carried forward for some time by Lake, but he did not complete it, and it was finished by Watson Company.

Plaintiff alleged that it had furnished all material used by Lake, and that he owed

a balance, after being allowed all just and proper credits, amounting to \$2,059.07, for which both Lake and American Surety Company were liable.

Recovery against Security Mortgage & Investment Company was sought upon allegations that the material supplied Lake was inwrought into its building, and that notice had been given it and verified claim of materialman's lien had been filed in the mechanics' and materialmen's records of Dallas county, all in the manner authorized by law; that concurrent with these events Security Mortgage & Investment Company was owing Watson Company, as the original contractor, for the construction of the addition to the building a sum much in excess of the debt due plaintiff for materials, and foreclosure of the mechanic's and materialman's lien so alleged to exist was prayed for.

Plaintiff alleged as against Watson Company that, when the mechanic's and materialman's lien was fixed against the building, as above stated, Security Mortgage & Investment Company was indebted to Watson Company; that Watson Company had contracted with Security Mortgage & Investment Company indemnifying it against all materialmen's liens and claims. It was also alleged in the same connection that Watson Company was indebted to Lake for material and labor used in constructing the building; and it was further alleged that Watson Company was made a defendant for the purpose of definitely ascertaining the state of the accounts between Watson Company and Security Mortgage & Investment Company and between Watson Company and Lake, and also because Watson Company was particularly named as obligee in the bond executed by Lake and the surety company.

The Security Mortgage & Investment Company and Watson Company filed cross-actions against Lake & American Surety Company of New York, which were practically identical. The cross-action alleged that Lake had violated his contract and abandoned the work, which resulted in Watson Company being compelled to complete it, and that in order to complete it Watson Company had expended \$2,631.11 more than the contract price provided for between Watson Company and Lake.

Lake and the surety company answered, excepting generally to the petition and specially excepting to certain allegations, and also denying all the material allegations respectively made against them. The surety company alleged that it was deceived and defrauded by Lake, Watson Company, and plaintiff Jones Lumber Company at the time it became surety, that Watson, Jones Lumber Company, and Lake, knowing that Lake had insufficient assets to enable him to induce it to make the bond, conspired that Jones Lumber Company should turn over



to Lake \$3,000 to be deposited in the bank by him and to be included in a financial statement to American Surety Company's agent, and that such acts of deceit were perpetrated and carried out and resulted in the bond being executed, but that no such bond would have been made except for the fraud of the three parties. It was also alleged that the bond, although made in the name of Lake as principal, was the Jones Lumber Company's bond, and that it was the undisclosed principal in the contract with Watson Company signed by Lake and also in the bond. Lake alleged that Watson Company and Jones Lumber Company conspired together to prevent him from completing the work, and also alleged that, if the cost of completing it was more than the contract price, it was because the estimates made by him had not been followed, but had been disregarded. He sought \$550 damages against Watson Company and Jones Lumber Company.

Various supplemental pleadings were filed joining issue as between the various parties upon their several contentions, but we do not regard a detailed statement of them essential to our discussion of the case.

The case was submitted to a jury upon special issues. Upon the answers returned by the jury judgment was rendered that the plaintiff Jones Lumber Company recover nothing against Security Mortgage & Investment Company and nothing against Watson Company. From this part of the judgment no appeal was prosecuted. But upon the jury's findings judgment was rendered against G. E. Lake and American Surety Company jointly and severally in favor of Jones Lumber Company for the amount sued for and also against them jointly and severally in favor of Watson Company for the amount alleged in its cross-action to be due. From this judgment Lake and the surety company have appealed.

[1, 2] Those assignments of error which insist that the general demurrer to the amended petition and to Watson Company's cross-action ought to have been sustained, we think, are without merit. These and all other assignments of error are jointly made in behalf of the appellants. The petition and Watson Company's cross-action both fully set forth facts revealing an indebtedness against appellant Lake. The bond is embodied in the petition, and its provisions in connection with the allegations descriptive of the surety company's liability clearly show a cause of action existing against it in behalf of Jones Lumber Company for materials furnished and used on the building in executing Lake's undertaking. The two clauses of the bond above quoted in stating the case are a basis of liability against the surety company under Jones Lumber Company's allegations and also under those of Watson Company's cross-action against ap-

pellants. In these circumstances the general demurrer in each instance was properly overruled.

[3] Error is assigned to the effect that the court erroneously admitted as evidence, over appellants' objection, an affidavit and an itemized account attached thereto without any proof that the items of material contained in the account were used in the building upon which work was done. A bill of exceptions duly approved and embodying the proceedings complained of in this assignment is found in the transcript; but we are not referred to any portion of the statement of facts where the evidence is set forth, and so far as we are able to determine from a search of the statement of facts it seems not to contain the particular evidence about which complaint is made. The statement of facts controls, rather than the bill of exceptions, in such situation. Hence, since the evidence is not in the statement of facts, we think the assignment presents nothing for our consideration.

Various assignments of error complain of the admission as evidence of certain records designated as "slips" or "receipts." Without attempting to set forth all the evidence we think pertinent facts are deducible from it which are competent to prove the delivery of all the material, which Jones Lumber Company claimed to have delivered to Lake, and the evidence complained of related to items of material constituting the account upon which plaintiffs' suit was based.

These facts we find were established: That Jones Lumber Company made the deliveries of all the items in response to requests for them from Lake; that, when a load was ordered and set out, at that time a fourfold record was made by Jones Lumber Company in conformity with its regular and usual system of bookkeeping; that each of these records was an exact copy of all the others; that one of the sheets containing the items and other data, such as the date and place of delivery, was a "journal sheet" which was carried forward and posted in the ledger; that one was either mailed to Lake or retained in Jones Lumber Company's office for him as an invoice; that two were put into the hands of the driver of the conveyance used for delivery, and that before the material left Jones Lumber Company's premises the load was checked with reference to the sheets to see that it corresponded with the list contained in the sheet; that when the driver arrived at the place of work the items were checked against the list either by Lake or some of his employes on the ground; and that one of the slips was retained by Lake or such employé, while the other was signed as a receipt for the items delivered and returned to the office of Jones Lumber Company by the driver and there retained with other copies of the record. Some of

the drivers of the delivery wagons testified in detail as to the facts connected with the actual deliveries. Others could not be produced as witnesses, but officers of the Jones Lumber Company testified that the "slips" or "receipts" which were identified as those returned by the drivers who did not testify and which appeared to be signed either by Lake or some other person acting for him went through the same course as those did concerning which drivers did testify, and it was established by the testimony that such signed "slips" or "receipts" could get back into the Jones Lumber Company's possession bearing Lake's signature or that of some one acting for him, only by following the course which characterized the "slips" identified as those delivered by the drivers who did give testimony. Besides, we are not directed to any evidence given by Lake or in his behalf directly challenging the position that the deliveries shown by these records were in fact made. Summers, an officer of the Jones Lumber Company, testified positively that the materials named in these records were delivered at the building for Lake; but it does not appear in any part of his testimony to which our attention has been directed in what manner his knowledge was acquired nor whether or not the reliability of his sources or means of information were questionable.

[4] We think the evidence fairly justifies all these conclusions: (1) That the "slips" or "receipts" were true and exact copies of the other three "slips" or "receipts" simultaneously made, and were tantamount to original entries; (2) that they were entries made in the regular course of business contemporaneously with the transactions to which they related; (3) that they show the transaction in the regular and usual way employed by the lumber company; (4) that they were made in the regular course of business by an agent or employé duly authorized; (5) and that the transactions were all regularly and correctly entered on the records of the company. The rules of procedure governing the introduction of records of accounts followed in *Randle v. Barden*, 164 S. W. 1066, and in *Stark v. Burkitt*, 103 Tex. 437, 129 S. W. 343, we therefore think, are not violated in the procedure of which appellants here complain, and all assignments of error raising or relating to such contention are overruled.

All assignments of error complaining of the exclusion and admission of evidence with reference to the alleged fraud, collusion, etc., between Lake and the lumber company have been considered in the light of the record on this feature of the case, and we are of the opinion that they reveal no error requiring us to disturb the judgment. We do not believe the evidence excluded tended to show any fraud or collusion between Lake and any

other party to deceive and mislead the surety company, nor did it tend to reflect the existence of any relation between Lake and the Jones Lumber Company which would support the conclusion that Jones Lumber Company was the undisclosed principal or partner for whom Lake acted in negotiating for the bond. The excluded evidence pertained to matters unrelated to and wholly remote from the contention the testimony was intended to establish.

The evidence which the court admitted, over appellants' objections, to combat the charge of fraud, collusion, undisclosed principal, etc., did not merely express opinions and conclusions of the witnesses as asserted by appellants, but stated knowledge of material facts. The questions and their respective answers constituting the testimony objected to were as follows:

"Q. They allege you colluded with the Watson Company to keep him [Lake] from finishing the job and keeping him from making a profit. What did you do with the Watson Company to keep him from making a profit? A. Absolutely nothing. Q. Now, when the contract was made, did you authorize Lake to sign the contract for the Jones Lumber Company? A. No, indeed. Q. When you were reimbursed for that (meaning material bills and money furnished for labor), where was the balance of the \$3,000 to go? A. To Guy Lake. Q. Now, did you turn over at any time any check to Lake to make a showing to the surety company in May when he was having his bond executed in March? A. No. Q. At whose instance and request, if any one, did Jones Lumber Company deliver this plaster that you have described in the itemized account to this Huey & Philp job at Elm and Griffin streets? (The answer was that it was delivered at the instance request of appellant Lake.) Q. Supposing there was \$1,500 due the plaster company for plaster, and the Watson Company had paid Lake in full, and there was no surety bond, where was the plaster company to get the money—who was responsible to the plastering company for the plaster? A. Jones Lumber Company."

[5, 6] This being a joint appeal prosecuted by appellants Lake and American Surety Company, and the assignments of error being jointly briefed, we do not feel called upon to treat certain of the assignments as those of one of the appellants and others of them as assignments exclusively made for the other's benefit. On the contrary, in conformity with the position of appellants themselves, we have considered every complaint in the brief as one urged with equal interest by both appellants. We also consider the record equally binding upon them in all respects, since they have jointly assailed the judgment under every assignment. Taking this view, it clearly follows that appellants are estopped from complaining, in any event, because proof of circumstances tending to

show collusion between Lake and any other party or proof of the relation of undisclosed principal was excluded, since Lake himself testified with particularity and clearness that no such relations between him and any other party ever existed in connection with the transactions in suit, and that he never heard of any claim to that effect until the pleading alleging such relations was read to him at the trial. His testimony was corroborative of strong and unequivocal evidence in appellees' behalf upon this issue.

We do not think the twenty-seventh, twenty-eighth, and twenty-ninth assignments of error are well founded. They complain that Watson Company's pay roll was admitted in evidence without proof of its correctness; that proof of claims in excess of the amount due Lake on his contract provided that, in case Lake failed to complete the work, Watson Company should be authorized to use the balance of the contract price to complete it; and that proof of "extras" was admitted in behalf of Watson Company. All this was over appellants' objections.

[7, 8] The correctness of Watson Company's pay roll was sufficiently shown by George Watson's testimony. He testified that he signed the checks for the pay rolls and that he ascertained that they were correct. That the provisions of the plastering contract between Watson Company and Lake, looked to exclusive of the bond, might preclude Watson Company from recovering beyond any amount due or to become due Lake, to say the least, is doubted. But, even if it had that effect, when looked to exclusively, yet the bond jointly executed by the appellants fixed the liability of both appellants to the extent of the penalty therein recited for "all sums of money which it (Watson Company) may pay to other persons on account of work and labor done or material furnished which said G. E. Lake may fail to do or furnish in accordance with said contract," etc.

We do not think the evidence of cost of extra material and labor was improperly admitted. George Watson's testimony seems to fairly explain and show that these items were all necessary, and that Lake contemplated them when he made the contract. Watson testified that he was familiar with the pay rolls and knew about the items for overtime. He testified in part as follows:

"In order to explain the overtime, as shown in these pay rolls, when the contract was taken it included the plastering of columns and other portions of the building then standing, four floors. We had to reinforce the columns and plaster the columns and also other plastering connected with the elevator shaft, etc., that came down through parts of the building that were occupied, and it was necessary, and Mr. Lake was familiar with it at the time the contract was taken, that it would be necessary to do that at night, and, although it is almost

impossible for me to remember the exact men that worked a certain night, I do know that the extra time allowed these men was for night work done on that portion of the building. These items in the pay rolls are correct and were actually paid by me."

There were records admitted which set out all extra items, and they seem to have been proper. Besides, while we probably do not clearly understand and fully appreciate the effect of certain statements in the record, apparently taken from Watson Company's books, they apparently show that extras were credited to Lake, as contended by appellees. And Watson testified that Lake was given credit for extra labor and material used.

[9, 10] The assignments of error from the thirtieth to the fifty-second, inclusive, are submitted in group. They relate to alleged errors of procedure comprehended in the verdict and judgment. Practically all of them are manifestly too general to impose upon this court the requirement of any consideration. Number 30 is as follows:

"The judgment of the court is contrary to the law and is not supported by the verdict of the jury."

Numerous others are to the effect that the verdict of the jury on certain special issues designated by mere number is contrary to the preponderance of the evidence and not supported by the evidence. The issues themselves are not stated nor are the answers indicated. Sections 24, 25, 26, Rules Texas Courts of Civil Appeals (142 S. W. xii); *Bynum v. Hobbs*, 56 Tex. Civ. App. 557, 121 S. W. 900; *First State Bank v. Jones*, 129 S. W. 145.

[11] Besides, some 14 of the issues, the findings upon which are complained about in as many assignments, were specially requested by the appellants themselves. This circumstance estops appellants to deny that a substantial conflict of evidence existed from which such answers and findings should be determined. Having by requesting the submission of such issues recognized the existing of evidence to support a finding against them, appellants are left by the answers of the jury in a position where they may not complain. *Polindexter v. Receivers of Kirby Lumber Co.*, 101 Tex. 322, 107 S. W. 42; *Sanford v. Railway Co.*, 143 S. W. 329.

However, in any event, from the examination we have made of each and all of the assignments contained in this group and from what we have ascertained from our examination and consideration of the record and the proceedings below in connection with other assignments of error, we are not prepared to hold that any of these assignments, however considered, indicate reversible error.

Numerous assignments of error challenge the judgment upon the views, variously stated, that the answers of the jury to different special issues submitted were contradictory of each other and confusing, and that the jury did not make any answers at all to certain material issues submitted.

We believe the answers of the jury, as made, were sufficient to determine the controlling issues in the case, and that they support the judgment rendered. The proof seems fully adequate to establish the amount of indebtedness claimed against appellants both by Jones Lumber Company and Watson Company in conformity with their allegations.

[12] We do not think that such specific findings as the reasonable market value of material supplied to complete Lake's contract and the amount of material supplied by Jones Lumber Company were indispensable to a judgment. And such is the nature of the findings sought by the unanswered questions submitted to the jury.

[13] We are inclined to agree with counsel for appellees in their contention that the questions which were unanswered called for evidential facts. The answers would not have evinced an expression of a conclusion as to what the evidence established with reference to the ultimate facts determining the issues. Accordingly we hold that such answers were not necessary to the rendition of a proper judgment. *Insurance Co. v. Beaton*, 187 S. W. 743.

The foregoing disposes of all assignments of error, and those not specifically considered nevertheless have been examined and are expressly overruled.

The judgment is affirmed.

### O'BRIEN et al. v. AMMERMAN et al. (No. 8095.)

(Court of Civil Appeals of Texas. Galveston.  
June 9, 1921. Rehearing Denied  
Oct. 6, 1921.)

1. Constitutional law §46(2) — Plaintiffs seeking injunction against statute must show ground for equitable relief to have constitutionality determined.

Mere allegation in the petition of the unconstitutionality of a statute, enforcement of which is sought to be enjoined, does not entitle plaintiffs to have the question adjudicated; but they must show some recognized ground for equitable relief.

2. Pilots §1—Regulation left by Congress with states.

Acts 4th Called Sess. 1920, c. 3, as to pilots, is not invalid as in conflict with federal powers; Congress, while having power to regulate pilotage when it sees fit to exercise

it, not having used it, but by act of 1789 (U. S. Comp. St. § 7081) having left it where it found it, and confirmed it in the states.

3. Statutes §93(2)—Act as to pilots not special, though there is but one city of the class to which it applies.

Acts 4th Called Sess. 1920, c. 3, as to pilots, is not special, though there is but one city of the class as to which it is made applicable—cities having 100,000 or more population, situated along or on navigable streams, and owning or operating municipal docks, wharves or warehouses—there being nothing unreasonable or arbitrary in the classification.

4. Constitutional law §63(2)—Legislative powers not delegated by pilotage act.

Acts 4th Called Sess. 1920, c. 3, authorizing cities of a certain population and situation to appoint pilot boards and define their powers and duties, and giving the cities jurisdiction over pilotage between the Gulf and their respective ports, and power to appoint, suspend, or dismiss branch pilots or deputy pilots, does not delegate legislative power, but, as is permissible makes the cities state agencies for accomplishing the purposes of the law.

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Suit by Charles O'Brien and others against A. E. Ammerman and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Gibson & Rogers, T. J. Harris and Sewall Myer, all of Houston, for appellants.

Geo. D. Sears, of Houston, for appellees.

PLEASANTS, C. J. This is an appeal from a judgment of the court below refusing a temporary injunction in a suit for injunction brought by appellants against appellees.

Plaintiffs are residents of the city of Houston, and each of them is a duly qualified and licensed pilot under the laws of the state of Texas and of the United States, having been appointed to the office of pilot by the Board of Pilot Commissioners for the inland waterway extending from the city of Houston to Bolivar Roads and the Gulf of Mexico, appointed by the Governor of Texas in 1919, under the provisions of chapter 1, tit. 107, art. 6299, of the Revised Statutes. The defendants are the mayor and city commissioners of the city of Houston and the members of the harbor board of the city of Houston, and the secretary of said board.

The petition alleges:

"Complainants would further show that by virtue of their appointments and qualifications and ever since said appointments were made and since they had qualified, complainants and their said deputy have been holding and exercising the functions and office of pilots in carrying out the duties of their offices in piloting vessels navigating upon the ship channel and San Jacinto and Galveston Bays to the Gulf of

Mexico, to the port of Galveston, Texas City, and the city of Houston, as the law required them so to do. That they have never been removed from office by the Governor of this state nor by the pilot commissioners appointed by the Governor of this state; that they have not resigned, and that they are prepared, ready, and willing, each of them, to still perform the duties of their offices and carry out the rules and regulations of the federal government and the state authorities in connection with the navigation of all vessels plying said waters."

It is then alleged in substance that the mayor and city commissioners of the city of Houston and the harbor board of said city, under the authority of an act of the Legislature passed at the Fourth Special Called Session in September, 1920 (Acts 4th Called Sess. 1920, c. 3), were claiming the right to appoint all pilots for the port of Houston and the inland waterway before described, and—

"to suspend or dismiss from office pilots, branch pilots, or deputy pilots and to provide qualifications for and examine and determine the qualifications for office of any and all pilots, branch or deputy pilots in office at the time of the taking effect of the act, and retain in service or suspend or dismiss from service any and all pilots as they deem advisable, to fix rates and pilotage and to establish and enforce criminal ordinance or otherwise any and all regulations compatible with federal regulations for the government of pilots, this act providing that the constitutional rule be suspended and this act take effect and be in force from and after its passage."

The other material allegations of the petition are as follows:

"VII. The complainants would further show that at the time said bill was introduced in the Legislature at said Fourth Special Called Session on September 21, 1920, there also existed, as was well known to the Legislature and to the Governor of this state, no other city containing 100,000 or more inhabitants upon a navigable stream in the state of Texas, owning and operating municipal wharves, docks, or warehouses, and that the said bill was House Bill No. 4, which was passed and approved and appears in the authorized Pamphlet Acts of the state of Texas, as chapter 3 thereof, that said bill, which was drawn in terms as a general bill or general law, it was well known that in its application and effect and force it could only apply to pilots or branch pilots or pilot commissioners for the Houston ship channel, a special waterway leading from the city of Houston to the Gulf of Mexico, as aforesaid, down the Buffalo bayou to the Gulf of Mexico, it being commonly and judicially known throughout the state by the Governor and the Legislature that at said time and now no other city of Texas, with 100,000 inhabitants, owning municipal wharves and docks, existed in Texas, and that no other city with 100,000 inhabitants would for many years be situated in Texas on a navigable stream or exist in this state except the city of

Houston, and that notwithstanding this was a common knowledge judicially known to said Legislature and to the Governor and to the parties proposing said bill, no publication had theretofore been made in the locality where the matter or thing to be affected by the bill was situated, stating the substance of the contemplated law, and duly published for 30 days prior to the introduction in the Legislature of such bill, and no evidence of such notice was exhibited in the Legislature before such act was introduced and passed.

"VIII. The complainants would further show that, acting under the alleged authority supposed to have been conferred by said enactment (chapter 3 of the Pamphlet Act of the state of Texas at the Fourth Special Called Session September 24, 1920), the said mayor and aldermen of the city of Houston, the said A. E. Ammerman, Dave Fitzgerald, Mat Drennan, H. A. Halverton, and Allie Anderson, acting as city council and commissioners of the city of Houston, duly qualified as such, by certain ordinances, copies of which will be herewith filed, undertook to take over and assume the authority to appoint, remove, and regulate the pilots and branch pilots serving upon said inland waterway, and amount other things have illegally created and undertaken to create the office of pilot commissioners for the port of Houston, and have appointed the members of the Houston harbor board of the city of Houston, to wit, the said D. S. Cage, J. S. Rice, R. M. Farrar, R. S. Sterling, and W. D. Cleveland, Jr. to said office and undertook to confer on them the authority of pilot commissioners for said port and waterway, and conferred upon said B. C. Allen certain power and authority as secretary thereof; that said defendants, as commissioners of the city of Houston, by ordinance, as will be shown by Exhibit A to this petition, required all these complainants and their deputy T. V. Jenkins should make and execute each a bond in the sum of \$5,000, to be approved by the said mayor and payable to the said city of Houston, conditioned upon their faithful discharge of their duties, etc., as pilots upon said ship channel leading to the Gulf of Mexico, and that said Mayor Ammerman, acting for the city and council and for the commissioners of the city of Houston, and under and by virtue of the alleged authority conferred by the said special act of the Special Fourth Called Session of the Legislature, has notified your complainants that they will not be permitted to act as pilots or branch pilots of that waterway, extending, as aforesaid, from the city of Houston to the Gulf of Mexico, without they shall recognize the authority of the city of Houston and of the pilot commissioners so appointed by the city or harbor board and its officials appointed by the city of Houston, and shall make and enter into the bonds as required by the ordinance of the city of Houston, payable to said city of Houston as officers and servants of the city.

"IX. The complainants would further show that they are advised and believe that the special act passed by the Legislature at the Fourth Special Session September 21, 1920, and approved October 2, 1920, same being chapter 3 of the Pamphlet Acts of said state, and which was introduced as House Bill No. 4 and enrolled, approved, and filed with the Secretary of State at Austin, Tex., is void and un-

constitutional, and that it is without legal force and effect."

"XI. The complainants would further show that they are advised and believe that the same is void and of no effect, because the same was a local bill or special law whose provisions were to take effect and be in force only in a prescribed locality, and that the same was not passed as required by section 57, art. 3, of the Constitution of the state of Texas, no notice stating the substance of the contemplated law having been published 30 days prior to the introduction of such bill, and such notice not having been exhibited in the Legislature before such act was introduced and passed.

"XII. The complainants would further show that they are advised and believe that said House Bill No. 4 of the Special Act contained in chapter 3 of said publication of the laws of Texas, is invalid and without force or effect in law because the same is in conflict with article 3, section 56, of the Constitution of the state of Texas, which prohibited the Legislature from passing any local or special law where the general law could be made applicable; that a general law was in force at the time, and such special act undertook to exempt this special territory from the General Law.

"XIII. The complainants would further show that because under article 3, c. 56, the Legislature was prohibited from delegating to the city of Houston or any municipality of the city the power of creating offices or fixing the duties of or qualifications of officers of the state of Texas and the federal government, and because the Legislature was prohibited from providing by special law (said House Bill No. 4, chapter 3, being shown to be a special law) from creating offices and prescribing their duties when a general law of the state could be made applicable.

"XIV. The complainants would further show that they are advised and believe that said law is unconstitutional and void, and that it is in conflict with article 16, § 59a, of the state Constitution, which requires the Legislature to pass all laws as may be appropriate to the navigation of inland and coastal waters; that said power so delegated to the Legislature of the state of Texas could not have been redelegated to the mayor and aldermen and commissioners of council or any municipal board by the Legislature of the state of Texas; that said act undertakes to redelegate and does redelegate to the mayor and aldermen and commissioners of the city of Houston exclusive jurisdiction over the piloting of boats between the Gulf of Mexico and the city of Houston, a territory the greater portion of which is outside and beyond the territorial limits of the city of Houston; that said enactment undertakes to delegate to the city of Houston the power to appoint and create state offices, and that of pilot commissioners be made by the Governor; that said enactment undertakes to confer upon said city of Houston authority to pass special laws fixing qualifications of pilots and branch pilots and laws governing such appointment, suspension, or removal; that said enactment undertakes to confer upon the said city of Houston power to pass laws fixing qualifications for office of any and all pilots, branch or deputy pilots to serve as said officers on this waterway and navigable stream between Hous-

ton and the Gulf of Mexico, beyond its limits in the county of Harris, in the county of Chambers, and in the county of Galveston; that the same undertakes to confer upon the city of Houston the right to pass ordinances establishing criminal offenses and enforcing the same regulating the acts of the pilots while engaged in the interstate and international commerce and to punish for acts committed outside the limits of the city of Houston.

"XV. The complainants would further show that said special act contravenes the laws of the United States of America, and in conflict therewith; that said laws and Constitution of the United States permits only the Legislature of the state to pass laws, rules, and regulations governing the navigation of inland waters, which are declared navigable streams open to navigation of interstate and international commerce not contrary to federal law; that said act is in conflict with articles 7402 to 7410, inclusive, of United States Revised Statutes, and in conflict with article 9983, United States Revised Statutes.

"XVI. The complainants would further show that they are officers of the state of Texas, and the offices that they hold under the state and federal authorities are valuable offices, and that they derive their maintenance and support from the fees derived from the services as such pilots and branch pilots from state and interstate and said international commerce carried upon said waterways; that said defendants have notified in writing these complainants, said notice being given on the 11th day of January, 1921, that they are required to make bond in the sum of \$5,000 payable to the city of Houston and it was expected that they would govern themselves accordingly copy of which notice is hereto attached Exhibit B; that the said A. E. Ammerman, acting for defendants, further in connection with said notice, has verbally stated to the complainants and to their attorney that unless the said complainants enter into and execute the bond demanded under the ordinances of said city of Houston, they would not be permitted to act as pilots upon the Houston ship channel unless it was otherwise decided by law, and that the defendants would appoint and employ other persons as pilots to act upon said vessels, and they would prosecute the said complainants under the law if there was any such law to authorize said proceedings, and that unless restrained by this court the said defendants will undertake to deprive them of their respective offices, and hinder and prevent them from performing the duties and functions thereof; that the said defendants are undertaking to deprive them of their respective offices and hinder and prevent them from exercising the duties thereof, and that if permitted so to do the said defendants would deny to these complainants and each of them, and to their deputies, the right to serve and perform the duties of said officer, and would prevent them from earning fees therefrom; that said defendants will use the power, force, and influence they possess as officials of the city government of Houston, to hinder, embarrass, and prevent the complainants from being employed by vessels plying said navigable streams as pilots, and unless restrained by decree of court having jurisdiction thereof said defendants will prevent complain-

ants' employment upon said vessels plying upon the ship channel aforesaid, and earning their fees as pilots as aforesaid, and deprive them of their valuable rights; that said defendants will be acting and are acting in their aforesaid capacity and under a mistake of their legal power and authority, and for such acts will not be liable as individuals, and said defendants will appoint other persons to act as pilots of vessels on said waters, who will be insolvent and who can be made liable only to complainants severally and against whom a multiplicity of suits would have to be instituted and complainants greatly hindered and embarrassed in the duties of their office, for which complainants would suffer irreparable injuries for which they have no full, complete, and adequate remedy by law, and that if said defendants be not immediately restrained by an order of this court they will be ousted from performing their duties and from the functions of their offices, deprived of the honor and compensation that would accrue to them by virtue of the performance of their respective duties; that it is important that their rights be immediately established not alone for themselves, but to the public, and they therefore pray that this court should immediately hear and determine the rights and authority of the said complainants and of the said defendants; that this court, pending the final hearing of this cause, grant an order enjoining and restraining each of the said defendants, their successors in office, or any person acting under them or their successors, from interfering with, hindering, or in any manner undertaking to prevent these complainants and their said deputies from performing their duties as pilots or deputy pilots piloting boats navigating the Houston ship channel in San Jacinto and Galveston Bays in the state of Texas, or appointing, employing, and authorizing other persons to act thereon as pilots or branch pilots; that on final hearing hereof they pray that this injunction be made perpetual, and that the court will enter a decree that the said act of the Legislature under which said defendants are undertaking to appoint pilots, pilot commissioners, deputy pilots, or exercise any authority to interfere with these complainants in the performance of their duties as pilots, be declared, in so far as complainants' rights are concerned, without force and effect; that they recover their costs herein, and such other and further general and special relief as may be found just and right in the premises."

Upon the hearing of the application for temporary injunction the trial court held the act of the Thirty-Sixth Legislature, the validity of which is assailed by plaintiff's petition, was not obnoxious to any of the constitutional objections urged against it by plaintiffs, and sustained a general demurrer to the petition.

[1] Before proceeding to a discussion of the validity of the statute involved, we will dispose of the contention of appellees that, if the invalidity of the statute should be conceded, the general demurrer was properly sustained for want of equity in the bill. It goes without saying that the mere allega-

tions of the unconstitutionality of the statute would not of itself entitle plaintiffs to have that question adjudicated in a suit to enjoin its enforcement, and unless the petition shows some injury to them will likely result from the attempted enforcement of the statute for which they would have no adequate remedy at law, or shows some other recognized ground of equitable relief, the courts will not, in a proceeding of this kind, undertake to pass upon the validity of a legislative act. We are strongly inclined to agree with the appellees that this petition does not allege any facts sufficient to call for the exercise of the equity powers of the court to enjoin the city authorities of Houston and Board of Pilot Commissioners appointed under said act from proceeding to carry out its provisions. It seems to us that plaintiffs have a plain and adequate remedy at law for any of the threatened injuries alleged in the petition. But we prefer not to rest the determination of this appeal upon this conclusion. In our opinion none of the grounds upon which the invalidity of the statute is claimed can be sustained.

The grounds upon which the legislative act, and the ordinance of the city of Houston passed in conformity thereto, are assailed may be summarized as follows: That the same are in conflict with the federal powers, being a regulation of commerce; that the legislative act is a special or local law, and not a general one, because Houston was the only city in the state which met the requirements of the law; that the legislative act is unavailing, because it is a delegation of non-delegable powers; that it gives the city of Houston extraterritorial powers, which are thereby nugatory; that because the law conferred upon the city of Houston potential power to declare a criminal offense beyond its territorial limits, it is thereby void.

[2] As to the first of these objections it is sufficient to say that while the regulation of pilotage is within the power of Congress when that body sees fit to exercise such power, so long as that body has not entered this field of legislative regulation the original power of the state to legislate upon the subject remains unimpaired. Congress has not only failed to draw this power to itself, but has expressly confirmed it in the several states. By the act of 1789 (U. S. Comp. St. § 7981) Congress left the power where it found it in this language:

"All pilots in the \* \* \* ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively \* \* \* or with such laws as the states may respectively enact for the purpose."

This enactment has been carried forward in all codifications, and will be found to be the legislative expression to-day. Gibbons v.

Ogden, 9 Wheat. 207, 6 L. Ed. 23; Cooley v. Philadelphia, 12 How. 299, 13 L. Ed. 996.

[3] Appellants' second contention, that the act in question is a local or special and not a general law, cannot be sustained. The act is general in its terms, and includes all cities in this state "of one hundred thousand population or more, situated along or upon navigable streams in the state of Texas, and owning or operating municipal docks, wharves or warehouses." Acts Fourth Called Session 36th Leg., ch. 3. There is on its face nothing unreasonable or arbitrary in this classification of the cities to which the act applies, and appellants do not so contend, but insist that, because of extrinsic facts which show that at the present time Houston is the only city in this state to which the act can apply, it must be regarded as a special or local act. We think the rule applicable here is that laid down in Sutherland's Statutory Construction, page 353:

"That if the objects of a law have characteristics so distinct as reasonably to form for the purpose legislated upon a class by itself, the law is general, notwithstanding it operates upon a single object only; for a law is not general because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation."

In the case of Clark v. Finley, 93 Tex. 179, 54 S. W. 343, our Supreme Court holds in effect that a statute which by its terms applies generally to the whole state cannot be declared a local or special law because that by reason of extrinsic facts its operation is restricted to certain localities. The locality of the operation of such a statute may change with the changing conditions of the state, but if its import and purpose is general it is a general law, whether it operates in one or all the cities of the state.

[4] There is no delegation of legislative powers in the act, and the authority of the Legislature to authorize an administrative board to make such rules and regulations as may be necessary to carry out the provisions and accomplish the purposes of the law such agency was created to enforce cannot be doubted.

"A legislature in enacting a law, complete within itself, designated to accomplish the regulation of a particular matter falling within its jurisdiction, may expressly authorize an administrative commission within limits, to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." 6 R. C. L. 178, and cases cited.

There is no claim on the part of the city of Houston that this statute gives the city any authority to pass ordinances punishing

any act committed outside of the territorial limits of the city, and no such ordinance has been passed.

As an agent of the state for the appointment of pilots and regulation of pilotage on the Houston ship channel, the city has passed an ordinance governing their appointment and regulating the performance of the duties of such officers. The fact that these pilots may conduct their business outside of the city limits does not affect the power of the city as a state agency for their appointment and regulation.

We think the trial court was correct in holding that the statute in question was not invalid, and in sustaining the general demurrer to the petition. It follows that the judgment should be affirmed, and it has been so ordered.

Affirmed.

#### COOPER v. CARTER et ux. (No. 8572.)

(Court of Civil Appeals of Texas. Dallas.  
June 18, 1921. Rehearing Denied  
Oct. 15, 1921.)

##### 1. Appeal and error $\S$ 387(4)—Appeal bond held prematurely filed.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2084, an appeal bond filed before the entry of a judgment is ineffective to perfect an appeal from such judgment entered nunc pro tunc at a later term of the court.

##### 2. Appeal and error $\S$ 387(4)—Appeal bond not to be filed until after entry of judgment.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2084, no appeal from a final judgment can be perfected by the filing of an appeal bond until after the entry of such judgment.

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Suit by C. H. Cooper against J. Mercer Carter and wife. Verdict for defendants, plaintiff's motion for new trial overruled, and plaintiff appeals. Appeal dismissed.

Parks & Hall, of Dallas, for appellant.  
Allen Charlton, of Dallas, for appellees.

TALBOT, J. The appellant, C. H. Cooper, brought this suit against J. Mercer Carter and his wife, Emma Carter, to recover an undivided one-half interest in all lands and tenements described in the appellant's petition, alleging, in substance, that said lands and tenements have been purchased by the defendants with partnership money of the appellant and J. Mercer Carter, that said lands had been conveyed either to J. Mercer Carter or Emma Carter, and that a "resulting or constructive trust existed in favor



of the appellant in the title to an undivided one-half interest in said lands and tenements," and prayed judgment for such interest. Appellant also prayed in the alternative that, in the event he did not recover his alleged interest in the lands and tenements, he have judgment against the appellees, J. Mercer Carter and Emma Carter, in the sum of \$17,500, with interest. On March 16, 1918, the appellant filed a trial amendment slightly amplifying his petition. On January 21, 1920, the death of J. Mercer Carter was suggested and all his heirs were made parties to the suit. On May 28, 1920, a trial was had, and at the close of the evidence the court instructed the jury to return a verdict in favor of the appellees, which was done, but judgment in accordance therewith was not then entered. The May term, 1920, of the district court expired August 31, 1920. On May 29, 1920, the appellant filed a motion for a new trial, which on September 2, 1920, was, before the entry of any judgment, overruled, and the appellant gave notice of appeal to this court. On September 22, 1920, and before the entry of judgment, the appellant filed an appeal bond in terms of the statute. On December 3, 1920, the court made an order directing that judgment be entered in accordance with the verdict of the jury returned May 28, 1920, no judgment whatever having theretofore been entered. No notice of appeal from the final judgment of the court thus rendered was given, and no appeal bond other than the one filed September 22, 1920, was given or filed.

[1, 2] The appellees contend that this appeal should be dismissed because: (1) "An appeal bond filed before the entry of a judgment is ineffective to perfect an appeal from such judgment entered nunc pro tunc at a later term of the court; and (2) that no appeal from a final judgment can be perfected by the filing of an appeal bond until after the entry of such judgment." These contentions are supported by authorities of this state and must be sustained. The decisions of this state upon the question are to the effect that an appeal from a judgment cannot be prosecuted until the judgment has been actually entered. By the terms of the statute the right of appeal is conferred when

the party appealing gives notice thereof and files with the clerk of the trial court an appeal bond as required by law. Article 2084, Vernon's Sayles' Civil Statute. The record before us shows that the instant case was tried and verdict returned at the May term, 1920, of the court; that a motion for new trial was filed at that term, but was not acted on until the 2d day of September, 1920, after the expiration of the May term, when it was overruled, and that an appeal bond was not filed until September 22, 1920, more than 20 days after the expiration of the May term, 1920. Thus it appears that a motion for a new trial was not made nor was notice of appeal given in this case until after the expiration of the term of court at which the judgment was rendered, and that the appeal bond was not filed until after the expiration of the time allowed for filing such bond to perfect an appeal, and hence conferred no jurisdiction on this court. But, aside from this, it is statutory in this state that only one final judgment may be rendered in a cause, and, since the judgment attempted to be appealed from in this case was not entered until after the appeal bond relied on to perfect the appeal had been filed, the judgment was not "legally effective for review by appeal." It is true that the actual entry of a judgment final in form may, under proper proceedings, be by a nunc pro tunc order which renders the judgment legally effective; yet it has been held that in such instances the right of appeal begins from the date of the entry of such order. *Railway Company v. Atlantic Fruit Distributors et al.*, 184 S. W. 294; *Trotti v. Kinnear*, 144 S. W. 326; *Partridge v. Wooten*, 63 Tex. Civ. App. 280, 137 S. W. 412; *S. W. Slayden & Co. v. Palmo*, 90 S. W. 908. The appellant's right of review beginning, as it does, only at the date of the entry of the judgment under the nunc pro tunc order, and there being no notice of appeal given from the judgment thus entered, and no appeal bond being thereafter filed, no appeal from said judgment was perfected, and we are without authority to entertain jurisdiction of the attempted appeal brought before us, and the same must be dismissed.

It is therefore ordered that this appeal be dismissed at the appellant's costs.

**BOSTON & TEXAS CORPORATION et al. v.  
GUARANTEE LIFE INS. CO.  
et al. (No. 7981.)**

(Court of Civil Appeals of Texas. Galveston.  
June 24, 1921. Rehearing Denied  
Oct. 6, 1921.)

**1. Appeal and error ⇨931(3)—Finding of fact necessary to support judgment conclusively assumed.**

It must be conclusively assumed, where the court, before whom a cause was tried without a jury, filed no conclusions of law or fact, that every material fact on which there was evidence was found in such a way as to support the judgment rendered.

**2. Corporations ⇨482(5) — Finding single stockholder owned and controlled all of corporation's stock warranted.**

Evidence held to support a finding that a single stockholder owned and controlled all of a corporation's stock.

**3. Corporations ⇨182—Stockholders equitable owners of property to extent that contract or conveyance by all of them would be binding.**

The stockholders are, in final analysis, the equitable owners of its property to the extent that a contract impounding or a conveyance passing title to it by all of them would be binding and effective for the purpose.

**4. Corporations ⇨477(3) — All stockholders held to have participated in execution of deed of trust and notes by corporation.**

All the stockholders of corporation must be held to have participated in execution of a deed of trust and notes secured thereby when a stockholder who indorsed the notes owned and controlled all of its stock.

**5. Corporations ⇨477(8) — Neither corporation owned and controlled by single stockholder, nor its receiver, held entitled to avoid deed of trust and notes.**

Neither a corporation all of whose stock is owned by a single stockholder and which is but a cloak to shield his individual operations, nor its receiver, could avoid a deed of trust and notes secured thereby indorsed by such stockholder, on the ground that it was still a legal entity, and, being such, could neither in the first place execute the same, nor be precluded from setting up its inability to do so.

**6. Railroads ⇨33(1)—Loan to dummy foreign corporation building railroad held not illegal under statute.**

Rev. St. § 6406, providing that no corporation except one chartered under the laws of the state shall be authorized to construct a railway, does not prohibit construction of a railroad by an individual, and hence a loan of money to a foreign corporation to construct a railroad in Texas is not illegal, where an individual owns all its stock and the corporation is but a dummy.

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Action by the Guarantee Life Insurance Company and others against the Boston & Texas Corporation and others. Judgment for plaintiffs, and the named defendant and its receiver appeal. Affirmed.

Hunt & Teagle, of Houston, and Ball & Seeligson and C. W. Trueheart, both of San Antonio, for appellants.

H. A. Hicks, of Denver, Colo., W. W. Searcy, of Brenham, and Hutchison, Bryan & Dyess, of Houston, for appellees.

GRAVES, J. In this cause judgment was rendered below in favor of appellee Farmers' Life Insurance Company against appellants Boston & Texas Corporation, A. W. Seeligson as its receiver, and S. A. Hopkins individually, for \$110,288.98 as the aggregate sum found to be due the insurance company at that time as the owner and holder of 13 promissory notes for the sum of \$5,000 each, dated January 13, 1913, due January 13, 1918, executed by the Boston & Texas Corporation, indorsed by S. A. Hopkins, and payable to the Continental Trust Company of Houston, Tex., together with the foreclosure of a deed of trust lien upon 7,000 acres of land in McMullen county, Tex., given by the corporation at the time of executing the notes as security for their payment; the judgment being certified for observance to the Seventy-Third district court of Bexar county, in which court the receivership of appellant corporation was pending.

The Boston & Texas Corporation, and Seeligson as its receiver, alone appeal, making but three main contentions in this court:

(1) That the notes and deed of trust sued on, having been given in consideration of money borrowed for the express and agreed purpose of enabling the corporation to extend the Artesian Belt Railroad from Christine to Crowther in McMullen county, Tex., were ultra vires, void, and not binding upon appellants.

(2) That no recovery upon the instruments declared upon, or otherwise, was authorized upon any theory of benefits had and received by the corporation, because none were either properly plead or proven.

(3) That, apart from the question of ultra vires, the notes and deed of trust were void because the lending of the money to the corporation, which was a foreign oil company, for the express purpose and design of having it construct and acquire a railroad in Texas, was illegal under Revised Statutes, art. 6406.

It is accordingly thought that a discussion of the grounds upon which the appeal is disposed of may appropriately be confined to the issues thus advanced.

The appellee insurance company answered these several defenses with two definite but

independent theories, offering both pleading and proof in support thereof:

(1) That the loan and the expenditures pursuant thereto were not only for authorized corporate purposes, but in fact redounded to the corporate benefit.

(2) That the corporation at all material times was a "one-man corporation," that is, that S. A. Hopkins owned and controlled all its stock at the time the notes and deed of trust were given on January 13, 1913, and also on November 30, 1914, when a written ratification and novation of the original transaction had been executed; that he was not only a joint maker with the corporation of all these obligations on both the dates mentioned, but in reality was then and at all other material times had been the substance of the organization itself; that it was a mere vehicle or form through and under which he carried on his operations, and as a consequence both he and it were estopped from setting up ultra vires as a defense, and neither through such claim could escape liability for the debt declared upon.

[1] The cause was tried before the court without a jury, and no conclusions of fact or law were filed; it must therefore in this court be assumed that every material fact upon which there was evidence was found in such way as to support the judgment rendered.

The deference thus due the trial court's action, in view of the answering issue of estoppel so raised in both pleading and proof by the appellee, in the opinion of this court makes of primal importance in determining these questions appellants present, the matter of whether or not Hopkins did own and control all the corporation's stock at the time claimed upon the one hand and denied upon the other, and, if he did, what effect that situation—regarded as a fact—had upon the issue of liability for the obligations in suit. Under the presumption referred to, that he did so own the stock must here be conclusively assumed to have been the finding of the lower court, and as a consequence there remains in that connection for this court but a single inquiry: Was the evidence sufficient to support such a finding?

[2] After a most painstaking examination of the statement of facts, we conclude that it was. There was, it is true, a sharp conflict in the testimony about the matter, but nothing more, in our opinion, than the trial court had the authority to resolve; in other words, there is neither a total lack of evidence of such ownership nor such a weight and preponderance against it as to make a finding that it existed clearly wrong.

The record of the evidence bearing upon the question is one of much length, and an attempt to even adequately summarize its various features here would probably too much extend this statement. It is deemed

sufficient to say that on the date the papers declared upon were originally executed, January 13, 1913, the corporation's total capital stock was \$300,000; of this Hopkins then held in his own name a certificate for \$164,881, representing to the trust company's officers in procuring the loan, however, that he then owned all the stock both of that corporation and of the Artesian Belt Railroad as well; the original contract for the loan under recitation that the purpose of it was to enable the parties receiving it, and especially S. A. Hopkins, to extend the railroad from Christine to Crowther, was made by Hopkins acting for himself and for the corporation; the resolution of its board of directors authorizing the contracting of the loan stated that the arrangement had been made through Mr. Hopkins, and subsequently he signed its name to a written agreement providing for the use of \$10,327.39 of the money so borrowed to pay interest on the agreement of purchase he had prior to May 1, 1912, made for its benefit of the stock of the Artesian Belt Railroad.

On November 30, 1914, in consideration of the then holders' agreement to accept some overdue interest thereon, Hopkins and the corporation executed a written novation and extension of the notes sued on, the principle having been declared due for failure to pay interest installments thereon, in which they acknowledged the justness of their obligations thereunder, including the continuing validity of the deed of trust lien securing them, and repledged themselves to pay them according to their tenor and effect.

On March 2, 1914, there had been issued to Hopkins, in addition to the \$164,881 he already held, a certificate for \$135,112 of the remainder of \$135,119 of the stock, so that on the date of this extension and novation agreement he held in his own name all but seven shares of the total capital stock of \$300,000. These seven shares appear to have been then, as well as on the date the notes were originally given, standing in the names of seven persons whom Hopkins claimed to be directors in the corporation, one share to each; but the record bristles with testimony to the effect that these persons were on both the dates referred to, and at all other times had been, mere dummies for Hopkins, nominally holding directorships but in reality only recording his will and doing his bidding. Certain it is that in May, 1917, he delivered these seven shares also, along with the other \$135,112 of stock above mentioned, to the Plymouth Oil Company, a circumstance strongly corroborative of his statement to the trust company's officers in first borrowing the money that he owned all the stock and the directors were his creatures and would do what he said. Indeed, the testimony was undisputed that Hopkins so completely controlled the nominal directors of the company

that when it suited his purposes, he would order them by wire to resign, which by answering wire they would do, and he would then appoint others in his office, who would pass the required resolutions.

At the time of this trial the Plymouth Oil Company had also acquired the first-mentioned \$164,881 certificate, and so owned the entire capitalization. The finger of Hopkins was present there too, for he was one of its prime movers, if not in fact its organizer.

In the face of these significant and uncontroverted facts, which of themselves would have justified the finding that Hopkins did own and control all the stock, at least at the time of the ratification and novation of the entire debt on November 30, 1914, we regard it as of no controlling importance that he testified in June of 1918, in response to process in this cause, that on January 13, 1913, the date of the notes, the deed of trust on the 7,000 acres securing them, and of the resolution by the corporation's board of directors authorizing the transaction, he individually only owned \$75,000 of the \$164,881 of stock then standing in his name, and that of the remaining \$135,119 there were some 1,600 owners scattered over a dozen different states in this country and some in Canada, England, and Japan. As against this two unexplained facts of powerful portent remain:

(1) He had at all times held the legal title to the \$164,881, with no suggestion in the record that his dominion over it was ever other than absolute;

(2) Whatever may have been the status in January, 1913, of the remainder of \$135,119, all of it had before November 30th of 1914 likewise come under the complete control of Hopkins, and thus there could have been no unrepresented voice in the reviving on that date of the obligations sued on.

Of further significant bearing upon this ownership issue, to say nothing of the oft-repeated and direct declaration of his intimates in the management of the business that Hopkins was the whole corporation and it was nothing more nor less than he, there stands another undisputed fact: Nowhere in this record is there intimation that any other person ever set up any rights as a stockholder; no other appeared in these court proceedings to object, or to assert that he then did or ever had owned any of the stock.

We also think there was sufficient evidence to support a finding that no creditor other than Hopkins himself interposed any objection to the entry and enforcement of this judgment.

Appellants claim there were other creditors, and that the receiver for the corporation was shown to have been appointed by the district court of Bexar county on averment to that effect. The appellees, upon the

other hand, insist that the alleged indebtedness thus referred to, other than such of it as was owned and controlled by Hopkins, was shown either to have been paid or to have been transferred to other obligors than the corporation. Be that situation as it may, no such other creditor intervened here, nor did the receiver establish in this suit that any had proven up claims against the corporation in receivership proceeding.

From these findings upon and deductions from the facts, recurrence is now had to their legal effect.

[3] Under the conclusion that Hopkins did so own and control all the stock of the Boston & Texas Corporation, that is, that it was merely his shadow, his alter ego, the inquiry as to whether or not the corporation exceeded its powers, or whether it was estopped to assert that it did, seems to us to become superseded by the doctrine that the stockholders of a corporation are in final analysis the equitable owners of its property, to the extent that a contract impounding or a conveyance passing title to it by all of them would be binding and effective for the purpose. Under this view the question of corporate power and of the application of estoppel thereto is no longer involved.

This doctrine referred to is well fortified by authority in Texas, as well as elsewhere. *Harbor Co. v. Manning*, 94 Tex. 558, 63 S. W. 627; *Irrigation Co. v. Hutchins*, 21 Tex. Civ. App. 274, 52 S. W. 101; *Assurance Co. v. Davenport*, 16 Tex. Civ. App. 283, 41 S. W. 399; *Church Co. v. Martinez*, 204 S. W. 486; *Dillard v. Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

[4,5] The principle and the fact that the cited cases apply it is recognized by appellants, but they contend it is inapplicable here because: First, all the stockholders did not participate in this transaction; and, second, if they all did, the corporation was still a legal entity, and being such, could neither in the first place lawfully execute the notes and deed of trust, nor in the second be precluded from setting up that inability.

Our fact finding disposes of this first objection, and we think the second is fully answered by the authorities already cited and by many others that might be. To apply the technical rules appertaining to the attributes of corporations contended for by appellants to such a situation as was here developed would, it seems to us, be exalting form above substance, appearance above reality, the very thing equity will not do. In addition to the fact of his ownership of the whole of the stock, the evidence before us justifies the further conclusion that this "distinct corporate entity," as appellants term it, was but a cloak to shield Hopkins in his individual operations, and that, if the plea of ultra vires had prevailed and this indebtedness been declared null and void as against ap-

pellants, he after being undisputedly shown to have received and used all the proceeds of the loan, and despite his admitted liability in propria persona, would yet have been enabled, through the use of this corporate vestment, to avoid repayment of the money he had so borrowed and used and also to still retain the property he had pledged as security for it. No principle of either law or equity with which this court is familiar looks with favor upon such legal legerdemain as that.

In *Perkins v. Realty Co.*, 69 N. J. Eq. 781, 61 Atl. 170, this was said:

"In a case in which no question of public policy is concerned, and therefore the rights of the state or of the public are not involved, and where no creditors exist, and all of the stockholders have assented to the action, I do not see upon what basis the plea of ultra vires can be rested.

"When the rights of the state, the public and creditors are eliminated, and only the rights of stockholders are involved, the form of the fictional body termed a corporation does not hamper the court in the least in dealing with the rights of the parties. And that which the individuals composing the corporation might do, and will be held to have done among themselves, will be dealt with without regard to the immaterial fact that they were members of a fictional body.

"No citation of cases is necessary to establish the well-settled doctrine that courts of equity will disregard the corporate form where justice requires it and its retention is not needed to protect some interest requiring protection.

"To permit stockholders of corporations to unanimously make a disposition of the corporate property where no one else's rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud."

Of similar import is the declaration of the Supreme Court of Missouri in *Bank v. Trust Company*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79, while our own Supreme Court through Chief Justice Gaines in the *Manning Case*, supra, thus quotes with approval from *Thompson on Corporations*:

"Other decisions tend to the conclusion that whilst, in theory of law, the corporation and its shareholders are distinct persons, and the latter have no agency for the former, yet equity, which looks to the substance of things, may, in an appropriate case, and for the purposes of justice, treat a debtor corporation and an individual owner of all its shares as identical." 7 *Thomp. on Corp.*, § 8048. The text is supported by the following cases: *Jordan v. Collins*, 107 Ala. 572; *Moore, etc., Co. v. Towers, etc., Co.*, 87 Ala. 206; *Swift v. Smith*, 65 Md. 428."

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It may be quite true, as appellants so ably argue, that upon their particular facts these cited cases do not, as concerns the defensive plea of ultra vires, involve instances—to use appellants' own language—of "the inherent want of power in the corporation," but rather those of "simply a want of power in the corporate officers or agents, a disregard of certain formalities, or an improper use of power"; still that does not in any wise inveigh against their pronouncement of the rule that—

"Equity, which looks to the substance of things, may, in an appropriate case, and for the purposes of justice, treat a debtor corporation and an individual owner of all its shares as identical."

In the opinion of this court the facts here presented make this not only an appropriate but a most fitting case for the application of that equitable doctrine. As was said in the *Missouri case*, supra (187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79), the law never sustains a defense of the kind here tendered, that is, one grounded on the want of corporate power, out of regard for a defendant, but only where an imperative rule of public policy requires it. If for the purposes of justice *Hopkins* and his nominal corporation must here be treated as identical, how could it still be said that any sound consideration of public policy would be trenching upon by denying him the privilege of borrowing, giving his note for, and using this money, and then escaping its repayment while at the same time retaining the property he had pledged in security by merely donning his corporate clothes?

[8] But it is deemed unnecessary to pursue the discussion further. Obviously, under the conclusions stated, the third contention of appellants that article 6406 of our Revised Statutes stands in the way is likewise untenable. It has reference to corporations only, and does not prohibit the construction and acquirement of a railroad by an individual.

Whether or not, under a finding that there had been other owners of the stock, the ultra vires plea would have been valid against the contract and estoppel as from benefits received by the corporation applicable to it, as well as whether in such circumstances, what was so undertaken would then have been illegal under the statute invoked, being, under the view we have taken, unnecessary to the decision, are questions not determined.

Our conclusion is that all assignments should be overruled and the trial court's judgment affirmed; that order has been entered.

**Affirmed.**

**WESTERN UNION TELEGRAPH CO. v. WALLER. (No. 7303.)**

(Court of Civil Appeals of Texas. Galveston. Feb. 7, 1917. On Motion for Rehearing, April 6, 1917. Appellee's Rehearing Denied Oct. 6, 1921.)

1. Appeal and error  $\Leftrightarrow$  301—Assignment of error need not have been embodied in motion for new trial.

Under Supreme Court rule 71a (145 S. W. vii) and Vernon's Sayles' Ann. Civ. St. 1914, art. 1612, assignments of error need not have been embodied in motion for new trial.

On Motion for Rehearing.

2. Telegraphs and telephones  $\Leftrightarrow$  68(3)—Damages for mental suffering held too remote.

Telegraph company, which failed to deliver to husband stepdaughter's message that wife was in a dangerous condition from blood poisoning, and that he should wire money immediately, and other telegram sent on following day that wife's condition was very critical, and that he should come at once, was not liable to husband for mental pain and suffering sustained on receipt of telegram that wife had died, because he was prevented from furnishing wife and daughter financial assistance, and from wiring wife that he had received messages and was going to her on the first train, and delay in the preparation of wife's body for burial; such damages being too remote, contingent, uncertain, and speculative.

3. Telegraphs and telephones  $\Leftrightarrow$  66(3)—Admission of evidence as to wife's suffering in husband's action held reversible error.

In husband's action against telegraph company for negligent failure to deliver telegrams informing him of wife's illness, admission of evidence that the wife, prior to her death, kept calling for the husband, and had been very much worried on being told that no response had been received from him in reply to the telegrams, held error.

Graves, J., dissenting in part.

Appeal from District Court, Harris County; A. R. Hamblen, Special Judge.

Action by M. S. Waller against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

See, also, 232 S. W. 487.

Hume & Hume, of Houston, for appellant. O. B. Barkley and Woods, King & John, all of Houston, for appellee.

GRAVES, J. Defendant in error, M. S. Waller, as plaintiff, sued plaintiff in error, Western Union Telegraph Company, as defendant, for damages for mental anguish upon allegations hereinafter fully set out. The case was tried before Hon. A. R. Hamblen, special judge of the Eleventh district

court of Harris county, sitting with a jury, being submitted by the court upon a general charge, all the material parts of which are also hereinafter copied in full; and upon the jury's returning a verdict—also general—in the sum of \$1,100 for plaintiff, judgment was accordingly entered January 17, 1916, in his favor and against defendant for that sum.

Defendant's answer to said cause of action as so pleaded consisted of a general demurrer and 12 special exceptions, all of which were overruled, and a general denial. Defendant filed its motion for new trial within the time allowed, which it later abandoned by not securing action of the court thereon; then still later—that is March 8, 1916, and independently of said motion for new trial and of the grounds therein set up—it filed its assignments of error hereinafter discussed; such of these assignments as have been also presented in its brief in this court were all addressed either to the trial court's action upon the demurrers, general and special, or upon the admission or rejection of evidence; in all instances this action of the court, which is a matter of record wholly apart from the abandoned motion for new trial, was duly excepted to by the defendant. It further duly applied for and perfected its writ of error to this court, and upon such writ of error the trial here is had.

[1] The defendant in error has filed in this court and insisted upon his motion to dismiss the writ of error, mainly upon the ground that the assignments of error contained in the transcript cannot be considered under the statutes and rules, because a motion for new trial was filed and not called to the attention of the trial court, and, under article 1612, Vernon's New Sayles' Statutes, a motion for new trial constitutes the assignments of error, and a totally different set of assignments attempted to be filed is not entitled to consideration. In this motion he concedes that this court has jurisdiction of the case, due to the perfection of the writ of error, but insists that it should dismiss the writ for noncompliance with the rules and the statutes. His contention is that under rule 71a by the Supreme Court (145 S. W. vii) and said article 1612, this court cannot consider said assignments of error, because they were not embodied in the motion for a new trial shown by the record to have been duly overruled. We cannot sustain this contention, nor so construe said article 1612, but we think the plain purpose of said article was to permit such assignments to be filed either in or independently of the motion for new trial. *W. U. Tel. Co. v. Mitchell*, 89 Tex. 441, 35 S. W. 4; *American Life Ins. Co. v. Rowell*, 175 S. W. 170; *May v. Waniger*, 164 S. W. 1106; *Lee v. Moore*, 162 S. W. 438; *Sargent v. Barnes*, 159 S. W. 368; *Conn v. Rosamond*, 161 S. W. 73; *Rail-*

way v. Beasley, 106 Tex. 160, 155 S. W. 183, 160 S. W. 471; Davis v. Parks, 157 S. W. 449; Stein Tire Co. v. Fulton, 159 S. W. 1013; Craver v. Greer, 107 Tex. 356, 179 S. W. 862; Thompson v. Price, 157 S. W. 288; Gulf, T. & W. Ry. Co. v. Dickey, 108 Tex. 126, 187 S. W. 184. Accordingly we overrule the motion to dismiss the writ.

Coming now to the merits of the appeal: Since the evidence in all substantial and material respects established the facts as pleaded by plaintiff, including the telegraph company's negligence, since, further, on page 2 of its brief filed in this court it has admitted that it was guilty of the negligence charged, we omit from both the plaintiff's pleadings and the court's charge the averments of, and the instructions concerning, this negligence as nearly as may be. In all other material respects the allegations of plaintiff were as follows:

"That on said 29th day of August, A. D. 1906, plaintiff's wife and stepdaughter, Miss Genevieve Chilson, were sojourning temporarily in the city of Denver in the state of Colorado, and were then stopping at the Shirley Hotel in said city; that on said date, to wit, August 19, 1906, plaintiff and his wife and stepdaughter had their domicile and home in the city of Houston, Harris county, Tex., and they were on said date in the city of Denver, and his said wife and stepdaughter were on said date in the city of Denver spending a part of the summer; that when plaintiff and wife and stepdaughter last parted plaintiff's wife was apparently in good health; that it was understood and arranged between plaintiff's wife and himself and stepdaughter that they were to be supplied by plaintiff with money and funds as needed on their summer vacation while visiting Denver, and that they might inform him of said needs either by telegraph or letter.

"That plaintiff was at said time, to wit, August 29, 1906, and at all times thereafter and at the time of separating from his wife, financially able and willing to gratify all their wants and meet any demands for money made by them to him.

"That on said August 29, 1906, plaintiff's wife, who was then located in the city of Denver, as aforesaid, was taken suddenly and dangerously ill to such an extent as to utterly prostrate her, and confine her to her bed and room, and require the attention of a physician and surgeon; that plaintiff's wife and stepdaughter were utter strangers in the city of Denver, having no friends and associates to appeal to for assistance or financial aid, but were at said time and on said date entirely dependent for financial aid, for counsel and assistance, on this plaintiff; that his stepdaughter, Genevieve Chilson, was a young lady, inexperienced, and who had never had to rely upon herself in case of emergency or otherwise; that plaintiff had formerly resided in the city of Denver and other portions of Colorado, and had many friends and acquaintances residing in the city of Denver on said 29th day of August, 1906, but none of them knew or were acquainted with either his wife or stepdaughter, Miss Chilson.

"That plaintiff's stepdaughter, being at the

bedside of her sick mother, and the only companion and adviser, on August 29, 1906, at the instance of her mother and in her own behalf and in the behalf of this plaintiff, delivered to defendant company at its office in the city of Denver the following messages, and paid for the same the compensation demanded by said company, which was the usual and customary charges therefor, said messages so delivered were in substance as follows: 'Denver, Colorado, Aug. 29th, 1906. Judge M. S. Waller, 22 and 23 Masonic Temple, El Paso, Texas. Moved Mama to hospital tonight. Will operate tomorrow, very dangerous condition, blood poisoning, wire money immediately, am very worried. Genevieve.'

"And also the following: 'Denver, Colorado, Aug. 30th, 1906. Judge M. S. Waller, Room 22 Masonic Temple, El Paso Texas. Doctor obliged to perform big operation to save mama's life, very critical condition, come at once. Genevieve.'

"That said messages and telegrams as indicated by their terms were intended to inform plaintiff of two things: First, the dangerous sickness of plaintiff's wife; and, second, that she, Genevieve Chilson, plaintiff's stepdaughter, and plaintiff's wife, were destitute of money, and were in distress and in need of money at once to relieve plaintiff's wife and stepdaughter of their distress and needs and to have plaintiff come to their assistance at once.

"That said corporation did not transmit and forward said two telegrams, or either of them, as herein set out, from El Paso to Marfa on the 30th day of August, 1906, or at any other date, but delivered same to plaintiff at his special solicitation, instance, and request in the city of El Paso on September 1, 1906.

"That on August 31, 1906, plaintiff, while still sojourning at his hotel at Marfa, Tex., as hereinabove alleged, did receive a telegram sent to him by way of Galveston, from his stepdaughter, Genevieve Chilson, which said telegram was in substance as follows: 'Denver, Colorado, August 31st, 1906. M. S. Waller, Mother had serious operation yesterday, died this morning. Genevieve Chilson.'

"That that was the first information plaintiff received of the illness of his wife and the condition and situation of her and his stepdaughter, and that immediately upon receipt of same, which was about the noon hour on August 31, 1906, plaintiff telegraphed to friends in Denver, and other points near there, and advised them of the death of his wife, and of the situation of his stepdaughter alone with the corpse of her said mother, and among strangers and without funds, and requested them to go to her assistance at once and render to her all assistance, financially and otherwise, necessary, and to see to the burial preparations and preparing of the body for burial and embalming same, and to furnish a burial casket, and to do any and all other things necessary and proper in the premises, and to relieve the distressed condition of his said stepdaughter's mind in so far as possible.

"That he also immediately telegraphed to his said stepdaughter at Denver that he had telegraphed to friends in and near Denver to furnish her with money and all other assistance necessary and proper, and also instructed her as to her conduct in the premises, and that he would go to her on the first train.

"Plaintiff would further represent that Marfa

was a small town with no bank, and plaintiff could not remit money to his stepdaughter by the usual course by telegraph, but that he did the next best thing, and that was to telegraph his friends, as above alleged, who were amply able and willing to render to her all of the assistance requested, and they did upon receipt of the said telegrams to them, which was late in the afternoon of the said 31st day of August, 1906, call at the hotel where the body of his said wife was then lying, and where his said stepdaughter was still staying, and arranged to have said body embalmed and prepared for burial, and took charge of her said remains, and in so far as possible to do so relieved the distress of mind of his said stepdaughter, and arranged to have her cared for until the arrival of plaintiff.

"That by reason of the negligence of the defendant plaintiff was prevented for a period of 36 hours from learning the condition and situation of his wife and stepdaughter, and was prevented for said period of time from telegraphing them money needed by them in their distress, and was prevented from contributing those last testimonials of love so naturally prompted by the circumstances, which he would have contributed to his wife by means of defendant's telegraph wires prior to her death, and was prevented from informing his wife in her last illness and his said stepdaughter that he would go at once to Denver, and be with them and give them his assistance and aid in their distressed condition, and further was prevented from being with them for the period of 36 hours, in that plaintiff would have started on his way from Marfa, Tex., to Denver, Colo., August 30th, instead of August 31st, as he was forced to do by reason of not receiving said information promptly, as herein stated, and further was prevented by said negligence from informing his wife and stepdaughter to whom they could apply among his friends and acquaintances in the city of Denver for aid, assistance, and comfort in their distressed condition and situation; that because of said negligence on the part of defendant, its agents, servants, and employees, as above alleged, his said stepdaughter and his wife, for a period of from 18 to 20 hours before the death of his said wife, were alone among strangers, without funds, and dependent entirely for all that they received, including medicine and medical attention, hospital fees, and everything else, upon people charitably inclined, and his said wife died without ever having a last message from him, and believing that he was ignoring the appeals sent to him by telegraph as above alleged, and his said stepdaughter was left among strangers, in a strange land, with the corpse of her mother, unprepared for burial, and no burial arrangements or preparations made for at least 12 hours after the death of his said wife, during all of which time she was wholly without funds, which conditions would not have existed had said telegram been transmitted and delivered as defendant, its agents, servants, and employees contracted to transmit and deliver, because of all of which plaintiff has suffered, and continues to suffer, great mental pain, poignant grief, distress of mind, mental anguish, humiliation, and mortification, to his damages in the sum of \$1,995."

Aside from its reference to defendant's negligence, the relevant parts of the court's charge were as follows:

"If you believe that such failure prevented plaintiff from furnishing financial assistance to his wife at Denver, and that plaintiff was prevented from wiring his said wife that he had received said messages and was going to her on the first train, if you should believe that if he had received said messages he would have supplied his said wife with money, and would have wired her that he was going to Denver on the first train, and that he would have done so; if you further believe that the corpse of plaintiff's said wife was unprepared for burial at Denver for an unreasonable length of time, and if you further believe that because of such facts, if the facts you so find to be, plaintiff suffered grief or mental anguish; and if you further believe that the defendant should have contemplated that if said messages were not delivered plaintiff would suffer such grief or mental anguish—then you will find in favor of plaintiff and assess his damages in such sum as you may believe from the evidence will reasonably and fairly compensate him for such grief and mental anguish, if any, suffered by him.

"Should you not believe from the evidence that, had plaintiff received said two messages, he could and would have rendered the said Genevieve Chilson financial aid in time to have the corpse of his said wife prepared for burial immediately after her death; or if you do not believe from the evidence that, had plaintiff supplied the said Genevieve Chilson with the necessary funds, she would have caused the body of plaintiff's wife to have been prepared for burial within a reasonable time after her death; or if you do not believe from the evidence that said Genevieve Chilson was without money or financial aid at the time and under the circumstances submitted in the preceding paragraph of this charge; or if you should believe that the failure to have the body of his wife prepared for burial within a reasonable time after her death, if you have so found, did not cause the plaintiff to suffer humiliation, mortification, or distress of mind; or if you should believe that at the time and under the circumstances in the preceding paragraph of this charge that the said Genevieve Chilson was without money or financial aid, and because of which the body of plaintiff's wife was not prepared for burial within a reasonable time after her death, and because of which plaintiff suffered humiliation, mortification, and distress of mind, but do not further believe from the evidence that the defendant at the time of receiving said messages should have reasonably contemplated that plaintiff was likely to suffer some such humiliation, mortification, and distress of mind if the said Genevieve Chilson and her mother did not promptly receive money or financial aid—then and in either of such events you will let your verdict be for the defendant."

The first 12 assignments of error raise, in varying forms, but one question, which goes to the very foundation of plaintiff's case, and which, by largely adopting the language of plaintiff in error, may be stated as follows:



The mental anguish alleged was not the proximate result of defendant's negligence. And that the damages were too remote, contingent, uncertain, and speculative, and that there was no ground or element of recoverable or actionable damages alleged and proved.

Recognizing that the lines of cleavage between recoverable and nonrecoverable elements of damages in exclusively mental anguish cases are very close, and while adhering—both upon principle and in deference to well-established authority in Texas—to the doctrine allowing recovery in such cases, yet this court does not desire to undertake any elongation nor extension of it; each case must largely rest upon its own foundations. For this reason we have above recited the case as pleaded and as explained in the court's charge a little more fully than would otherwise have been necessary.

We cannot therefore go with some of the cases cited by the telegraph company into a discussion of the fundamental question of whether or not mental anguish alone is ever an actionable element of damage. It being, as before stated, no longer an open question in Texas, we pretermitt any consideration of it, and content ourselves with here citing some of our cases so holding: *W. U. Tel. Co. v. Ohlson*, 168 S. W. 878 (writ of error denied by Supreme Court); *Goodwin v. W. U. Tel. Co.*, 160 S. W. 107; *McFarlane v. W. U. Tel. Co.*, 161 S. W. 57; *W. U. Tel. Co. v. Richards*, 158 S. W. 1187; *W. U. Tel. Co. v. Simpson*, 73 Tex. 430, 11 S. W. 385; *S.W. Tel. & Tel. Co. v. Pearson*, 137 S. W. 736; *Stuart v. Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; *Tel. Co. v. Copper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689; *Tel. Co. v. Rich*, 59 Tex. Civ. App. 395, 126 S. W. 687; *Tel. Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575; *S. W. Tel. & Tel. Co. v. Allen*, 146 S. W. 1066; *S. W. Tel. & Tel. Co. v. Gehring*, 137 S. W. 754.

We think the contents of the two messages sued upon here were in themselves such that the telegraph company might reasonably have anticipated the conditions and consequences shown to have existed and resulted, but, if there be doubt about that, that they were clearly sufficient to put it upon notice that such conditions and consequences might exist and result, and so to cast upon it the duty of making inquiry and seeking further information. See *Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366, 63 S. W. 341; *Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851; *Tel. Co. v. Gamble*, 101 S. W. 1166.

It is very conclusively shown in the evidence that, had it made such inquiry, it could have quickly obtained the facts and have been in position to have entirely avoided the negligence it has thus confessed in this court.

Nor is it any answer to plaintiff's violated

rights here to say, as the telegraph company so earnestly insists in this court, that he suffered uselessly and unnecessarily, and therefore cannot recover damages, because his wife and daughter wanted for nothing, everything needed having been supplied by "strangers and those charitably inclined."

Even if the correctness of this statement as to what happened were conceded, that very fact, under the circumstances here, as we view it, established the right of action in plaintiff, for the very plain reason that it was his right and privilege to be himself allowed to supply the needs of his dying wife and worried daughter, and not to be compelled by the telegraph company's negligence to leave them to the ministrations of "strangers and those charitably inclined"; and this still further for the much more emphatic reason that through his lack of knowledge as to how they were faring, caused directly by the company's negligence, he suffered first, and that continuously throughout a period of 36 hours, and then discovered that they had been so furnished by strangers. Does this obliterate the fact that he had so suffered? The evidence is undisputed that he very keenly suffered in anticipation of and worry about the privations his dying wife and worried daughter—penniless and alone in a strange city among and wholly dependent upon strangers—must have, as he then thought, endured in that fateful two days between about 10 or 11 o'clock a. m. of August 30th and late in the afternoon of August 31st, and until they had been at this latter hour relieved by his friends; because, on arriving at El Paso, he knew all the facts of their condition and their need which had been stated in these first two messages, and he then also further knew, from the third telegram he had previously received at Marfa, that they could not have been relieved for those two days by or through him or his friends; and further because, he did not know until he reached Denver—36 hours still later—that they had not in fact endured such privations as he had thus anticipated and feared they would. How can this subsequent knowledge that his fear had been unfounded, and his consequent suffering from that one cause alone unnecessary, obliterate the accomplished fact that he had already as poignantly endured that suffering? Further how could this subsequent knowledge possibly relieve the telegraph company from its direct responsibility for having, through its admitted negligence, solely caused him to endure that experience? Here is furnished, we think, a parallel in principle to the case of *Telegraph Co. v. Rich*, 59 Tex. Civ. App. 395, 126 S. W. 687, which was an action for failure to deliver a message advising plaintiff that yellow fever was prevalent in San Antonio, where he was going. The message was

not delivered, he went there not knowing of the existence of yellow fever there, and was compelled to remain about 19 hours before he could get a train home. He claimed to have suffered mental anguish while there because of the fear that he would contract yellow fever, and that he might be quarantined and kept from home for an indefinite period. The court in upholding his right to recover said:

"The fact that yellow fever is a contagious disease or infectious, and in a large per cent. of cases a fatal, disease, is a matter of general knowledge, and is abundantly established by the evidence in this record. It is also a matter of common knowledge, that the methods of preventing the spread of the disease are vastly more effective now than they were in 1903, when this fever was discovered in San Antonio, and that at that time, whenever the yellow fever was discovered in a community, fear that it would become epidemic was almost universal, and in view of its fatal character we do not think it can be said, as a matter of law, that a person of ordinary firmness, intelligence, and courage would not have suffered mental anguish by having to remain in a community in which the disease had appeared. The agent of appellant knew the purpose for which the telegram was sent, and we think that he might reasonably have anticipated that, if it was not delivered promptly, appellee would go to the infected city in ignorance of the fever, and that when he discovered the fact that there were cases of yellow fever in the city he would suffer mental anguish through fear of contracting the disease. The fact that it may have subsequently developed that he was in no actual danger is immaterial. If he suffered from a reasonable apprehension of contracting the disease, under the circumstances as then known to him and to the appellant, the latter is liable for the mental anguish thus caused by its failure to comply with its contract to use reasonable care to make timely delivery of the telegram.

"We think it also follows, from the facts before stated, that appellee's apprehension that he would, by the enforcement of quarantine regulations, be kept from his business and family, was such a reasonable and probable result of appellant's negligence in the matter of the delivery of the telegram as would render it liable for the mental anguish of appellee caused thereby."

But the humiliation arising from contemplation of the embarrassment and hardships he thought his loved ones had been compelled to undergo was neither the only, nor by any means the most severe, element of mental anguish the plaintiff here was shown to have endured. It may be well to preface the recital of his further sufferings with the statement that this record is as silent as the tomb of his dead wife as to any suggestion or intimation of any lack between them of the usual mutual affection and consideration obtaining between husband and wife, or of any other condition which, upon his part, might have rendered him indifferent about promptly

claiming, meeting, and discharging every privilege and duty towards his family; rather the contrary appears. This being so, it was further alleged and shown that his being deprived of the opportunity of himself directly communicating through messages to his wife those last testimonials of love and affection before her death caused him great sorrow and grief.

Then, finally, the knowledge that came to him on reaching Denver that his wife's body, for a lack of money, had lain unprepared for burial for what the jury must, under the court's charge, have found was an unreasonable length of time, to wit, more than 12 hours, might, and we are told by him did, add sorrow's crown of sorrow to this man's mental suffering.

Another very plausible contention of counsel for the telegraph company is that what plaintiff really suffered from was the death of his wife, caused by the intervention of a Higher Power, and hence there was no causal connection between such suffering and the company's negligence. The answer to this position is twofold: In the first place, the above-cited authorities hold that recovery may be had in such cases for any increased pain or suffering that may have been sustained because of the negligent failure to deliver the telegram; in the second place, we do not think it could be said that the suffering here shown was either the result of "morbid sensitiveness," or of what is termed reflex or sympathetic suffering, that is, having its origin in, and based solely upon, the suffering of others, and but for which it would not exist at all; but it was rather the independent feeling of a sentient being—proud, perhaps, and certainly affectionate towards his wife and daughter, not only capable of, but also anxious, ready, and willing to claim, every privilege of love and relationship and to supply every need, financial and otherwise—originating in and directly arising from the invasion and wounding of his own individual sensibilities and affections.

Consequently, holding as we do, that the petition stated, and the charge submitted, a proper and recoverable cause of action, without the citation of additional authorities, we overrule the first 12 assignments.

The second group of assignments—that is, 13 and 14—challenge the court's action in admitting over objection testimony to the effect that prior to her death plaintiff's wife kept calling for him, and had been very much worried on being told that no reply had been received from him. The bills of exception show that the court admitted this testimony solely for the purpose of showing the mental and physical condition of plaintiff's wife. Under all the circumstances here we cannot say that this was prejudicial error. Recurrence now, for a moment, to the court's

charge, as quoted, will show that plaintiff's right to recover was very plainly restricted to his own mental suffering and anguish, and not that of his wife; and, having no right to consider this testimony, except as bearing upon plaintiff's state of mind, it will not be presumed the jury violated their instructions and did so.

Nor can we say that this evidence, taken in connection with the other circumstances in this case, could not be properly considered by the jury in estimating the feelings of this plaintiff for his wife, or of the mutual feeling between them, and therefore as tending to show whether or not he really suffered as alleged. It therefore seems to us that the principle announced in *Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701, and *Tel. Co. v. Adams*, 75 Tex. 535, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920, applies here. Accordingly we overrule both these assignments.

By its third group of assignments, 15 to 18, inclusive, the telegraph company complains of the admission over its objection of the testimony of plaintiff's stepdaughter to the effect that she had no money, nor friends upon whom she could call for aid, and that the same was furnished to her by strangers. Believing that this evidence was directly material to the issues properly made by the pleading under the court's charge, for the reasons given in our discussion of the first 12 assignments, we likewise overrule these.

Having already held that the matters complained of in the last group of assignments, 19 to 21, inclusive, constituted a recoverable cause of action in plaintiff, it follows that the court did not err in permitting him to testify to them.

This disposes of all the questions raised, and finding no reversible error in the record, the judgment of the trial court will be in all things affirmed.

**Affirmed.**

#### On Motion for Rehearing.

In our original opinion the main contentions of the telegraph company in this case were summarized as follows:

"The mental anguish alleged was not the proximate result of defendant's negligence, and that the damages were too remote, contingent, uncertain, and speculative, and that there was no ground or element of recoverable or actionable damages alleged and proved."

[2] After much deliberation, and not without some hesitation, the questions so stated were resolved adversely to the plaintiff in error, and going, as they necessarily did, to the foundations of the case, that conclusion—in the absence of a holding that there was other reversible error—led to the affirmance of the trial court's judgment. But after a further consideration upon rehearing of all questions presented, much aided by the very

able and comprehensive additional brief filed by plaintiff in error, the majority of the court have reached the conclusion that our former determination of this fundamental question was error, and that this basic contention of the telegraph company that the damages alleged were too remote, contingent, uncertain, and speculative must be sustained.

In arriving at this conclusion, a re-examination of the adjudicated cases in Texas has convinced the majority of this court that our original opinion would extend the mental anguish doctrine in this state beyond what has heretofore been regarded as its legitimate confines; that the *Rich Case*, 59 Tex. Civ. App. 395, 126 S. W. 687, quoted from in the original opinion, may be distinguished from the case at bar, and is therefore not strictly analogous with it, in that in that case there was an actual, reasonable ground of fear and apprehension of contracting said contagious disease directly and proximately resulting from defendant's failure to deliver a telegram warning *Rich* not to go to said place; while here it is thought that what defendant in error really suffered from was the illness and death of his wife in his enforced absence, and that therefore his were reflex injuries to the feelings from mental distress of another, or mere sympathetic mental anguish, which are not in any event recoverable; that there is lacking a proximate cause—the negligence of the defendant is not shown to have proximately resulted in an injury to the feelings of plaintiff himself of such a nature as the law recognizes—and that the facts of the instant case make it more nearly analogous to the case of *Telegraph Co. v. Young*, 61 Tex. Civ. App. 232, 130 S. W. 257.

Since this determination of the controlling questions presented necessarily involves the finding that defendant in error was not entitled to recover, it is deemed unnecessary to discuss other questions presented in the motion for rehearing, except the assignment that this court erred in holding that no reversible error was committed below in admitting, under the circumstances shown, the testimony relating to the state of mind of defendant in error's wife.

In support of the above-stated conclusions of the majority of the court, the following authorities are collated and cited: *W. U. Tel. Co. v. Young*, 61 Tex. Civ. App. 232, 130 S. W. 257; *Tel. Co. v. Luck*, 81 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869; *Tel. Co. v. Edmundson*, 91 Tex. 206, 42 S. W. 549; *Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *Tel. Co. v. Motley*, 87 Tex. 38, 27 S. W. 52; *Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482; *Tel. Co. v. Kuykendall*, 90 Tex. 323, 89 S. W. 965; *De Voegler v. Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107; *Ricketts v. Tel. Co.*, 10 Tex. Civ.

App. 226, 30 S. W. 1105; *Ratliff v. Tel. Co.*, 183 S. W. 78; *Tel. Co. v. Chamberlain*, 169 S. W. 370; *Tel. Co. v. Sherlin*, 184 S. W. 310; *Tel. & Tel. Co. v. Wilcoxson*, 129 S. W. 868; *Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969; *Tel. Co. v. Steenbergen*, 107 Ky. 460, 54 S. W. 829; *Tel. Co. v. Vickery*, 158 S. W. 794; *Hancock v. Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 405; *Tel. Co. v. Birchfield*, 14 Tex. Civ. App. 664, 38 S. W. 635; *Tel. Co. v. Reed*, 37 Tex. Civ. App. 445, 84 S. W. 296; *Tel. & Tel. Co. v. Thomas*, 185 S. W. 396; *Goodwin v. Tel. Co.*, 160 S. W. 107; *Tel. Co. v. McFarlane*, 161 S. W. 57; *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059.

From the views of the majority of the court thus expressed and the consequent decision rendered, the writer, adhering as he does to the contrary position as stated in the original opinion, respectfully dissents. It is, for the reason stated in the former opinion, not thought by him that the principle applied to the developed facts of the *Young Case*, 61 Tex. Civ. App. 232, 130 S. W. 257 (and the line of cases cited supporting it), in which recovery was sought in behalf of both the husband and wife, rules the case at bar.

If it be true that, under the peculiar facts shown here, it would, under the precedents of our decisions, be an extension of the mental anguish doctrine in Texas to allow defendant in error a recovery in his own right for the suffering he endured, it is respectfully suggested that the extension should be made, for the simple reason that it is fundamentally right in principle. Hence, without lengthening the statement of this dissent, under the conviction that the original opinion is right, it is here reiterated as the view of the writer.

[3] But the court all agreed, upon the reconsideration of the question, that we erred in holding that no reversible error was committed by the trial court in admitting testimony to the effect that, prior to her death, defendant in error's wife kept calling for him, and had been very much worried on being told that no response had been received from, etc. A further examination of the cases of *Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701, and *Tel. Co. v. Adams*, 75 Tex. 535, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920, especially as construed in *Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438, and *Tel. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936, has convinced us that they furnish no authority for our former holding, and that the testimony should have been excluded. Defendant in error could not in his own right recover for the mental suffering and anguish of his wife, but only for his own, and while the court so restricted his right of recovery, still the jury may have been unduly influenced by the prominence thus given the deathbed scene presented for their con-

sideration. As the verdict was for a lump sum, it is not possible to say what part of it might have been awarded for an improper and nonrecoverable element of damage, to wit, the mental anguish of the wife. For this reason alone the case would have to be reversed, and in the opinion of the writer it should be on that account remanded for a new trial; but in obedience to the majority opinion the motion for rehearing has been granted, and the cause will be here reversed and rendered for plaintiff in error.

Reversed and rendered.

GRAVES, J., dissenting in part.

### MILLER v. BRANCH. (No. 8545.)

(Court of Civil Appeals of Texas, Dallas.  
June 18, 1921. Rehearing Denied  
Oct. 15, 1921.)

1. Constitutional law  $\S$  298(1) — Landlord and tenant.  $\S$  200(1½) — Statute providing penalty for collecting rent greater than authorized void as denying due process.

Rev. St. 1911, art. 5475, as amended in 1915 (Acts 34th Leg. c. 38, § 1 [Vernon's Ann. Civ. St. Supp. 1918, art. 5475]), providing that tenant may recover twice the rental advanced, if the rental exceeds one-third the value of the grain and one-fourth of the cotton crop, is void as violating the due process clauses in both the federal and state Constitutions (Const. U. S. Amend. 14, § 1; Const. Tex. art 1, § 19).

2. Courts  $\S$  90(7) — If decisions of co-ordinate courts conflict on constitutional questions, the correct one will be followed.

Where the decision of the Court of Civil Appeal of another district conflicts with a decision of the court determining a constitutional question, the decision of the other court will not be followed, where not considered well founded.

Appeal from District Court, Collin County;  
F. E. Wilcox, Judge.

Action by T. F. Branch against A. M. Miller. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for appellant.

Smith & Abernathy, of McKinney, for appellant.

Truett & Neathery, of McKinney, for appellee.

HAMILTON, J. This action was brought by appellee to recover a penalty of \$2,000 against appellant under the provisions of an amendment to article 5475 of the Revised

Civil Statutes of Texas, the amendatory provision of the statute being that enacted by the Thirty-Fourth Legislature of Texas (Vernon's Ann. Civ. St. Supp. 1918, art. 5475).

Appellant rented to appellee a certain tract of agricultural land for the period of time between January 1, 1919, and December 31, 1919, and for it the appellee paid in advance as rental \$1,000 in cash. He cultivated the farm in grain and cotton during the year 1919 under the contract, and \$1,000 was more than the total value of one-third of the grain and one-fourth of the cotton produced on the land. Under these facts it was alleged by appellee that the rental contract was null and void and in contravention of the provisions of article 5475, and that in these circumstances he was entitled to recover from appellant \$2,000, double the amount of rent paid, as a penalty under the provisions of said article of the statutes.

The appellee recovered judgment for the amount claimed, and appellant has appealed upon various grounds assigned, among which the statute which authorizes the recovery is assailed as being in contravention of the due process clause of the Constitution of Texas (article 1, § 19) and of section 1, article 14, of the Constitution of the United States.

[1] That the enactment is repugnant to both the state and federal Constitutions in the respects complained of by appellant is the opinion of this court, for which reason we sustain the views presented to us in behalf of appellant. At the present term of court in passing upon another case involving the same contentions, we have construed the provision of the statute here assailed, and in that case already have held it to be in conflict with the above-mentioned respective constitutional provisions. The case is styled *Rumbo v. Winterrowd*, and is reported in 228 S. W. page 258. There our views and the reasons sustaining them are fully expressed. They apply precisely to the case here presented. No reason for modifying or extending any part of that opinion occurs to us in connection with the instant case, and we therefore merely refer to the *Rumbo* Case, above cited, for a full expression of the conclusions of law upon which we dispose of this appeal.

[2] Appellee cites the case of *Hawthorne v. Coates*, 202 S. W. 804, as an authority expressly upholding the validity of the statute and conflicting with the decision of this court in the case of *Rumbo v. Winterrowd*. We do not believe the two decisions are necessarily in conflict. The court in that case specifically stated that the only point involved was that of a statutory lien, and held that the landlord's lien should only apply to a certain class of rental contracts. The reason for the holding was said by the court to be that a lien created by statute for the payment of a debt is but a part of the remedy

afforded by law for collection of the debt; that it acts upon the property and is no part of the obligation of a contract. In that case the court did not expressly pass upon the constitutionality of the law with reference to the question here presented; nor do we think that decision impliedly holds the act to be valid. But, if in any view, it must be said that a conflict exists between the two decisions in relation to the constitutionality of the law, believing, as we do, the decision in the *Rumbo* Case to be well founded and entirely correct, we could not abandon it to adopt the contrary opinion of a court of equal dignity and jurisdiction, notwithstanding the very great respect we entertain for the decisions of that able tribunal.

Appellee cites, as in conflict with the decision of this court in the *Rumbo* Case, the case of *People v. La Fetra*, 230 N. Y. 429, 130 N. E. 601, recently decided by the Court of Appeals of New York, and the case of *Block v. Hirsh*, 255 U. S. —, 41 Sup. Ct. 458, 65 L. Ed. —, also recently decided by the Supreme Court of the United States. The constitutionality of legislation to regulate housing conditions in New York City was upheld in the former case, and a law designed for the same purpose in Washington was held to be constitutional in the latter. In both instances there were vigorous dissenting opinions. We deem it unnecessary to discuss at length the holding of the majority in either case.

The grounds, however, upon which the validity of the enactments in those cases was declared are not present in the legislative act which our decision in the *Rumbo* Case nullifies. We perceive no analogy whatever between either of those decisions and that in the case of *Rumbo v. Winterrowd*. The legislative acts under consideration in both of those cases were designed to meet an emergency arising out of the disordered conditions and turmoil resulting from the World War to which the inhabitants of those cities had fallen victim. Both measures were born of a purpose, expressed in the legislative acts and recognized by the courts' decisions, to protect the public in a passing emergency in the nature of a public calamity for which the police power may always be invoked. The legislative acts passed upon in those cases were demanded to protect the health, the morals, and the general welfare of the public, which were ascertained to be threatened because of temporary abnormal conditions produced by world-wide warfare among all civilized peoples. The good of the whole public, in the situation dealt with, demanded suppression of the profiteer's greed as much as the public welfare demands suppression of the gambler's depredations at all times. An examination of this court's opinion in the *Rumbo* Case reveals no statement question-

ing the right and authority of the Legislature to bring into action the police power in such exigencies as those of which the legislative acts construed by the New York Court of Appeals and the Supreme Court took cognizance. But the situation and the conditions, to which the Texas statute construed by us in this case and the Rumbo Case applies, are wholly dissimilar to those passed upon in the cases cited. The act involved here arbitrarily imposed restrictions upon the classes to be affected in normal times, and as a permanent thing, destroying the right to contract with reference to a subject-matter unaffected by any public interest. In the Rumbo Case this court has said that—

"The law does not pertain to the health or moral condition of those engaged in farming as tenants. The contracts to which the law applies in no way involve a rule of the landlord placing the tenant under constraint in regard to how he shall labor. It cannot soundly rest upon the theory that ownership of lands is concentrated into a few persons' possession, who create a monopoly affecting the public welfare, and hence requiring control and regulation. The very opposite of this is known to be true, for the ownership of land is most widely disseminated, and it is a matter of common knowledge that the tendency prevails towards ownership of smaller tracts by individuals. In their private relations with each other all men in their dealings upon such subjects as the leasing and selling of land in normal times must be free of the kind of interference and restriction interposed by this act in what clearly appears to us to be arbitrary fashion."

To differentiate this case from the cases of *People v. La Fetra* and *Block v. Hirsh* it is necessary only to bear in mind that no abnormal situation prevailed calling for regulating contracts between rural landlords and tenants as was done by our Legislature, and that no pretense was made to repress a widespread evil arising out of an emergency and afflicting the entire public, impairing the public welfare; whereas, the other two acts were passed to relieve crucial afflictions, pressing down upon the public out of a grave abnormality, superinduced by unprecedented and almost universal warfare, more destructive and unsettling in its effect than any which had gone before in the history of mankind. And, as said, the legislative acts in both instances cited expressly recognized these conditions, and resorted to the police power as a temporary means of dealing with a temporary exigency, in its nature a present emergency demanding action for the public welfare. They were war measures.

In the case of *Block v. Hirsh* the Supreme Court used this language:

"No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts. \* \* \* But a declaration by a legislature concerning public conditions that by necessity and duty it must know is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world."

Elsewhere the court used this significant expression:

"The regulation is put and justified only as a temporary measure. See *Wilson v. New*, 243 U. S. 332, 345, 346, 37 Sup. Ct. 298, 61 L. Ed. 755, 1 L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *Ft. Smith & Western R. R. Co. v. Mills*, 253 U. S. 206, 40 Sup. Ct. 526, 64 L. Ed. 862. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

In the course of the opinion also appears this expression:

"Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

Both the *La Fetra* and the *Block* decisions declare the statutes to be valid because pressing public necessity, universally recognized as growing out of the unusual and unprecedented conditions incident to war, demanded their enactment for the general welfare. The arbitrary quality by which the statute we construe is characterized, and also the quality of class legislation by which it is characterized, find no analogy in the acts construed in the *La Fetra* Case and the *Block* Case, and we do not think a reasonable construction of those decisions or of any other case can render our decision in the *Rumbo* Case in conflict with sound authority.

The judgment of the trial court is reversed, and judgment is here rendered for appellant.

## WILLIS et al. v. DAVIS. (No. 8129.)

(Court of Civil Appeals of Texas. Galveston.  
June 29, 1921. Rehearing Denied  
Oct. 6, 1921.)

**1. Associations ⇐10—Rules as to courts' interference with decisions relating to members stated.**

Courts will not interfere with decisions of voluntary associations in disciplining, suspending, or expelling its members, where no property rights are involved, except to ascertain whether or not the proceeding was pursuant to the rules and laws of such association, whether it was in good faith, and whether there was any violation of the laws of the land.

**2. Associations ⇐10—Member must exhaust remedies provided by association itself before applying to equity for relief.**

Where a voluntary association under its rules expels a member, the member must resort to, and must exhaust, the remedies provided by the association itself through its constitution and by-laws, before applying to a court of equity for relief.

**3. Associations ⇐10—Member who has been expelled in violation of rules of association may resort to equity for relief.**

Where member of voluntary association has been convicted of an offense and expelled in violation of the rules and by-laws of the association, and where no by-laws or other laws of the association make any adequate allowance for relief by appeal from such conviction and expulsion, such member may resort to equity for relief.

**4. Associations ⇐10—Member held entitled to enjoin association from expelling him.**

Member of voluntary association who was acquitted by his local lodge of making an attack upon grand officers, but who on appeal to the grand officers themselves was found guilty and ordered to be expelled, *held* entitled to restrain the association from expelling him; the provision of the by-laws providing for an appeal to and another trial before the grand officers, without the right on the part of the accused member to appeal from the judgment of such grand officers, being unreasonable and inadequate in such case.

Appeal from District Court, Waller County; J. D. Harvey, Judge.

Suit by W. L. Davis against W. S. Willis and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Allen V. McDonnell and J. D. Williamson, both of Waco, and A. G. Lipscomb, of Hempstead, for appellants.

Maurice Hirsch and Allen Hannay, both of Houston, for appellee.

LANE, J. This suit was brought by appellee, W. L. Davis, against appellants, W.

S. Willis and others, to restrain and enjoin them from expelling or causing him to be expelled as a member from Golden Banner Lodge No. 81 of the order of the Colored Knights of Pythias, same being the local lodge of said order at Hempstead, Tex.

W. L. Davis substantially alleged that he is and was prior to the 9th day of September, 1920, a member of said Golden Banner Lodge No. 81 of the Colored Knights of Pythias; that the defendant W. S. Willis was the Grand Chancellor of the Grand Lodge, Colored Knights of Pythias of the State of Texas; that the defendant J. E. Smith was the Grand Keeper of Records and Seals of said Grand Lodge, and that the other defendants were officers of said local lodge at Hempstead; that on said 9th day of September, 1920, he was duly and regularly tried by said local lodge on charges preferred against him by the defendant W. S. Willis, charging him with conduct unbecoming a member of said lodge, and of violating his oath and obligation as a knight of said order; that upon said trial he was adjudged not guilty of such charges, and was duly acquitted; that at said time Grand Chancellor W. S. Willis was represented by his attorney A. S. Wells, whom the said Willis had appointed under the provisions of the laws of said order to prosecute said charges; that after the trial which resulted in his acquittal the said prosecutor, Wells, gave no notice of appeal, but to the contrary stated to him (Davis) that he (Wells) was satisfied with the results of the trial; that notwithstanding such statement made by A. S. Wells to him (Davis), the said W. S. Willis attempted to appeal from said judgment of acquittal to the Grand Lodge officers; that in said body of Grand Lodge officers the complainant W. S. Willis was the presiding judge; that he (Davis) had no notice of or knowledge of such attempted appeal; that no notice of the time and place of hearing such appeal was ever given to him, and that he had no opportunity to be present or to have a representative present at the hearing of said appeal so as to make his defense; that there is no law of the order allowing the appeal attempted to be taken by said W. S. Willis, but notwithstanding the foregoing facts the Grand Lodge officers presided over by the complainant, W. S. Willis did without authority of law on the 9th day of November, 1920, pass a resolution directing and commanding the officers of said local lodge to expel him therefrom.

He alleged further that he had exhausted all remedies provided by the laws of said order before filing this suit, and that if the order of expulsion of the Grand Lodge officers is carried into effect, he would suffer irreparable damage, and that he had no adequate remedy at law to prevent such damage. His

prayer was for injunction to restrain the defendants from expelling him from the local lodge as directed by the Grand Lodge officers.

The defendants replied by general denial and special pleadings, as follows:

That the Golden Banner Lodge No. 31 of Hempstead, Tex., was a subordinate lodge of the Grand Lodge of the Colored Knights of Pythias of Texas, which Grand Lodge was a subordinate lodge of the Supreme Lodge of the Colored Knights of Pythias.

That the constitution and by-laws regulating the conduct of the Supreme Lodge, Grand Lodges, and subordinate lodges, together with the members thereof, duly adopted in 1913, provided for charges being made against any member of the order, for the trial upon said charges, and for appeal from the action of the local lodges by the Grand Chancellor of the Grand Lodge, to the officers of the Grand Lodge, and further provided for appeal by the party accused, from such action, as the Grand Lodge or the Grand Lodge officers might take, to the Supreme Lodge.

The defendants further alleged that the plaintiff had been subjected to trial in conformity with the rules, by-laws, and regulations of his order, and that on trial before the local lodge had been found not guilty; that an appeal had been taken by the Grand Chancellor in conformity with the rules and regulations of the order to the Grand Lodge officers, and that plaintiff had been found guilty on such appeal, and a decree of expulsion had been rendered, and that no other appeal had been taken; that all of the proceedings had been regularly done within the lodge, and were authorized by the constitution and by-laws of such lodge, and that such action of the lodge was conclusive, and they prayed that the temporary restraining order be set aside, and the plaintiff denied his injunction as prayed for by him.

A hearing was had before the judge in chambers on the plaintiff's application for injunction pendente lite, at the conclusion of which hearing on May 2, 1921, the court entered an order granting a temporary injunction in accordance with plaintiff's prayer.

Appellants' contention on appeal is that the court erred in granting the temporary injunction restraining the defendants from expelling appellee, W. L. Davis, from his local lodge and from the order of the Colored Knights of Pythias of Texas, as directed by the Grand Lodge officers, because:

First, under the pleadings and undisputed evidence on the hearing, the plaintiff, W. L. Davis, had been tried and ordered expelled from said fraternal order in the manner and in accordance with the rules and regulations provided in the constitution and by-laws of the said fraternal order, and no property rights being involved, the plaintiff cannot complain of his expulsion from said order

where same is done in the manner and form provided in the by-laws to which he had subscribed by becoming a member of said fraternal organization.

Second, under the pleadings and undisputed evidence adduced on the hearing, the plaintiff, W. L. Davis, had a right of appeal from said order and had not exhausted his remedies within the fraternal order, of which he was a member, to correct or have set aside, if wrongfully made, the order of his expulsion, by proper appeal to tribunals within the order.

Neither of these contentions should be sustained. The charges preferred against appellee Davis by Grand Chancellor W. S. Willis, upon which he was tried and acquitted by the subordinate lodge at Hempstead, were: First, that he caused to be published in a newspaper a part of the proceedings of the Grand Lodge of said order, and thereby made known to the public the proceedings of the order in violation of his oath as a member of said order; second, that he caused to be published in said paper and circulated in the state of Texas an article headed as follows:

"Unusual, Non-Pythian and Wholly Unparliamentary Proceedings in Knights of Pythias Grand Lodge at Dallas. Tactics Employed Disgrace to Pythianism. Action of Opposition Exonerates Rodgers in the Minds of all Fair-Minded, Unprejudiced Men."

That by said article the Grand Lodge, the Grand Chancellor, and the Grand Lodge officers of said order were attacked and scandalized, in violation of the laws of the order; and that said article was calculated to and was intended to bring said Grand Lodge officers and the Grand Lodge into disrepute among its members and the public generally. By section (c) of article 247 of the laws of the order it is provided:

"If the lodge shall, after trial, fail or refuse to convict a member against whom complaint and charges have been filed, any member thereof, or the Grand Chancellor may in his discretion, appeal to the Grand Lodge officers. If upon final hearing the offender or offenders be convicted of the offenses charged and the lodge shall still fail or refuse to inflict the penalty prescribed by this statute, and ordered to be imposed by the tribunal of the final hearing in the case, the Grand Chancellor of the jurisdiction shall at once suspend the charter of such lodge; provided, that such a majority of the members of such lodge, prior to the next convention of this Grand Lodge, petition the Grand Chancellor for permission to rescind the action upon which suspension was based, he may authorize such lodge to take the action proposed in the petition, and upon compliance of such lodge with the orders or judgments made in the case, he shall revoke his order suspending the charter of such order."



The only article of the laws and rules of the order relied upon by appellant as fixing the time and manner of giving notice of appeal by the Grand Chancellor, from an acquittal of the accused by the local lodge, is article 80, which reads as follows:

"An appeal may be taken from the action or decision of any subordinate lodge under the immediate jurisdiction of the Supreme Lodge of the Knights of Pythias \* \* \* to said Supreme Lodge, by any member of such subordinate lodge, or by any other person whose rights have been denied by such action or decision, upon giving written notice to said subordinate lodge of such appeal, within two weeks from and after such action or decision."

From the judgment of acquittal of Davis by the local or subordinate lodge at Hempstead, Grand Chancellor Willis attempted to appeal to the Grand Lodge officers, by giving notice of such appeal to said local lodge after the expiration of two weeks. No notice of such appeal was given to the accused, W. L. Davis.

Upon the appeal to the Grand Lodge officers the charges against the accused were heard by said officers, without notice to the accused, and thereupon they passed a resolution expelling the accused from his local lodge and from the order, and directed and commanded the local lodge that it carry into effect its said directions and demands and expel the accused from the order.

[1, 2] It is well settled that the courts will not interfere with the decisions of any kind of voluntary association in disciplining, suspending, or expelling its members where no property rights are involved, except to ascertain whether or not the proceeding was pursuant to the rules and laws of such an association, whether or not it was in good faith, and whether or not there was in it anything in violation of the law of the land. *Brown v. Harris County Medical Association*, 194 S. W. 1179, and authorities there cited. It is also well settled that where such an association under its rules expels a member such member must resort to and must exhaust the remedies provided by the association itself, through its constitution and by-laws, before applying to a court of equity for relief. *Brown v. Harris County Med. Ass'n*, supra, and authorities there cited.

[3] But we have found no authority holding that where a member of a voluntary association has been convicted of an offense and expelled in violation of the rules and by-laws of the association, and where no by-

laws or other laws of the association make any adequate allowance for relief by appeal from such conviction and expulsion, such member may not resort to a court of equity for relief. The uniform holdings of the courts are to the contrary.

"As a rule the writ (mandamus or injunction) will not be granted until the relator has exhausted the means of relief and appeal \* \* \* afforded him by the by-laws and rules of the corporation (association) unless such remedies are inapplicable or unreasonable, and inadequate, or would prove vain and useless." 26 Cyc. p. 345.

[4] It is apparent from appellee's petition and the undisputed facts that he was duly tried upon a complaint made by the Grand Chancellor, charging him with an attack upon the complainant and other Grand officers; that he was by his local lodge found not guilty and acquitted; and that by the by-laws and rules of the order, the charges were in the manner heretofore stated carried by appeal before the Grand officers to be by them again tried. Under the facts of this case, can it be supposed that these officers could give the accused an unprejudiced hearing? We think not. We think the rule thus provided for the trial of the accused under the circumstances was unreasonable, inadequate, and that had he been notified of such appeal and given an opportunity to appear before such officers and make his defense, such defense as he might have made would in all reason have proven vain and useless. The articles of the constitution and by-laws of the order thought applicable to the matters at issue are found in the statement of facts, and from them we have been unable to find any provision empowering the Grand Lodge officers to order the local lodge to expel the appellee from the order, unless such power be implied by section (c). art. 247, hereinbefore quoted; nor have we discovered in any of these articles a right on the part of appellee to appeal from the judgment of the Grand Lodge officers no matter how unjust the same might be.

After a careful examination of the pleadings and evidence, we have reached the conclusion that under such pleadings and evidence the trial court was justified in granting the injunction prayed for.

Having reached such conclusion, it becomes our duty to affirm the judgment, and it is so ordered.

Affirmed.

**SHANNON v. STAHA. (No. 711.)**

(Court of Civil Appeals of Texas. Beaumont.  
July 8, 1921. Rehearing Denied  
Oct. 12, 1921.)

1. Specific performance  $\S$  120—Receipt given purchaser for part payment held admissible to show parol sale.

In purchaser's suit for specific performance of parol contract for sale of land, receipt given purchaser for part payment held admissible as evidence of the parol sale.

2. Specific performance  $\S$  117 — No variance between allegation that purchaser purchased four lots and proof that he purchased two, where suit was dismissed as to other two.

In purchaser's suit for specific performance of parol contract for sale of land, there was no variance between the allegation that he purchased lots 23, 24, 25, and 26, in a certain block, and testimony that he purchased only lots 23 and 24, where before resting purchaser dismissed his suit as to lots 25 and 26.

3. Frauds, statute of  $\S$  129(11)—Parol sale held not within statute where purchaser paid part of price, took possession, and constructed dwelling on lot.

Where purchaser under parol contract paid a portion of the purchase price, took possession, and constructed a dwelling on the lot before any dispute arose as to the validity of the sale, the sale was not within the statute.

Appeal from District Court, Jefferson County; W. H. Davidson, Judge.

Suit by Louis Staha against Joe Shannon. Decree for plaintiff, and defendant appeals. Affirmed.

A. L. Shaw, of Beaumont, for appellant.  
David E. O'Fiel, of Beaumont, for appellee.

**WALKER, J.** This was a suit by appellee against appellant, praying for specific performance of a verbal sale of land and for damages. On a trial by the court without a jury, judgment was for the plaintiff. Defendant duly entered his exceptions, and on his motion the trial court filed the following conclusions of fact:

"(1) I find that on or about Monday, December 3, 1917, the defendant herein entered into a verbal agreement with the plaintiff, Louis Staha, to sell him a plot of land in block 91 of a suburb to Beaumont, sometimes called 'East Beaumont,' but in a map or plat of same, which was introduced in evidence herein, called 'Rose City' laid out on tract of land directly opposite the city of Beaumont and on the east side of the Neches river about 2½ miles from Beaumont, Tex., on what is known as the 'Beaumont-Orange Upper Road,' for a total consideration of \$35, and that same was a reasonable and fair price for said land.

"(2) That on or about Monday, December 3,

1917, and after the making of said agreement, the plaintiff, Louis Staha, paid the defendant, Joe Shannon, the sum of \$10, and received from Joe Shannon a receipt for the same, written and signed by Joe Shannon, reading as follows: 'Received of Louis Staha \$10.00 as part payment on lot in East Beaumont, Blk. 91, total price \$35.00, balance \$25.00, Monday Dec. 3, 1917. [Signed] Joe Shannon.'

"And that at the time of making the sale, or immediately thereafter, the said Joe Shannon went out upon the land and stepped it off, showing plaintiff the boundaries and plot on the ground, making a strip of land 60 feet wide by 140 feet deep, and which said strip or plot of land was identified as lots 23 and 24, block 91, of 'Rose City' as laid out by the East Beaumont Oil & Gas Company on their lands in Orange county, opposite Beaumont, Tex., as shown by the plat or map above referred to introduced in evidence.

"I find that on September 16, 1918, of the remaining \$25, Joseph Shannon, defendant, accepted payment of \$10 in work, and which the evidence shows was agreed to be applied in part payment of said \$25, at which time the said Joseph Shannon executed and tendered his receipt in writing, signed by him, reading as follows: 'Sept. 16, 1918. I, Joseph Shannon, hereby acknowledge that I am in debt to Louis Staha, \$10.00 for carpenter work. [Signed] Joseph Shannon.'

"I find that on or about January 1, 1919, and before the filing of this suit, Louis Staha tendered and offered to pay Joe Shannon the sum of \$15 balance, which tender and offer were refused by Joe Shannon, defendant, and that thereafter and at the time of the trial of this suit, the sum of \$15 was tendered and paid into the registry of the court for the use and benefit and to be paid to the said Joe Shannon by Louis Staha, as a preliminary to his receiving a deed of conveyance from Joe Shannon, defendant, which was also refused by said Joe Shannon.

"I further find that at the time of the agreement to sell said land by Joe Shannon to Louis Staha, the said Joe Shannon agreed to make and deliver to Louis Staha a general warranty deed, conveying him said land, which said conveyance was to be made on the completion of the payment of said balance due of \$25.

"I find that immediately after the agreement to sell, made him about the 1st of December, 1917, the said Louis Staha entered into the possession of said premises and cleared off the land, which was grown up with scrubs and underbrush and covered with stumps, at considerable effort and expense and matter of time to himself, and that very shortly and almost immediately thereafter the said Louis Staha made and erected on said premises a small two-room frame house, which in workmanship and material at the time of its erection was worth approximately the sum of about \$125 or \$130, and that thereafter the said Louis Staha made an addition to said house, an expense to himself in workmanship and material of approximately \$75, and that at the time of the filing of this suit herein and trial hereof, the improvements upon the place in the way of said house were worth at least the sum of \$200, and I find that said improvements were made and the

house erected before any dispute arose between plaintiff and defendant as to defendant's executing to plaintiff said deed.

"I find that the plaintiff inclosed said land with a fence of poultry wire netting entirely around the same, with six-inch rail at the bottom and one or two wires at the top, and that the approximate worth of said fence in material and labor was about the sum of \$40.

"I find that some time on or about November 15, 1919, before the filing of this suit and during the casual absence of plaintiff, Louis Staha, from off of said premises, the said Louis Staha being an unmarried man and living alone on said premises in controversy, the defendant, Joe Shannon, with two others, without the knowledge or permission of the plaintiff, Louis Staha, chopped down, partially destroyed, and injured the fence erected by plaintiff around said property, and that stock, consisting of cattle and hogs, entered on said property and injured the patch of sweet potatoes, resulting in a total loss to the plaintiff of said sweet potatoes, and that the value of the potatoes was \$45, and that the fence, while not resulting in a total loss, was damaged and injured to the extent of \$15.

"I find from the evidence that after the filing of this suit the defendant, Joe Shannon, had filed two suits in forcible detainer against the plaintiff, Louis Staha; one in the Tiger Creek schoolhouse precinct No. 4, Orange county, Tex., and one at the justice court, precinct No. 1, Orange county, at Orange, Tex., which latter suit has occasioned the plaintiff herein a great deal of annoyance and inconvenience in order to look after, and I find that immediately after the defendant herein had chopped down and destroyed the fence around plaintiff's property he had made threats to plaintiff that he would chop his fence down every time he put it up, and I further find that at another time about the time of the bringing of this suit the defendant, Joe Shannon, had entered upon the premises of the plaintiff and went into the plaintiff's house and attacked him in his house, apparently without cause or provocation, and from such evidence so submitted and adduced before me, I find that the actions of the defendant in cutting said fence were malicious, unprovoked, and unjustifiable, and done with the intent to harm and injure the plaintiff, and I find that the sum of \$100 is an approximate and adequate sum to be awarded the plaintiff, as exemplary damages.

"I find that the plaintiff made the contract for the purchase of said land in good faith, relying upon the representations and statements of the defendant that defendant would execute to him a deed for said land, as soon as he had paid for same, and that but for such promise on the part of the defendant the plaintiff would not have purchased said land, nor made the improvements thereon, which he did.

"I find there is \$500 owing as balance on a mortgage on a large tract of land, by Joe Shannon, of which large tract this land is a part."

[1] Appellant's first assignment of error is against the admission of the following receipt:

"Received of Louis Staha \$10.00 as part payment on lot in East Beaumont, Blk. 91, total price \$35.00, balance \$25.00, Monday Dec. 3, 1917. [Signed] Joe Shannon."

No error is shown in the admission of this instrument. This instrument was not the basis of appellee's cause of action, but was offered only as evidence of parol sale. Under the evidence, as reflected by the statement of facts, appellee did not buy the property in controversy by lot number, but bought it as a "lot." He testified that the defendant pointed out to him the property actually sold, and that he thought he was buying one lot 50x140 feet.

[2, 3] Under his second and third assignments, appellant advances the proposition of variance between the facts alleged and the facts found by the court. We cannot sustain him in this contention. Appellee alleged that he bought lots 23, 24, 25, and 26 in block 91. He alleged further that after the parol purchase of these lots he immediately went into possession and improved them by building a house thereon, fencing and grubbing and putting it in cultivation. His testimony sustains his allegation that he fenced all the land he bought. The testimony showed that he had under fence only lots 23 and 24. Before resting he dismissed "his suit" as to lots 25 and 26, leaving in controversy only lots 23 and 24. This did not constitute a variance between his allegations and his proof. In fact, the proof directly sustains the allegation that the sale involved the land appellant had under fence. Then when he dismissed as to lots 25 and 26, the property, by lot and block number, was the identical property which had been sold him. The court's conclusion of fact that appellant agreed to sell these lots to appellee is abundantly supported by testimony. Under the facts found by the trial court, this sale does not come within the provisions of the statute of frauds.

This disposes of all of appellant's assignments of error.

The judgment of the trial court is in all things affirmed.

**MITCHELL v. TEAGUE. (No. 692.)**

(Court of Civil Appeals of Texas. Beaumont. July 1, 1921. Rehearing Denied Oct. 12, 1921.)

1. Principal and agent §88 — Where agent delegates performance, subagent cannot look to his principal for compensation.

Where an agent on his own account undertakes to delegate to a third party the performance of a duty which he owes his principal, the subagent must look for his compensation to his immediate employer, and not to the principal.

2. Executors and administrators §97 — Executor employing broker held personally responsible for commission.

Where an executor represented to a broker that he had authority from his mother as co-executor, and his brothers and sisters, to lease land belonging to the estate, and employed the broker at a stipulated compensation per acre for his services, he was only the agent of the others, and was personally responsible for the commission.

Appeal from Liberty County Court; O. N. Smith, Judge.

Action by J. S. Teague against Leon Mitchell. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Pickett, Jr., and C. H. Cain, both of Liberty, for appellant.

J. F. Dobney, of Liberty, for appellee.

**WALKER, J.** This was a suit by appellee against appellant individually and as executor of the estate of his deceased father for commissions on a real estate deal. Appellant and his mother were joint executors. Appellee, as a real estate broker, under a contract with appellant found a purchaser for an oil lease on 25 acres of land belonging to the estate, who was able, ready, and willing

to take the lease and pay for it on the terms stipulated by appellant. Individually and as executor, appellant promised and bound himself to pay appellee \$10 per acre for his services for selling the lease. He also contracted that all the parties interested in the land would join in the execution of the lease. His mother and his brothers and sisters refused to consummate the sale, and he joined them in leasing the land to other parties. As we understand the record, there is no controversy as to the facts. Under instructions from the court, the jury returned a verdict for appellee.

[1] There was no error in this instruction. When an agent, upon his own account, undertakes to delegate to a third party the performance of a duty which he owes his principal, the rule is well settled that the subagent must look for his compensation to his immediate employer, and not to the principal. *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953; *National Cash Register Co. v. Hagan & Co.*, 37 Tex. Civ. App. 281, 83 S. W. 727; *Houston Cotton Oil Co. v. Bibby*, 43 Tex. Civ. App. 100, 95 S. W. 562; *Tynan v. Dulling*, 25 S. W. 466.

[2] Appellant represented to appellee that he had authority from his mother, as his coexecutor, and his brothers and sisters to lease the land belonging to his father's estate. According to his own statement of the facts, he employed appellee to find a lessee, agreeing to pay him \$10 per acre for his services. Thus, on his testimony, he was only the agent of his mother and his brothers and sisters, and under the rule above announced was personally responsible to appellee for the commission.

Appellant presents numerous assignments against the instructed verdict, but we believe, on the facts of this record, the proposition of law just announced is decisive of all issues against appellant.

The judgment of the trial court is therefore in all things affirmed.

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**BENTON, County Clerk, et al. v. CLAY.**

(Court of Appeals of Kentucky. Oct. 14, 1921.)

**Appeal and error** ⇐781(4)—**Appeal dismissed as presenting only moot question.**

Where plaintiff sought to enjoin proceedings for an election under the previous form of city government on the ground that a commission form of government had been legally adopted at a valid election, but asking no other affirmative relief and temporary injunction issued, and after the time set for such election judgment was entered, holding the adoption of such new form valid, but giving no affirmative relief, an appeal presented only a moot question, and must be dismissed.

**Appeal from Circuit Court, Henderson County.**

Suit by C. L. Clay against Otis A. Benton, County Clerk, and others, to enjoin printing names on a ballot for an election under the prior form of city government after alleged adoption of a new form. From a judgment deciding that the new form of government was legal but granting no affirmative relief, defendants appeal. Appeal dismissed without prejudice.

**Henson & Taylor, of Henderson, for appellants.**

**John C. Worsham and G. O. Letcher, both of Henderson, for appellee.**

**THOMAS, J.** At the regular election on November 2, 1920, the voters of the city of Henderson, Ky., a city of the third class, by a large majority adopted the commission form of government for such cities, as is provided by section 3480b, Kentucky Statutes, Carroll's 1915 Edition. The votes of the election adopting that form of government were duly canvassed and certified as required by law, and nothing remained to be done to put into effect the commission form of government except the election of the necessary officers, including two commissioners in the year 1921, as provided in subsection 5 of the section referred to.

On June 8, 1921, this action in equity was filed by appellee C. L. Clay against appellant and defendant Otis A. Benton, the clerk of the county court of Henderson county, and George M. Royster, in which plaintiff sought an injunction against the clerk to prevent him from printing the name of his codefendant Royster on the ballot for the primary election on August 6, 1921, as a candidate for the Democratic nomination for councilman in one of the wards of the city, and to enjoin Royster from taking any steps seeking such nomination upon the ground that the commission form of government had been adopted, which dispensed with the office of councilman, and substituted therefor commissioners, and that plaintiff, as a taxpayer,

was interested in preventing the expense of such illegal primary election. Answer was filed in which the validity of the election on November 2, 1920, adopting the commission form of government, was attacked on the sole ground that the sheriff, who held it under the order of the county court calling it, had not complied with the law requiring him to publish the order in a newspaper, as is provided in subsection 3 of the section supra. But in all other respects it was admitted by the answer that the election was legal.

Pursuant to notice the judge of the Henderson circuit court, on June 18, 1921, granted a temporary injunction in accordance with the prayer of the petition. The defendants, in due time, made motion before Judge Clay, a member of this court, to dissolve that injunction, and he, before the August primary, 1921, overruled that motion, three other members of the court concurring. No further action was taken in the case until the regular September, 1921, term of the Henderson circuit court, when on the 16th day of that month the cause was submitted for final judgment, and the court adjudged that the election adopting the commission form of government was legal and regular in all respects, but no reference whatever was made in the judgment to any affirmative relief by injunction or otherwise, either for or against any of the parties litigant. From that judgment this appeal by defendants is prosecuted. No prayer for relief is contained in any pleading in the case, except the one for an injunction which affected only the right of defendant Royster to seek the nomination for councilman of the city in the primary election on August 6, 1921, and when the judgment appealed from was rendered that time had passed, and the question involved became essentially a moot one. The validity of the 1920 election was only incidental to the whole relief sought by the action.

It is unfortunate that the condition of the record is such as prevents us from adjudicating the single question raised against the validity of that election; but it is a firmly settled rule in this and all other courts that it will not assume jurisdiction to determine abstract or moot questions, and thereby consume and appropriate its time in academic discussion, since courts are created for the purpose of trying cases rather than questions. *Waller v. Henderson Telephone & Telegraph Co.*, 101 S. W. 372, 31 Ky. Law Rep. 39; *Searcy v. Fayette Home Telephone Co.*, 143 Ky. 811, 137 S. W. 777; *Winslow v. Gayle, Mayor*, 172 Ky. 126, 188 S. W. 1059; *Thompson v. Thompson*, 188 Ky. 811, 224 S. W. 350; 2 Cyc. 533, and 3 Corpus Juris, 357, 358. These and all other authorities hold that "it is not within the province of appellate courts to decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief" (*Corpus Juris, supra*), and the fact

that the question involved is one of public importance does not change the rule. Cases involving the exact question here are *Xavier Realty Co. v. Louisiana R., etc., Co.*, 115 La. 343, 39 South. 6; *Central Bitulthic Paving Co. v. Highland Park*, 164 Mich. 223, 129 N. W. 46, Ann. Cas. 1912B, 719, and *Winslow v. Gayle*, Mayor, supra. In the latter case suit was filed by some citizens of Carrollton, Ky., to enjoin the mayor and the board of councilmen of the city from issuing a license granting to the proposed licensee, who was also a defendant, granting to him the privilege of holding a street fair on the streets of the city on December 1, 1915, upon the ground that there was no authority to issue such license. The case did not reach this court until after the date for the exercise of the privilege, and we held that only a moot question was presented, and said in the opinion that—

"Nothing is involved now in this action but an abstract proposition of law. It therefore follows that this action is a moot case."

Cases are cited in that opinion, both foreign and domestic, holding that—

"A 'moot case' is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy."

There is now no existing controversy between any of the parties to this action, although it is quite probable that as members of the public in the city of Henderson they are indirectly interested in having the question of the validity of the 1920 election settled, but all citizens of the state or of any municipality therein might be said to have the same indirect interest in the settlement of all public questions affecting the territory involved.

It results therefore that this appeal must be, and it is dismissed, but of course without prejudice to another appropriate action to determine the validity of the election involved.

#### HOOVER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 14, 1921.)

1. Homicide  $\S$ 250—Evidence held sufficient to convict of manslaughter.

In murder trial, evidence held to sustain verdict of manslaughter.

2. Homicide  $\S$ 300(14), 301—Instruction on self-defense and defense of family held to omit element of real or apparent danger.

In murder trial, where the evidence raised the issue of self-defense or defense of accused's

family, such issue held not covered by instruction given, which omitted the element of real or apparent danger impending.

Appeal from Circuit Court, Lee County.

James D. Hoover was convicted of manslaughter, and appeals. Reversed and remanded.

Ezart Ashcraft, of Heidelberg, and Sam Hurst, of Beattyville, for appellant.

Chas. I. Dawson, Atty. Gen., and Thomas B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CLARKE, J. The appellant, James D. Hoover, at his home in Lee county shot and killed Greeley Addison on November 8, 1919. He was indicted for murder and convicted of manslaughter, his punishment being fixed at confinement for 21 years in the penitentiary.

[1] The first complaint upon this appeal is that the verdict is not supported by the evidence. This contention is based upon the theory that defendant by his testimony made out a clear case of self-defense, and that the jury could not disregard his evidence since he was the only witness who saw or attempted to state how the killing occurred or what happened at the time and immediately prior thereto. But this argument is obviously unsound even if we could admit that defendant's evidence justified the homicide, since the commonwealth proved previous threats, statements made by the defendant, and his conduct immediately following the killing and that thereafter, arming himself, he avoided arrest for several days by hiding in the mountains and away from his home, which with many other proven circumstances cast much doubt upon the truth of his testimony and which are quite inconsistent with innocence of wrongdoing. We are therefore of the opinion that the evidence is quite sufficient to sustain the verdict and that there is no merit in appellant's first contention.

[2] 2. Another contention made by appellant upon the appeal is that the court erred in failing to instruct the jury upon the question of self-defense. The Attorney General in his brief for the commonwealth admits that it is doubtful whether the court's action in this matter can be sustained, but seeks to do so, first, by attempting to show that there was no evidence that defendant killed deceased in his necessary defense, and, second, that an instruction given by the court in lieu of the ordinary self-defense instruction was sufficient under the evidence in this case. Defendant and deceased lived on the same creek about a mile apart. Defendant went to the home of deceased three times on the day of the killing, which did not occur until about midnight. On the first two visits, one in the morning and the other early in the

afternoon, defendant carried a shotgun and, according to Mrs. Addison, simply asked for her husband, who was not at home, and stated that he had a sick child. Defendant says these two visits were made for the purpose of buying whisky and that he purchased a quart from Mrs. Addison. The last visit was made about dark, and deceased was then at home. Defendant was unarmed, ate supper, and remained there until between 9 and 10 o'clock, when he and deceased left together; and the wife says her husband accompanied defendant upon invitation of the latter to "come and go with him, that he had a dram of whisky he would give him down there on the creek." Defendant says deceased followed him home over his protest cursing him and threatening him with violence if he did not go with him to drive off a neighbor. There is evidence that both, if not drunk, were at least somewhat under the influence of liquor. What happened after they reached defendant's home is thus related by him:

"Well, he commenced using bad language and talking bad, and my wife was sick, and I ordered him out of the house. I told him my wife wasn't able to stand it and that he had to go, and he got out there, and by that time the moon was getting kindly dim, showed a little, and he said, 'Let me come back in the house and fix my carbide lamp,' and I said, 'Will you go on off if I'll let you do that?' and he said, 'Yes,' and he said he wanted a knife and some water, and he comes in the house and got a chair and went out and sat down in front of the door and emptied the old carbide out of his light and got it lit, and then he come back in the house, and when he come back he come the same way using bad language and cussing, and I said, 'I thought you were going to leave when you got your light fixed,' and he was telling me I had to leave all the time, and I put him out again, and he come right back in the house when I made him get out, and he said, 'You, by God, you have got to go,' and I said, 'No, I am not going,' and he kept saying what he was going to do for my woman and that he could wait on her, said he had doctored cattle and all like that, and he said he was her, and he got his fixing out and he told her what he was going to do and said then she could have it, and my wife was in the bed and bad off, and he taken himself out and said that when he done so and so to the woman she could give birth to the child, and I put him out of the house and told him to go and took him and put him clear out to the creek and told him if he come back I would kill him, and I come back to the house, and he come back right after me telling me he aimed to stay, and he said, 'God damn you, you have got to leave' and I begged him to be gone and told him to start, and he throwed his hand back like that, like he had a pistol or a bottle or something, and he said, 'I am going to come back if I have to fill that house full of steel jackets,' and I jobbed my gun out that way and shot, and he staggered backwards and fell, and when he fell he asked me to forgive him, and I

stepped over to him and forgave him, he said, 'Forgive me, Jim Dan,' and he never spoke another word, and I told him he was forgiven."

It is urged by the attorney for the Commonwealth that this statement by the defendant himself of the facts and circumstances leading up to the killing does not contain the necessary elements of self-defense especially when considered in connection with the fact that it was shown without contradiction that deceased was unarmed at the time of the killing; that defendant was not in real danger and could not have believed that he was, if he thought deceased was only reaching for a "bottle or something" when he shot him; and that even if he believed deceased was reaching for a pistol the language used by deceased did not indicate a purpose of using it against defendant but upon the house merely; that the threatened danger, if any, was to the members of defendant's family who were in the house and not to him as he was on the outside.

This argument is adroit rather than convincing, since it is familiar law that one is authorized to act in his self-defense, or in defense of a member of his family, to avert an impending danger of death or great bodily harm, whether such danger is "real or to him apparent" only, and the evidence here certainly is sufficient to require a decision by the jury of whether or not, under all the facts and circumstances, defendant was so acting when he shot and killed deceased. To deny such weight to defendant's own testimony is to deny the very purpose for which it was given and the only reasonable inference that can be drawn therefrom.

Unless, therefore, the instruction given in view of the ordinary self-defense instruction contains every essential of such an instruction, the whole law was not given to the jury, and prejudicial error was committed.

The instruction to which the defendant objects, and which counsel for plaintiff insists was sufficient when considered as a self-defense instruction, reads:

"If the jury believe from the evidence that the deceased, Greeley Addison, after entering defendant's house, in the presence and hearing of his family used obscene language or assaulted any members of his family, defendant had the right to command him to leave the house, and if he refused to do so, to eject him therefrom by the use of such force as was necessary, or appeared to defendant reasonably necessary to that end. And if the jury believe from the evidence that defendant to protect his family from such obscene language, or from such assault, if any or either, ordered deceased to leave the house, and the latter failed or refused to leave and defendant then believed and had reasonable grounds to believe from the conduct of the deceased and all the circumstances that he or any member of his family

was then in danger of death or great bodily harm at the hands of the deceased, he had the right to use such force as was necessary or reasonably appeared to him to be necessary for his or their protection, even to the shooting of the deceased, and if he so shot and killed the deceased the jury should acquit him."

This instruction is almost a literal copy of one that this court prepared and directed to be given on a new trial in *Watson v. Commonwealth*, 132 Ky. 46, 116 S. W. 287, not, however, in lieu of the ordinary self-defense instruction, but in addition thereto, which fact alone would seem sufficient answer to the contention it covers the question of self-defense. That it was not so intended in the *Watson* Case is obvious, and that it is not sufficient for that purpose here is at once apparent, since it omits entirely the words "real or to him apparent" and the idea thereby conveyed with reference to the impending danger, which omission this court has frequently held to be prejudicial error. See *Hobson's Instructions*, § 758, and cases there cited, especially *Martin v. Commonwealth*, 78 S. W. 1104, 25 Ky. Law Rep. 1928.

Not only so, but this instruction was prepared to fit the facts of the *Watson* Case which are not analogous to the facts of this case. There the deceased was in the house and actually assaulting members of the defendant's family, while here deceased was not so engaged but had been ejected from the house and was attempting to return.

Since it is the duty of the court to instruct upon the whole law applicable to the case, the jury upon the evidence here should have been informed of defendant's right to prevent deceased from forcibly re-entering his house; but as in doing this alone and by itself defendant would not have been justified in killing deceased, it doubtless would be more appropriate to incorporate such information in the self-defense instruction rather than to give it as a separate instruction, although it can be done either way.

As the other matters complained of are not apt to occur upon another trial, we do not pass upon them.

For the reasons indicated, the judgment is reversed, and the cause remanded for a new trial consistent herewith.

#### WAGES v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 14, 1921.)

1. Criminal law § 1211—Second offense must be committed subsequent to offense for which defendant was previously convicted to warrant heavier penalty.

A second offense, to warrant a heavier penalty under Ky. St. Supp. 1918, § 2572c8

must have been committed subsequent to the offense for which defendant had been previously convicted.

2. Criminal law § 1202(7)—Defendant could not complain that the offense was not a second offense in absence of objection or exception to instruction authorizing increased penalty.

Defendant, convicted of a second offense under Ky. St. Supp. 1918, § 2572c8, authorizing a heavier penalty on conviction for a second offense, could not complain on appeal that the offense for which he had been convicted had been committed prior to the offense for which he had been previously convicted, where no exception or objection had been interposed to the instructions authorizing the increased penalty.

3. Criminal law § 1202(2)—Proof that offense was defendant's second offense unnecessary where he pleaded guilty.

Where defendant, indicted for a second offense under Ky. St. Supp. 1918, § 2572c8, pleaded guilty, the state was not required to prove the offense with which he was charged had been committed prior to the offense for which he had been previously convicted.

4. Criminal law § 1202(1)—Defendant's affidavit that the offense was not a second offense held insufficient to warrant granting of new trial.

In prosecution for a second offense under Ky. St. Supp. 1918, § 2572c8, defendant's affidavit that the offense had been committed prior to the offense for which he had been previously convicted, and that he pleaded guilty, thinking that he was being tried for another offense, held not to warrant the granting of a new trial, since by his plea of guilty he confessed to having committed such offense subsequent to the offense for which he had been formerly convicted, and since the affidavit was not insufficient to show that the plea of guilty was entered and maintained under duress or under incapacitating circumstances, or to show newly discovered evidence, or to support a claim of surprise, under Cr. Code Prac. § 271.

5. Criminal law § 936(5)—Claim of surprise made as ground for new trial comes too late where made for first time on motion for new trial.

A claim of surprise, to constitute a ground for a new trial under Cr. Code Prac. § 271, comes too late when made for the first time on motion for new trial.

6. Criminal law § 918(1)—Statute authorizing new trial where defendant has not received fair trial refers only to cause for which defendant is not responsible.

Cr. Code Prac. § 271, authorizing the court to grant a new trial where of the opinion that the defendant has not received a fair and impartial trial, applies only to a cause for which defendant is not himself responsible.

Appeal from Circuit Court, Laurel County.

Conrad Wages was convicted of operating a moonshine still, and he appeals. Affirmed.



C. C. Williams, of Mt. Vernon, Ray C. Lewis, Lewis & Johnson, J. K. Lewis and B. F. Johnson, all of London, for appellant.

Chas. I. Dawson, Atty. Gen., and G. I. Rader, of Annville, for the Commonwealth.

CLARKE, J. On November 19, 1919, which was the twenty-second day of the October term of the Laurel circuit court, an indictment was returned against the appellant charging him with the offense of owning and operating a moonshine still in Laurel county, Ky., on November 13, 1919. In a second count of the indictment it is further charged that the defendant had been previously indicted for the same offense, and had been convicted thereunder on the 29th day of October, 1919, and his punishment fixed at a fine of \$100 and one day imprisonment in the county jail.

The proceedings of the former trial and conviction are fully set out, and it is specifically stated:

"That the offense described and of which the defendant is accused and indicted in the first count of this indictment was committed at a time subsequent to the said conviction and sentence referred to in this count."

On February 19, 1921, this indictment came on for trial, and defendant not being able to employ counsel, the court appointed two lawyers to represent him. A jury was selected, and defendant waived arraignment and entered a plea of guilty. The jury was sworn, and, "after hearing the instructions of the court and statements of counsel," returned a verdict finding the defendant guilty and fixing his punishment at five years' confinement in the penitentiary. His motion and grounds for a new trial having been overruled, he has prosecuted this appeal from the judgment entered on the verdict.

[1] Of the numerous grounds set out in his motion for a new trial but one is argued and relied upon here for reversal of the judgment, namely, that the offense for which defendant was convicted under this indictment was not committed subsequent to his former conviction for a like offense. The statute under which defendant was tried and convicted upon both indictments (section 2572c8, Ky. Stats., vol. 3) provides that—

"Any person guilty of any offense enumerated in this section shall, for the first offense, be fined not less than fifty dollars nor more than five hundred dollars and confined in the county jail not exceeding six months, and for the second offense confined in the penitentiary not less than one year nor more than five years, in the discretion of the jury."

In construing similar statutes providing a heavier penalty for a second or subsequent violation thereof, we have uniformly held that the increased penalty only applies to offenses committed after the first conviction. *Brown v. Commonwealth*, 100 Ky. 127,

37 S. W. 493, 18 Ky. Law Rep. 630; *Hyatt v. Commonwealth*, 116 Ky. 410, 78 S. W. 174, 25 Ky. Law Rep. 608; *Sharp v. Commonwealth*, 124 S. W. 317; *Morgan v. Commonwealth*, 170 Ky. 400, 186 S. W. 132. Hence if, as now contended for defendant, the offense for which he was convicted in this case was not committed subsequently to his prior conviction under this statute, the imposition of the heavier penalty was not warranted by the statute. There are however several obstacles in the way of a reversal for this reason upon the record in this case.

[2, 3] In the first place, neither objection or exception was interposed to the instructions authorizing the increased penalty. Then again, such an objection and exception, if saved, would have been unavailing, since by his plea of guilty defendant confessed that the offense for which he was being tried was committed on November 18, 1919, and after his former conviction for a like offense on October 29, 1919, as charged in the indictment. This plea rendered the introduction of evidence unnecessary, and none was offered, and the trial court properly instructed the jury on the whole law applicable to the facts confessed to be true which, under the authorities cited above, included the penalty imposed. Hence it follows that these authorities upon which defendant so confidently rests his appeal not only do not support his contention, but render it untenable.

[4] The fact that defendant in his affidavit filed in support of his motion for a new trial states that, "In truth and in fact I have not been operating any moonshine still nor had one in my possession at all since" his former conviction, cannot be sufficient by itself to warrant a new trial, since by his plea of guilty he confessed he had done so, and as a necessary consequence of such confession waived every right to contest that fact so far as this case is concerned, unless, perhaps, upon a sufficient showing upon the motion of a new trial that the plea was entered and maintained throughout the trial under duress or other incapacitating circumstances. Whether or not under such circumstances a new trial should be granted we need not decide, since we are sure there is nothing in appellant's affidavit sufficient for that purpose, as he only states as the reason for pleading guilty that the plea was entered "through misapprehension and being misinformed and under the wrong belief about the indictment," that he thought this indictment had been dismissed or filed away, and that he was being tried for another offense.

[5, 6] This is, of course, not in any sense newly discovered evidence. Neither is it a claim of surprise, although it more nearly resembles that than any of the other grounds for a new trial enumerated in section 271 of the Criminal Code, but even if it were a claim of surprise, such a claim first made in a motion for a new trial comes too late.

*Lewis v. Commonwealth*, 190 Ky. 160, 227 S. W. 149. Nor is it covered by the final general specification of section 271, supra, "or from any other cause, the court be of opinion that the defendant has not received a fair and impartial trial," since these words refer only to a cause for which the defendant is not himself responsible. *Ferrell v. Commonwealth*, 176 Ky. 330, 195 S. W. 495. To hold that the defendant was not responsible for the mistake here, if any, would be inconsistent with every known theory of his obligations and responsibilities upon the trial.

Wherefore the judgment is affirmed.

### ELK STAVE LUMBER CO. v. LEWIS, Judge.

(Court of Appeals of Kentucky. Oct. 11, 1921.)

1. Prohibition  $\S$  3(2)—Will not lie to interfere with judge proceeding within his jurisdiction where there is adequate remedy by appeal.

The Court of Appeals will not interfere by writ of prohibition with the judge of an inferior jurisdiction if he is proceeding within his jurisdiction and there is an adequate remedy by appeal from any erroneous decision he may make.

2. Prohibition  $\S$  3(2)—Will not lie to prevent court having jurisdiction from trying case at certain term.

Prohibition will not lie to prevent court having jurisdiction of persons and subject-matter from trying case during certain term; there being a remedy by appeal.

Application for writ of prohibition by the Elk Stave Lumber Company against William Lewis, Judge. Petition dismissed.

A. T. W. Manning, of Manchester, for plaintiff.

HURT, C. J. [1] The plaintiff, Elk Stave Lumber Company, seeks a writ of prohibition against William Lewis, judge of the Clay circuit court, to prohibit him from proceeding to try an action of the Elk Stave Lumber Company against P. D. Marcum et al., on the 12th day of October, 1921. The ground upon which the writ of prohibition is sought is that the action does not stand for trial at the term of the court which includes the 12th day of October, but the defendant, as judge of the circuit court, it is alleged, erroneously decided that it did stand for trial at that term, and over the objection of plaintiff ordered it to be set down for trial for the date stated, and, if not prevented by a writ of prohibition, will proceed to a trial of it upon that date. It is alleged that the defendant was in error in construing the provisions of the Civil Code (§§ 363, 364) re-

lating to the time that actions stand for trial, and will make such error again on the day set for the trial unless prevented by the process of this court. There is no pretense that the court in which the action is pending has not jurisdiction of the subject-matter of the action and of the parties, both plaintiff and defendant. This court has continuously held that it will not interfere, by a writ of prohibition, with the judge of an inferior jurisdiction, if he is proceeding within his jurisdiction and there is an adequate remedy by appeal from any erroneous decision he may make. *Fitzpatrick v. Young*, 160 Ky. 5, 169 S. W. 530; *Rush v. Denhardt*, 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199; *Hargis v. Barker*, 85 S. W. 704, 27 Ky. Law Rep. 441, 69 L. R. A. 270; *Morgan v. Clements*, 153 Ky. 33, 154 S. W. 370; *Carey v. Sampson*, 150 Ky. 460, 150 S. W. 531; *Jenkins v. Berry*, 119 Ky. 350, 83 S. W. 594, 26 Ky. Law Rep. 1141; *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006, 17 Ky. Law Rep. 286.

[2] The plaintiff has a right of appeal from a final judgment in the action which he is waging against P. D. Marcum et al., and there is nothing to indicate that as a remedy it will be inadequate to redress any wrongs that he may suffer or has suffered in the action on account of decisions of the court. To sustain the petition in this action would be to hold that a party to an action could apply to this court for a writ of prohibition on account of every apprehended adverse decision of a trial court which is proceeding entirely within its jurisdiction, and, in effect, have a decision of this court upon every issue in the action before a decision by the trial court.

The petition is therefore dismissed.

### BAKER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 11, 1921.)

1. Criminal law  $\S$  923(2)—Jury  $\S$  99(3)—Juror's previously formed opinion held to disqualify, and concealment thereof misconduct requiring new trial.

One who, following the commission of a homicide, expressed his opinion that defendant committed the crime and should be electrocuted, was not qualified to sit as a juror, and his concealment on voir dire examination of previously formed opinion was misconduct depriving defendant of a fair and impartial trial and requiring new trial.

2. Criminal law  $\S$  956(10)—Evidence that juror had expressed opinions concealed on voir dire examination should be convincing to warrant court in setting aside verdict.

To justify trial court in setting aside verdict of guilty on the ground that one of the ju-

rors had previous to the trial of the case expressed opinions that would disqualify him from sitting in the case if they had been known, the evidence should be very clear and convincing.

**3. Criminal law §1156(4)—Evidence held not to prove previously formed opinions of juror.**

Evidence as to juror having expressed opinions as to defendant's guilt following the homicide, concealed on his voir dire examination, held not sufficiently convincing to require appellate court to interfere with trial court's discretion in overruling motion for new trial.

Appeal from Circuit Court, Bell County.

Dan Baker was convicted of voluntary manslaughter, and he appeals. Affirmed.

Sawyer A. Smith, of Barbourville, and John Howard, of Middlesboro, for appellant.

C. I. Dawson, Atty. Gen., and Thos. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

**HURT, C. J.** The appellant, Dan Baker, was indicted for the crime of murder, committed as alleged by killing one John H. Hensley, and being tried upon that charge, was found guilty by the jury of voluntary manslaughter, and his penalty fixed at imprisonment for 21 years. A judgment was rendered accordingly. The appellant in due time made a motion to set aside the verdict of the jury and the judgment of the court, and to grant him a new trial; but his motion was overruled and he has appealed to this court.

Several grounds were set forth in the motion for a new trial, but all are without any merit, except one which the appellant seems to wholly rely upon to obtain a reversal of the judgment. This ground is based upon the alleged actual bias of one of the jurors who tried the case and rendered the verdict. It is alleged that this juror, before and at the time he was called as such, had formed and expressed an opinion to the effect that appellant was guilty of the crime of which he was accused and ought to be punished therefor, and entertained a strong prejudice against the appellant, but that appellant did not know of the bias of the juror until the day following that upon which the verdict was made and the jury discharged. He further claimed that the juror was examined upon his voir dire and then stated that he had no opinion touching the appellant's guilt or innocence and did not entertain any bias or prejudice against the appellant or his cause. It is furthermore insisted that appellant would not have accepted the juror, but would have excused him, if he had known of the bias on the part of the juror. It is insisted earnestly that the bias of this juror prevented the appellant from having a

fair and impartial trial. To sustain the charge that the juror was biased against him and his cause, appellant filed his own affidavit setting forth the bias and prejudice of the juror and his want of knowledge of it until after the trial. With it there was filed the affidavits of T. I. Green and Harvey Elliott, each of whom deposed that two or three days after appellant committed the homicide for which he was tried and convicted, the juror Miller, in their presence, said:

"That Dan Baker went to the barber shop and got his pistol and went to John H. Hensley's room and stuck his arm and shoulder around the door and shot Hensley while he was sitting in a chair, and that it was too bad to kill a man that way, and he wished he could get on the jury to try Dan Baker, and, if he did, he would hang him or send him to the electric chair, as he was a bad man and ought not to be at large."

An affidavit of R. A. Sowders was also filed in which the affiant stated that on the day the homicide was committed he (Sowders) related to the juror, Miller, the manner in which, according to his information, the killing occurred, and that Miller said "that it was a bad murder and Baker would get life or the electric chair." About 15 days before the trial, Sowders claimed to have had another conversation with Miller in which Baker was mentioned, and that Miller then said:

"That he would like to be on the jury for some of these murder cases, and if he was on the jury some of them would never remember killing another man."

The commonwealth's attorney, in opposition to the grounds of the motion, filed the affidavit of Miller, and in it Miller unequivocally denied that he had any of the conversations or made any of the statements attributed to him by Green, Elliott, or Sowders, and also deposed that the only conversation he ever had with Green about any indictments for murder was about the one which was then pending against Green, and that Green said in that conversation "that none of the murderers were going to jail, because they were all going to stick together." Miller also deposed that he left his home in Middlesboro on the morning of the day of the homicide before the time of its occurrence, and went into the country and remained in church and at his brother's the entire day, not returning until late in the night, and thus had no opportunity for a conversation with Sowders about it on that day, and also thus demonstrated his ability to call other witnesses to corroborate his statements that he did not see Sowders upon that day. Sowders then made another affi-

davit, in which he deposed that he was mistaken when he stated in the first that he had heard Miller converse about the homicide on the day of its occurrence, but fixed the time on the day following, when no one was present except he and Miller. The trial judge, after a consideration of the motion and the grounds set forth in support of it, was of the opinion that the charge that Miller entertained a bias toward the defendant, and had formed and expressed an opinion before being called upon the jury, was not a fact and overruled the motion.

[1, 2] There can be no doubt that if the juror made such expressions as are attributed to him, they incontrovertibly evidence such a bias upon his part as to render him unfit to sit as one of the triers of appellant, and he should not have concealed his previously formed opinion of the guilt of appellant, and his misconduct in so doing deprived appellant of such a fair and impartial trial as the law contemplates and undertakes to give. *Netter's Adm'r v. L. & N. R. R. Co.*, 134 Ky. 678, 121 S. W. 636; *Vance v. Haslett*, 4 Bibb. 191; *Taylor v. Combs*, 50 S. W. 64, 20 Ky. Law Rep. 1828; *Mansfield v. Com.*, 163 Ky. 495, 174 S. W. 16. The trial judge, if he had believed that the juror made the expressions, would certainly have set aside the verdict and granted a new trial. It became his duty to decide whether the alleged biased juror was thus disqualified so as to impeach the verdict. As was said in *Mansfield v. Commonwealth*, supra:

"The evidence that would justify the trial court in setting aside a verdict on the ground that one of the jurors had expressed opinions that would disqualify him from sitting in the case, if they had been known, should be very clear and convincing, when first brought to the attention of the court after the verdict. If new trials could readily be secured after the verdict on grounds like these, the temptation to procure the needed evidence, and the ease with which it could be procured, would result in many new trials being granted on this ground when the verdict should not be disturbed."

Again in *Allen v. Commonwealth*, 175 Ky. 49, 193 S. W. 652, it was said:

"In the disposition of a matter of this kind this court must necessarily rely to a large extent upon the sound discretion of the trial court. The trial judge had seen and observed the juror, who is assailed, and observed his conduct during the trial, is acquainted with his character, as well as the witnesses who make the charges against him. This court will not interfere with the discretion of the trial court in such a matter, unless it is evident that it came to an erroneous conclusion, and a fair

trial has not been had because of a bias of the juror."

[3] The evidence does not convince clearly that the trial judge arrived at an erroneous conclusion. There are several things arising out of the evidence which are calculated to shatter belief in the truth of the statements of these impeaching witnesses. Green and Elliott fixed the place where Miller made the expressions which they attribute to him at the same time and place, and as having been made to them when together. Green had an indictment for murder then pending against him, and Elliott was a boarder at his hotel. According to Miller, Green had expressed the intention of standing by the various murderers then in trouble in the community, and this Green does not deny. The affidavit of the county attorney, which is not denied, shows that Green was carrying out his purpose, and was present in court and taking an active interest in the defense of appellant, and was consulting with his attorneys in the selection of the jury, and was present and presumably advised the acceptance of Miller as a juror. It is not believable that Green knew of Miller's bias and prejudice by having heard him make the expressions which he now attributes to him, and then stood by and advised or consented to his acceptance as a juror. If he had heard him make such expressions, he certainly would have communicated the fact to appellant's attorneys, and they would have taken steps to have excluded him from the jury. Sowders, after showing with particularity how he was able to fix the time when Miller made the expression to him, changed the time by another affidavit when it was discovered that the commonwealth would be able to prove by other witnesses than Miller that Sowders had no opportunity to have heard any expression from Miller on the day when he first deposed that he conversed with Miller. The circuit judge was also acquainted with the character of Sowders. It should not be overlooked that Miller denies in toto all the conversation which Green, Elliott, and Sowders attribute to him, and the fact that the court accepted his statements as against those made by them, under the facts which appear on the record, furnishes no ground to hold that the court abused its discretion in so doing. *Brannon v. Com.*, 162 Ky. 353, 172 S. W. 703, L. R. A. 1915D, 569; *McKee v. C. F. & S. R. Co.*, 161 Ky. 711, 171 S. W. 425. The record shows the homicide to have been a very useless and unnecessary killing, and the penalty not disproportioned to the crime.

The judgment is therefore affirmed.

## WILSON v. MORRIS.

(Court of Appeals of Kentucky. Oct. 11, 1921.)

1. Vendor and Purchaser  $\S$ 334(7)—No recovery for acreage deficiency where farm is sold by boundaries without reference to acreage.

Where a farm is sold by the boundary without reference to the number of acres and the deed so recites, grantee cannot recover for shortage of acreage.

2. Vendor and purchaser  $\S$ 334(7)—Rule as to recovery for deficiency in acreage, stated.

Deed conveying a number of acres, "be the same more or less," conveyed the designated number of acres, entitling purchaser to recover for shortage in acreage unless the shortage was less than 10 per cent., since the expression "more or less" relieves only from the necessity for exactness and not from gross deficiency.

3. Vendor and purchaser  $\S$ 341(1½)—Grantee to whom vendor conveyed at purchaser's request could sue for deficiency in acreage.

Vendor having executed warranty deed to third person at purchaser's request could not, in third person's action for deficiency in acreage, defend on ground that he did not sell farm to third person; the transaction being in effect a sale and conveyance by vendor to third person.

Appeal from Circuit Court, Pendleton County.

Action by G. P. Morris against C. D. Wilson. Judgment for plaintiff, and defendant appeals. Affirmed.

M. C. Swinford, of Cynthiana, A. H. Barker, of Falmouth, and W. A. Byron, of Brooksville, for appellant.

L. T. Applegate, of Covington, for appellee.

SAMPSON, J. For some years before 1913, appellant, C. D. Wilson, owned and resided on a farm in Pendleton county which he bought at a commissioner's sale. It consisted of six small adjacent tracts, containing in the aggregate 182 acres, but there was excepted from the six small tracts a described boundary supposed to contain 50 acres, so that Wilson believed his farm contained 132 acres. It had not been surveyed, nor had the expected boundary been measured. In May, 1913, Wilson sold and by title bond agreed to convey his farm to one Insko for \$4,000; Insko paying \$600 down on the purchase price and agreeing to pay the balance March 1, 1914, when Wilson was to give possession. The contract was in writing and signed by both parties. The entire purchase price having been paid by Insko to Wilson in October, 1913, the land was conveyed by Wilson and wife to appellee, Morris, by deed of general warranty, at the instance of Insko.

Claiming to have discovered a deficiency

in acreage in the boundaries so conveyed, Morris, the grantee, commenced this action against Wilson, the grantor, in 1917, to recover \$534.49, being the proportion of the purchase price which the alleged shortage of acreage would total. The title bond which Wilson executed and delivered to Insko contained only a general description of the farm, stating:

"In Pendleton county on the Bradford Turnpike about six miles southeast of Falmouth, adjoining lands of Kavanaugh, Avlick, Fisher, Harbeson, Morris and Smith, containing 132 acres be the same more or less and being the same land conveyed to first party by master commissioner by deed dated October 30, 1899, and record in Deed Book 48, page 206, in the Pendleton county court clerk's office."

The deed which Wilson made to Morris did not contain a statement of the total acreage conveyed, nor the expression "be the same more or less," as did the bond, but it particularly describes each of the six tracts, concluding each description with the statement of the number of acres contained; and this acreage when totaled and the excepted boundaries deducted is 132.

In defense of the action Wilson in the lower court insisted, and on this appeal insists: (1) That the farm was not sold to Morris and if so sold it was in gross, by the boundary as a whole, and not by the acre; (2) there is no deficiency in the acreage conveyed, or at least plaintiff has not proven same to exist.

[1] If the sale of the farm was by the boundary without reference to the number of acres it contained and the deed had so recited, Morris would have no cause of action for any shortage of acreage. Young v. Craig, 2 Bibb, 271; McCoun v. Delaney, 3 Bibb, 46, 6 Am. Dec. 635; Boggs v. Bush, 137 Ky. 95, 122 S. W. 220; Rust v. Carpenter, 158 Ky. 672, 166 S. W. 180.

[2] It is also the rule that a sale of a designated number of acres, the deed containing the expression "be the same more or less," or some similar expression, is a sale of the number of acres stated in the deed, and if the boundary contains not exceeding 10 per cent. more land the vendee will take the entire boundary under the deed without being required to make up the balance of the purchase price for the additional acreage, and if the boundary contain less than the number of acres named in the deed, the vendee cannot recover a proportional part of the purchase price for the shortage unless the shortage amounts to 10 per cent. of the designated number of acres. If, however, the shortage exceeds 10 per cent., the plaintiff's recovery is not confined to the excess of 10 per cent. only, but he may recover for all acreage less than that named in the deed.

[3] Literally, appellant, Wilson, did not sell the land in controversy to appellee, Morris, but the sale was made to Insko, who in turn requested Wilson to convey the land to Morris; Insko having paid the full purchase price. Of course, Wilson consented to this arrangement and made the deed accordingly. It was therefore in effect a sale and conveyance by Wilson to Morris. The deed expressed the terms, conditions of sale, and the property conveyed, and concludes with a covenant of general warranty. Thus the contract between Wilson and Morris is completely evidenced. The law does not regard the shadow, but the substance, from which it therefore follows that Wilson's insistence that the sale was not made to Morris, a mere quibble, need not be further considered.

The second contention of appellant is much more difficult to answer. The six small tracts which make up the boundary of 182 acres from which is deducted a boundary supposed to contain 50 acres, leaving 132 acres in the farm which Wilson acquired at the commissioner's sale, are definitely described, but when such a boundary has taken from it a certain designated boundary, the acreage of which is not definitely known, that which remains cannot be known with certainty. This is the gist of the contention of appellant, Wilson, on this appeal. It is not denied that the original boundary composed of the six small tracts contains 182 acres. Of course, if 50 acres only be taken from 182 acres, there will remain 132 acres, but if a given boundary lying upon one side of the road be taken from the whole acreage, there may remain more or less than 132 acres. The evidence convinces us that Wilson offered his farm for sale for \$4,000, and declined to accept a less price without regard to the number of acres contained therein. He so stated to prospective purchasers, but when he conveyed the property he described it as 182 acres less 50 acres, thus leaving 132 acres. The evidence satisfactorily establishes the acreage to be 114 acres—a shortage of 17 acres. As 10 per cent. of 132 is 13.2 acres it is manifest the shortage is more than 10 per cent. of the acreage which the deed purports to convey. It has long been the rule in this jurisdiction to allow a vendee to recover for all shortage in acreage, even where the deed, after expressing the number of acres conveyed, contains the clause, "be the same more or less." The deed in question contained no such provision, but the bond did. Under our rule, Morris was entitled to recovery for the entire shortage of 17 acres. This was the amount of the judgment entered in his favor, from which this appeal is prosecuted.

Appellant, Wilson, attempted to obtain a reformation of the deed by alleging that by mistake the expression "be the same more or less" was omitted therefrom. This the lower court disregarded. Had the deed been so reformed, it would not have advantaged Wilson in the least under the facts of this case, for the deed fixed the number of acres at 132, and had the expression "more or less" followed, it would only have indicated that the parties intended to convey 132 acres or thereabouts. Such an expression creates a shuttle which entitled the parties to a deficiency or increase, as the case may be, not to exceed 10 per cent. of the acreage attempted to be conveyed.

The expression "more or less" in a deed relieves only from the necessity for exactness and not from gross deficiency. When the excess or deficiency is as much as or more than 10 per cent., relief may be had. *Boggs v. Bush*, 137 Ky. 95, 122 S. W. 220; *Shipp v. Swann*, 2 Bibb, 82; *Rust et al. v. Carpenter*, 158 Ky. 672, 166 S. W. 180.

The trial court therefore properly held as unimportant the effort of appellant, Wilson, to reform the writing.

For the reasons indicated, the judgment is affirmed.

#### BAKER et al. v. LEMON et al.

(Court of Appeals of Kentucky. Oct. 11, 1921.)

##### 1. Wills $\S$ 324(2)—Evidence held insufficient for submission of mental capacity to jury.

In daughters' contest of father's will, the unsupported expression of opinion by one of the daughters that her father was of unsound mind a few days before the will was made, and the fact that the testator undertook to dispose of two policies of insurance as if they belonged to his estate, when in fact they were the property of designated beneficiaries, held insufficient for submission to jury of mental capacity.

##### 2. Wills $\S$ 324(2)—Opinions of nonexpert witnesses not based upon tangible facts insufficient to take question of mental incapacity to jury.

The opinions of nonexpert witnesses not based upon tangible facts testified to by themselves or others are insufficient to take the question of mental incapacity to the jury.

##### Appeal from Circuit Court, Graves County.

Proceedings to probate will by Lucretia Lemon and others, contested by Luna Baker and another. From decree for proponents, contestants appeal. Affirmed.

J. E. Warren, of Mayfield, and Mocquot & Berry, of Paducah, for appellants.

Robbins & Robbins and B. C. Seay, all of Mayfield, for appellees.

TURNER, C. J. R. Lemon died on the 27th of January, 1919, a resident of Graves county.

Twelve days before and on the 15th day of January he made and published his last will and testament, which is the subject of this controversy.

On the night of the 6th of January, 1919, or the early morning of the 7th, the decedent was stricken with a violent attack of heart disease, and was from that time until the 27th, when he died, confined to his room, although not at all times to his bed.

His will was probated in February, 1919, and his two married daughters prosecuted an appeal from the order of probate to the circuit court, and in that court, after hearing the evidence of the contestants, the jury was peremptorily instructed to find for the will, and from that action of the court this appeal is prosecuted.

Mr. Lemon had been twice married, having by his first marriage three children, a son and the two appellants, and by his second marriage two sons, and the last wife survives him.

His estate is valued at about \$30,000, and by his will he devised to his widow the home where he lived and the household and kitchen furniture absolutely, and he also devised her absolutely the building in which his newspaper plant was situated and where it was operated. He gave to his three sons the newspaper plant and business, but charged them with the payment of any indebtedness the newspaper business might owe.

To his two daughters, the appellants, he devised jointly an insurance policy for \$1,000 on his life. He also gave what he refers to in his will as a \$4,000 life insurance policy to his wife and recited that such policy is payable to her.

The evidence discloses that there was no \$4,000 policy, but that he had two \$2,000 policies, one of which was payable to his wife and the other jointly to the two appellants, the widow and the son by the first marriage.

After the preliminary showing of the execution of the will by the propounders, there were only three witnesses introduced for the contestants, and only one of them, the appellant Mrs. Baker, ventured any statement that the decedent was at any time in his last illness lacking in testamentary capacity. She states that when she visited her rather about a week before the will was made his attitude was not that of a man who was in his right mind and that when she saw him again a few days before his death he seemed to be brighter, but his mind still wandered, and that was just two or three days before his death; and we gather from her evidence that she had not seen him for a week before the will was so executed and for several days afterward.

On the issue of undue influence, this same

witness states in substance that the summer before her father's death he had told her that her stepmother was complaining of his doing so much for her, and that she would thereafter have to get along the best she could, although she and her child could continue to live and take their meals at his home.

The other appellant, Mrs. Proctor, testified that she had for several years before her marriage worked at the office with her father, and that he had paid her a small salary varying from \$3 a week to \$7.50 a week; that her father had had several slight spells before, and that upon such occasions her stepmother would insist upon his taking some steps to straighten up his affairs; that two of her brothers had given her father a great deal of trouble, and she had heard him complain of the expense to which they had put him, and she testified in a general way that her father always seemed to think the same of all his children. She also stated that at the same time her father was ill her own child was very ill, and she did not see him during that period for that reason.

It also appears from the evidence that the three sons had been associated with their father in the newspaper business in various capacities.

The contestants also introduced a witness, Mr. Brand, who appears to have been an intimate friend of the decedent and a man whom Lemon had chosen to be one of the witnesses to his will, but who was out of town the day it was executed. But this witness gave no evidence, and was asked to give none, on the question of mental capacity or undue influence, and was the last witness introduced.

[1] The argument for the appellants is that the unsupported expression of opinion by Mrs. Baker that her father was of unsound mind a few days before the will was made, taken in connection with the fact that in his will he undertook to dispose of two policies of insurance on his life as if they belonged to his estate, when in fact they were the property of the designated beneficiaries, should have been sufficient to submit to the jury the question of mental capacity.

We attach little importance to the fact that the testator mentioned these policies in his will; he says in the instrument that the so-called \$4,000 policy—evidently meaning the two \$2,000 policies—was made payable to his wife, when in fact that was not, strictly speaking, true, although one of them was made payable to her exclusively, and she was a joint beneficiary with three of his children in the other. Any man, even though in vigorous health, might be guilty of such discrepancies as to the amount of the policies and to whom they were payable; or it might be that many nonprofessional men of intelligence would assume that policies of insurance upon which they had paid the premi-

ums themselves belong to their estates as against the designated beneficiaries, and that consequently they might dispose of them by will.

So that, eliminating the life insurance incident and casting it aside as meaningless on the question of mental capacity, we have left only the unsupported statement of Mrs. Baker that her father did not have mental capacity, and on the question of undue influence we have no tangible evidence at all, only the fact that the stepmother had the opportunity to have exerted the influence if she had undertaken to or if she could have exercised it.

We then have the opinion of only one nonexpert witness, who had seen her father only twice in a period of 21 days—once a week before the will was dated, and once several days afterward—to the effect that his mind wandered, and that his mental attitude was not that of a sound-minded man. She gives no single tangible thing upon which to base such a statement, there is nothing stated as a basis for her opinion, and she gives that opinion in answer to a hypothetical question not fairly based on all of the evidence that she herself had given.

[2] It is a rule in this state that the opinions of nonexpert witnesses, unless they be based upon tangible facts testified to by themselves or others, are insufficient to take to the jury the question of mental incapacity. *Schrodt's Executor v. Schrodt*, 181 Ky. 174, 203 S. W. 1051; *Bailey v. Bauey*, 184 Ky. 455, 212 S. W. 595.

The appellants may have adduced sufficient evidence to cause the court to suspect that the decedent had possibly not made a fair distribution of his property, but they have brought no evidence to show that he was incapable of disposing of his property according to his own desires.

The action of the trial court was proper, and the judgment is affirmed.

#### NATIONAL COUNCIL DAUGHTERS OF AMERICA v. POLSGROVE.

(Court of Appeals of Kentucky. Oct. 14, 1921.)

1. Appeal and error  $\S$  281(1)—Sufficiency of pleadings and evidence only question on appeal in absence of motion for new trial.

In the absence of motion for new trial, the only question on appeal is whether the pleadings sustain the judgment, and whether the evidence, properly presented, authorized it.

2. Appeal and error  $\S$  548(1)—Evidence not presented so as to allow consideration of sufficiency.

The evidence is not properly presented so as to allow consideration of whether it author-

izes the judgment, there being in the record no bill of exceptions or bill of evidence, but merely a document marked "Transcript of Evidence," never filed in the lower court, nor even bearing indorsement or memorandum of the clerk of the lower court as having been filed there, and filed for the first time in the appellate court, after the record was lodged with the clerk.

3. Appeal and error  $\S$  537—Filing and evidence thereof necessary to make bill of exceptions part of record.

The bill of exceptions, to properly be made part of the record, must be filed in the lower court in the time prescribed by law, and this must be shown by order of court.

Appeal from Circuit Court, Franklin County.

Action by O. B. Polsgrove against the National Council Daughters of America. Judgment for plaintiff, and defendant files papers in the Court of Appeals, with motion for appeal. Motion overruled, and judgment affirmed.

Leslie W. Morris, of Frankfort, for appellant.

Jas. H. Polsgrove and Hamilton & Polsgrove, all of Frankfort, for appellee.

THOMAS, J. [1-3] The appellee and plaintiff below, O. B. Polsgrove, upon a trial of this action before the circuit judge, a jury having been waived, recovered a judgment against appellant and defendant below, National Council Daughters of America, for the sum of \$250, and, complaining of that judgment, the transcript of the record has been filed in this court by defendant, with a motion for an appeal. There was no request for a separation of law and facts by the court, and none was made. There was no motion for a new trial, which is required in such cases, and the only question before us is whether the pleadings sustain the judgment. *Helm v. Coffey*, 80 Ky. 176; *Henderson v. Dupree*, 82 Ky. 678; *Albin Co. v. Ellinger*, 108 Ky. 240, 44 S. W. 655, 19 Ky. Law Rep. 1896; *Harper v. Harper*, 10 Bush. (Ky.) 447; *McAllister v. Insurance Co.*, 78 Ky. 531; *Owensboro Railroad Co. v. Barker*, 22 S. W. 444, 15 Ky. Law Rep. 175; *Beeler v. Sandidge*, 49 S. W. 533, 20 Ky. Law. Rep. 1580.

The *Helm* and *Henderson* Cases and the case of *Roberts Cotton Oil Co. v. Dodds & Johnson*, 163 Ky. 895, 174 S. W. 485, also hold that—

"In the absence of a motion and grounds for a new trial, nothing is brought to this court for review on appeal except the inquiry as to whether the pleadings state any cause of action or any defense, and whether the evidence heard and properly presented by bill authorize the judgment."



And in the case of C. N. O. & T. P. Ry. Co. v. Hansford, 125 Ky. 37, 100 S. W. 251, 30 Ky. Law Rep. 1105, it is said:

"If there is nothing in the record to sustain the judgment, then, on the face of the record, the judgment is unwarranted, and should not be permitted to stand, although there is no motion for new trial."

Under the latter rule we might look to the bill of evidence in this case to see whether there was any testimony to support the judgment, and, if none, reverse it as being wholly unwarranted, although there was no motion for a new trial. We are prevented, however, from doing so because there is neither a bill of exceptions nor a bill of evidence in the record. There is a document in the record marked "Transcript of Evidence," in which appears the examination and cross-examination of witnesses, but it was never filed in the court below, nor does it even bear the indorsement or memorandum of the circuit court clerk as having been filed in that court. It appears to have been filed for the first time in this court after the record was lodged with the clerk. The bill of exceptions, to properly be made a part of the record, must be filed in the trial court within the time prescribed by law, and this fact must be shown by order of court. Padgett v. Mays, 2 Ky. Law Rep. (Abstract) 213, 11 Ky. Opinions, 24; Spitzelberger v. S. O. & C. St. Ry. Co., 189 Ky. 493, 225 S. W. 237; Board of Council of the City of Frankfort v. Fidelity & Guaranty Co. of New York, 189 Ky. 725, 225 S. W. 1076.

The only question, then, presented by the record is whether the pleadings sustain the judgment, and, there being no doubt concerning this proposition, the motion for an appeal must be, and it is, overruled, and the judgment is affirmed.

#### MEADORS v. MEADORS' ADM'R et al.

(Court of Appeals of Kentucky. Oct. 12, 1921.)

##### 1. Money paid $\S$ 9—Evidence held not to show father's indebtedness to son.

In an action involving issue as to father's indebtedness to son for payments alleged by son to have been made by him for father's benefit, evidence held not to warrant court on appeal to disturb finding for father, in that it was as consistent with the theory that the payments were made out of the father's money as with the theory that they were paid out of son's own money.

##### 2. Appeal and error $\S$ 1009(2) — Finding of fact not disturbed.

Where the evidence is as consistent with theory of plaintiff as it is with the theory of defendant, the court on appeal will not disturb finding of chancellor for plaintiff.

##### 3. Trusts $\S$ 72—Grantee's parol agreement to hold property in trust for another valid.

Notwithstanding Ky. St.  $\S$  2353, providing that no trust shall result when a deed is made to one person and consideration is paid by another, a parol agreement of grantee to hold property in trust for the use of the one furnishing the consideration is valid and enforceable.

##### 4. Trusts $\S$ 44(3)—Proof of grantee's agreement to hold property in trust for another held sufficient.

Evidence held sufficient within the rule that parol agreement by grantee to hold property in trust for one who has furnished the consideration must be established by clear and convincing evidence.

##### Appeal from Circuit Court, Lincoln County.

Suit by Thomas Meadors, for whom his administrator and others were substituted against John R. Meadors, in which defendant filed a counterclaim. Judgment for plaintiffs, and defendant appeals. Affirmed.

James Denton, of Somerset, for appellant. T. J. Hill, Jr., of Stanford, and Stephens & Steele, of Williamsburg, for appellees.

CLAY, J. Thomas Meadors brought this suit against his son, John R. Meadors, to recover certain tracts of land which he alleged were conveyed to his son under an oral agreement by which his son was to take the title, hold the property subject to the order of plaintiff, and convey the property at plaintiff's request. In his answer and counterclaim defendant admitted that he agreed to hold certain designated tracts of land subject to the order of plaintiff, but denied that he was to convey the same at the pleasure of plaintiff. He further alleged that plaintiff was indebted to him in various sums, aggregating about \$2,000, and it was agreed between them that this indebtedness should be paid before he was required to convey the property to plaintiff. This pleading contained the further allegation that the land was conveyed to defendant for the fraudulent purpose of defeating plaintiff's creditors. During the pendency of the action Thomas Meadors died, and the cause was revived in the name of his widow and heirs. The case was referred to the master commissioner, who filed a report rejecting the claim of defendant. Defendant's exceptions to the report were overruled, and judgment was rendered in favor of plaintiffs. Defendant appeals.

It appears that about the year 1890 Thomas Meadors was the owner of certain tracts of land in Whitley county, which he conveyed to the defendant. Afterwards these lands were sold and the proceeds invested in the lands in question. Though the title was held in the name of the defendant, the father took and retained possession of the title

papers. Some few months before this suit was brought, the father was ill, and defendant came to his house and took possession of the title papers. When his father recovered, he instituted this suit.

[1, 2] It is first insisted by defendant that the commissioner and the lower court erred in dismissing his counterclaim. The point is made that the exhibits introduced show beyond dispute that the sums sought to be recovered were actually paid by him to his father or to others for his father's benefit. It is true that the exhibits show that the payments were made, but the father testified that they were paid out of his money. On the other hand, defendant claimed that they were paid from the proceeds of property which he himself owned. On this point the defendant's evidence is not convincing. He admits holding the lands for the benefit of his father. He admits receiving large sums from the proceeds of prior sales. While he claims to have accounted for all the sums so received, he does so only in a general way, without showing any specific payments. Furthermore, the sources from which he claims to have derived his own funds are not satisfactorily accounted for. Viewing defendant's evidence as a whole, we are constrained to the view that it is just as consistent with the theory that the payments were made out of the father's money, as with the theory that they were paid out of defendant's money. That being true, we see no reason to disturb the finding of the chancellor.

[3, 4] Another contention of defendant is that no trust can arise in this case because prohibited by section 2353, Kentucky Statutes, which is as follows:

"When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person."

This statute has been before the court in a number of cases, and the uniform ruling has been that a parol agreement of the grantee in the conveyance to hold the property in trust for the use of the one furnishing the consideration is valid and enforceable. *Patrick et al. v. Prater*, 144 Ky. 771, 139 S. W. 938; *Smith v. Smith*, 121 S. W. 1003; *Campbell v. Campbell*, 79 Ky. 395; *Webb v. Foley*, 49 S. W. 40, 20 Ky. Law Rep. 1207. And while it is true that to establish a parol trust in the circumstances here presented the evidence must be clear and convincing (*Holtzclaw v. Wells*, 166 Ky. 353, 179 S. W. 193), there can be no doubt that the positive testimony of the father, coupled with the admis-

sion of the defendant, is sufficient to meet the requirements of the rule.

We find no merit in the contention that Thomas Meadors conveyed the property in question to the defendant for the fraudulent purpose of defeating his creditors.

Judgment affirmed.

#### WHEELER v. PATRICK (three cases).

(Court of Appeals of Kentucky. Oct. 25, 1921.)

1. Elections  $\S$  154(6)—Where transcript of evidence on appeal in contest incomplete it is presumed conclusively that evidence supported judgment.

Though Ky. St.  $\S$  1550, subsec. 28, directs the clerk in a contest to transmit to the Court of Appeals the original papers in the suit, "including such transcript of evidence as may be furnished or as may be required by the court or by the parties," a schedule which directs the clerk to transmit "such transcript of testimony as may be filed with you" is insufficient in that it does not specify the names of the witnesses, or otherwise designate the parts of the transcript to be transmitted, in such a way as to furnish definite information on the question, and where, pursuant to such schedule, the transcript of the evidence is only partial, the rule applies that, where portions of the evidence bearing on the questions involved are omitted from the record on appeal, it will be conclusively presumed that the omitted evidence supported the judgment.

2. Elections  $\S$  149—Error or omission in placing candidate's name on ballot not ground of contest, statute providing exclusive remedy.

Ky. St.  $\S$  1550, subsec. 27, as to error or omission in placing or failing to place the name of any candidate on the official primary ballot, provides an exclusive remedy, and such error or omission is not a ground of contest after election.

3. Appeal and error  $\S$  781(7) — Where only moot questions presented an appeal from injunction against election officers, appeal will be dismissed.

Where successful primary candidate procured injunctions against election officers requiring correction of election certificate, the appeals from the injunctions would be dismissed, as involving only moot questions, where appellee had pleaded the alteration of the certificate as ground of counter contest, and the presumption was that the omitted portions of the evidence on the appeal from the judgment in the contest were sufficient to support the judgment, and defendants in the injunction had complied with the injunction, and the time had long passed when anything could be accomplished by either an affirmance or reversal of the judgment.

Appeals from Circuit Court, Floyd County.

Election contest by C. B. Wheeler, contestant, against A. T. Patrick, contestee, and two injunction suits by A. T. Patrick against the officers of the election in Mouth of Mud precinct No. 14 and the election commissioners of Floyd county, in which C. B. Wheeler intervened. From judgment for contestee in the election contest, and from judgments for plaintiff in the injunction cases. C. B. Wheeler appeals. The appeals were consolidated. Judgment in contest case affirmed, and appeals in injunction cases dismissed.

See, also, 192 Ky. 362, 233 S. W. 747.

C. B. Wheeler and John N. Hamilton, both of Prestonsburg, for appellant.

Joseph D. Harkins, of Prestonsburg, for appellee.

CLAY, J. These three appeals have been consolidated and will be considered in one opinion.

C. B. Wheeler and A. T. Patrick were rival candidates for the Republican nomination for circuit judge in the Thirty-First judicial district at the primary election held on August 6, 1921. Patrick was awarded the certificate of election, and Wheeler instituted a contest. Patrick filed an answer and counterclaim denying the grounds relied on by Wheeler and pleading numerous grounds of counter contest. On final hearing the circuit court dismissed the contest and adjudged Patrick elected. Wheeler appeals.

[1] Subsection 28, § 1550, Kentucky Statutes, provides:

"The party desiring to appeal from the judgment of the court shall, on the same day after the same is rendered, execute a supersedeas bond in the same form and to the same effect as other supersedeas bonds in other civil actions for an appeal to the Court of Appeals, and the clerk shall immediately thereafter transmit to the clerk of the Court of Appeals the original papers in said contest, including such transcript of evidence as may be furnished or as may be required by the court or by the parties, and said record of said contest when received by the clerk of the Court of Appeals shall be immediately delivered to the Chief Justice, and said contest shall have precedence over all other business and causes then pending in the Court of Appeals and shall be heard and disposed of by the Court of Appeals as speedily as the exigencies in the case will admit."

Two days after the judgment was rendered appellant filed in the office of the circuit clerk the following schedule:

"The clerk of this court is directed to copy for use in the Court of Appeals all the orders and judgment entered in this case since its return from the Court of Appeals, and to transmit the same together with all the original papers hereof and such transcript of testimony as may be filed with you to the clerk of the Court of Appeals for use in that court on the

trial of this cause on appeal from a judgment of this court entered October 15, 1921."

Pursuant to the schedule, the clerk transmitted to this court the orders and original papers referred to, together with a transcript of evidence, which shows on its face that it is incomplete and does not contain all the evidence heard. Of course, a party may bring up an incomplete record upon the filing of a proper schedule showing concisely what parts of the record shall be copied or transmitted. Though the statute directs the clerk to transmit to this court the original papers in the contest suit, "including such transcript of evidence as may be furnished or as may be required by the court or by the parties," a schedule which directs the clerk to transmit "such transcript of testimony as may be filed with you" is wholly insufficient in that it does not specify the names of the witnesses, or otherwise designate the parts of the transcript to be transmitted, in such a way as to furnish any definite information on the question. The schedule being fatally defective, the result is that the appellant is here with only a partial transcript of the evidence. It has long been the settled rule in this state that, where portions of the evidence bearing on the questions involved are omitted from the record on appeal, it will be conclusively presumed that the omitted evidence was sufficient to support the judgment, and the judgment will be affirmed. *Roundtree v. Meadors*, 183 Ky. 47, 209 S. W. 505. This disposes of all the contested issues of fact presented by the pleadings.

[2] One of the grounds of contest, however, is that appellee's name was not properly on the ballot, and the facts are admitted by the pleadings. It appears that appellee filed his own notification and declarations, supported by the affidavit of two reputable electors of the same party, as required by subsection 6, § 1550, Kentucky Statutes, instead of being proposed as a candidate, either by resolution of the proper committee, or by the application of two reputable electors, as required by the Nonpartisan Judiciary Act of 1920. Whether or not the steps taken by appellee constituted a substantial compliance with the provisions of the Nonpartisan Judiciary Act we deem it unnecessary to determine. Subsection 27, § 1550, Kentucky Statutes, which is a portion of the primary election law, is as follows:

"Whenever it shall be made to appear by affidavit accompanied by a motion, filed in the circuit court in the county where the cause of action arises, as hereinafter provided, that an error or omission has occurred or is about to occur in the placing or failing to place the name of any candidate on the official primary ballot, or that an error or wrong has been or is about to be committed in the printing of said ballots, or any officer has failed or is about to fail to perform any duty imposed by this act, the court shall order the officer or person charg-

ed with such error, wrong, neglect or failure to forthwith correct the error, desist from such wrongful act, to supply the failure, or to perform the duty, or show good cause why he should not be compelled so to do. Failure to obey the orders of the judge or court shall be treated as a contempt of court, and may be punished as such. Any officer whose duty it is to prepare, or furnish ballots as required under this act, who shall willfully or neglectfully fail to do so, shall, upon conviction therefor be fined not less than one thousand (\$1,000) dollars nor more than two thousand (\$2,000) dollars for each offense and in addition thereto may be imprisoned in the county jail not less than sixty days nor more than six months. If the circuit court be not in session in the county, the circuit judge of the district in which the county lies shall hear and determine the matter. If the circuit judge of the district in which the county lies be absent from the district, then the motion and affidavit shall be filed before the circuit judge of a contiguous district, if he be therein at the time, and if not, then before any circuit judge in the commonwealth. And any of the circuit judges above indicated shall have full power to hear the complaint during court or in vacation in a summary manner, and to determine and make final orders therein, and when any such order is made, it shall be conclusive and not subject to appeal.

"Of the filing of the motion and affidavit, and the time and place of hearing thereon the officer or person against whom same is directed shall have notice, which notice shall be served as notices are directed to be served under the provisions of the Civil Code of Practice.

"Candidates only shall have the right to institute proceedings under this section, and the candidates shall pay the costs of the proceedings."

It will be observed that the statute provides for a remedy in case of an error or omission in placing or failing to place the name of any candidate on the official primary ballot, and provides, in substance, that only the candidates shall have the right to resort to such remedy. Where there is a failure to place the name of a candidate on the primary ballot, he is the party aggrieved, but, where the name of a candidate is improperly placed on the ballot, his opponent is the one aggrieved, and may resort to the remedy provided by the statute. While the statute does not so declare, we are of the opinion that the statute, construed as a whole, shows a plain purpose on the part of the Legislature to make the remedy exclusive. In the first place, it puts all errors, whether of placing or refusing to place the name of a candidate on the ballot, in the same category, and provides for a summary method of hearing and determining the questions before the primary takes place. Not only so, but it is not to be supposed that the Legislature would have provided that the judgment rendered in such a proceeding was not

subject to appeal, and at the same time have left the parties free to disregard the statute and make the error a ground of contest after the election, with the right of an appeal in case of an unfavorable decision. If such were the law, no candidate would ever pursue the remedy provided by the statute for the purpose of contesting his opponent's right to go on the ballot. He would simply await the result of the election, and, if defeated, make the error a ground of contest, thus preserving his right of appeal. In such a case he would be declared elected, although his opponent received a majority of the votes, if it was made to appear that his opponent's name was not properly on the ballot. The result would be to defeat the popular will, by giving a nomination to a candidate who had not received a majority of the votes, and thus discourage the people from participating in elections. To guard against such results and to inspire confidence in the stability of primary elections by giving effect to the popular will, the Legislature intended that all errors in placing or refusing to place the name of a candidate upon the primary ballot should be corrected before the primary, and should not be available after the election as grounds of contest by a defeated candidate.

[3] The two injunction suits were brought by Patrick against the officers of the election in Mouth of Mud precinct No. 14 and the election commissioners of Floyd county. One was filed with the clerk of the Floyd circuit court, and the other was presented to Circuit Judge William E. Holbert in chambers. In each it was alleged, in substance, that after the primary election was held the officers of election certified that Patrick received 77 votes and Wheeler 63 votes, and that after the certificate was returned it was altered, changed, and forged so as to read that Wheeler received 83 votes instead of 63. The petition in each case asked for a mandatory injunction requiring the officers of election to reassemble and correct the certificate so as to make it read as it did before it was changed by forgery. It was also asked that the election commissioners be restrained from certifying the vote to the Secretary of State until after the election officers had assembled and corrected the forgery. Judge Holbert granted an injunction awarding Patrick all the relief asked, and the circuit clerk issued a restraining order restraining the election commissioners from certifying the result to the Secretary of State until the officers of election had assembled and corrected their certificate. Pursuant to the order of injunction, the officers of election did assemble and correct their certificate. Whereupon two of the election commissioners signed an amended certificate conforming to the corrected certificate of the officers of election, and the amended certificate was transmitted to the Secretary of State, who

thereafter issued a certificate of election to Patrick. A few days later orders were entered filing each of the causes away. Some time thereafter Wheeler intervened in each action and asked that the orders filing the cases away be set aside, and that he be permitted to file his petition and be made a party defendant. These motions were sustained. Thereupon Wheeler filed a special demurrer in each case, and, without waiving the special demurrers, filed a general demurrer and an answer denying the allegations of the petition. On final hearing it was adjudged that the injunctions theretofore granted in each case should be made perpetual.

It is the contention of appellant that, as the officers of election had made their certificate as required by law, a court of equity had no power to cause them to reassemble and make a new certificate or correct the old. It is further contended that the proceedings were void as to him because he was not a party to the actions, and the whole relief asked was granted without notice. If appellee had relied solely on the plea of rescission to support the claim of forgery in the certificate, it would be necessary for us to determine whether or not the injunction proceedings were regular and valid. As a matter of fact, however, appellee pleaded the forgery of the certificate as a ground of counter contest, and, as before stated, we must presume that the omitted portions of the evidence were sufficient to support the judgment on this question. That being true, and all the defendants in the injunction proceedings having already complied with the orders of injunction, the time has long since passed when anything can be accomplished by either an affirmance or a reversal of the judgments. Hence only moot questions are presented, and the appeals will be dismissed. *Searcy v. Fayette Home Tel. Co.*, 143 Ky. 811, 137 S. W. 777.

Wherefore the judgment in the contest case is affirmed, and the appeals in the two injunction cases are dismissed. The mandate will issue immediately, and the clerk of this court is hereby directed to certify the result to the Secretary of State and to the county court clerk of Knott and Floyd counties.

### STOUT v. STOUT et al.

(Court of Appeals of Kentucky. Oct. 14, 1921.)

1. Wills  $\S$  782(5)—Will held to provide for widow's support so as to place her upon election.

Will of the owner of a business and plant manufacturing whisky barrels, in terms placing the entire estate in his wife during her life

or widowhood in trust to carry on the business, held, in view of his expressed wish that "the children together with her to continue as near the same as may be," and "that the family will continue to live as nearly as during my life as possible," to provide from the income of the trust, or, if necessary, from its corpus, for the maintenance of his wife and his children as might live at home with her, the excess over such use to be distributed at her death or remarriage, so that there was a substantial provision made for his widow such as placed her upon her election within the statutory period to renounce the will if she sought to claim under the statute.

2. Wills  $\S$  686(1)—Trust held not to be terminated because of unprofitableness of business in which invested.

Where will of the owner of a business and plant manufacturing whisky barrels in terms placed the entire estate in his wife during her life or widowhood in trust to carry on the business, held that, the business having become unprofitable because of national prohibition, it was proper to authorize the trustee to cease the operation of the business, but, the corpus of the estate being still largely intact and the time fixed by testator for the termination of the trust not having arrived, there should be a continued enforcement of it, by investing the trust property and using the income, or, if necessary, the corpus, for the support of the wife and children living with her.

Appeal from Circuit Court, Daviess County.

Action by Virginia D. Stout against W. R. Stout and others to construe a will. From the judgment, Virginia D. Stout appeals. Reversed, with directions.

Ben D. Ringo, Clements, & Clements, and Richard H. Slack, all of Owensboro, for appellant.

W. P. Sandidge, of Owensboro, for appellees.

TURNER, C. George W. Stout, a resident of Daviess county, in January, 1907, executed the following will:

"I, Geo. W. Stout, of Owensboro, Daviess county, state of Kentucky, do make and publish this my last will and testament hereby revoking and annulling any and all former wills I may ever made.

"It is my will and desire that my business shall continue just as it has been conducted during my lifetime; and for this purpose I do hereby will and bequeath to my wife, Nancy Stout, all property of every character, real, personal and mixed, so long as she shall live and continue to be my widow; and the children together with her to continue as near the same as may be with my two sons, Walter R. Stout and Clyde W. Stout, both of them or either of them as may to them seem best to manage and carry on the business just as it has formerly been done; they being acquainted with and fully understanding the business, and that after her death or ceasing to be my widow—

then it is my will and desire that all of our children viz. M. Etta Brown, now the wife of Thos. Brown of Louisville, Ky., Walter R. Stout and Clyde W. Stout, sons above mentioned, Woodie A. Stout and Bessie May Stout, the two last named being daughters and at this time unmarried, and the children of our son, J. W. Stout, deceased, shall all share equally in the said property, share and share alike, except that first there shall be deducted from the portion going to said children of said J. W. Stout, deceased, the sum of three thousand dollars (\$3,000.00) money which I have advanced to my son, J. W. Stout, deceased, during his lifetime; and after this shall have been deducted from or rather shall be charged to them each of the said children being six in number the estate shall be equally divided into six equal parts and they shall take share and share alike, deducting, however, from the portion going to the said children of J. W. Stout, our deceased son, the said sum of \$3,000.00 which I advanced and furnished said J. W. Stout, our son, during his lifetime.

"I also wish and hereby specially direct that there shall be no administrator appointed, but that my said wife, Nancy Stout, shall act as executrix of this my last will and testament, who, together with and by the assistance and management of our two sons, Walter R. and Clyde W., will carry on the business as above stated, and also I direct that no inventory or appraisement be made of the said property, but the said executrix, Nancy Stout, shall be allowed to qualify and act without executing any bond or having any appraisement made or inventory of any portion of any property I may leave, and that the family will continue to live as nearly as during my life as possible.

"I also will and direct that that portion going to the children of our deceased son, J. W. Stout, shall be placed in the hands of a suitable and safe trustee, to be held by said trustee in trust for said children until the youngest one shall arrive at the age of twenty-one years, when it shall be equally divided between them, and if there shall be any income proceed from such portion as shall go to them it shall also be added to and become a part of their estate.

"I also leave my said wife, Nancy Stout, free, by and with the wish and consent of the other children, the two sons and three daughters, to give any aid and assistance to said children of said son, J. W. Stout, deceased, that they all may desire and agree upon."

The testator died in 1912, and in June of that year the above will was probated.

The decedent was, for many years prior to his death, engaged on a considerable scale in the cooperage business at Owensboro, Ky., and was the owner of a plant used and conducted by him in that business, and that is the business to which he refers in his will. He was engaged chiefly in the business of manufacturing whisky barrels, and the plant he owned was specially equipped for that particular business. The business was continued, as provided in his will, after his death, and for a few years was prosperous.

But in the year 1918, because the manufacture of whisky had become unlawful, there was no longer any demand for the whisky barrels, and, consequently, it was thereafter impossible to carry on the cooperage business without a continued loss, and impossible, therefore, to execute further the trust created by the will in so far as it contemplated the continued manufacture of whisky barrels.

This action was instituted in June, 1918, seeking to have the trust declared to be at an end, a construction of the will, settlement of the accounts of the testatrix, the sale of certain property, and the settlement of the estate. From the judgment construing the will this appeal is prosecuted; there being no complaint of anything else in the judgment.

[1] The judgment of the lower court was that the decedent provided in his will that his cooperage business should be continued after his death just as it had been conducted during his life, and for this purpose alone he had placed the title to his entire estate in his wife during her life or widowhood, with the provision that the business should be managed by his two sons or either of them, as might seem best to all his children; but that the title to the estate was not placed in the wife for life for her own use and support, but was placed in her in trust for the sole purpose of conducting the cooperage business; that the testator did not dispose of the profits to be derived from the conduct of his business during the life of his wife and did not, by his will, provide for the support of either his wife or any of his children from the conduct of this business, but simply created a trust to carry on his business after his death and during the life or widowhood of his wife, and provided the machinery for executing that trust; that he did not dispose of the profits to be derived from the trust or devise to any one the beneficial use of his property during the life or widowhood of his wife; that he made no beneficial provision for his wife, as contemplated by the statute, and that, therefore, she was not put to her election or required to renounce the will as required by statute, and that as to the widow the testator had died intestate, and, no provision having been made for her, she now had the right to take under the statute, and did take, the absolute title to one-half of his personal property, including the profits accumulated from the business, and a dower interest in the real property, and that the children and and grandchildren of the testator take their present interest during the life of the wife in the remaining half under the statute of descent and distribution, and the remainder interest therein, after the death of the wife, they take under the will of the testator and subject to its terms; that the trust

created by the will is at an end because of the impossibility of now conducting the business at a profit by reason of the changed conditions since the decedent's death, which he could not have and did not foresee.

The literal interpretation of this instrument gives strong support to at least some of the views of the chancellor, for it must be admitted that in terms it does not give any beneficial interest to any one during the life or widowhood of his wife; but, when we take a broader view and interpret the same in the light of the natural instincts of men, and in view of the manifest solicitude of the decedent for the maintenance of his wife and the home over which she presided and such of his children as resided with her there, we are impelled to a different interpretation.

While in terms the title is placed in the widow "for the purpose" of continuing his business as he had conducted it during his lifetime, the underlying and chief purpose in his mind, as gathered from the subsequent provisions of the will, was that the business should be so conducted during her life or widowhood, so that "the children together with her to continue as near the same as may be" and "that the family will continue to live as nearly as during my life as possible." From these expressions it is clear that the uppermost thing in his mind was to create a trust during her life and make his wife the trustee, so that that trust under the joint management of his wife and two sons would provide the means whereby the home over which his wife presided might be kept and maintained by her and for her support and maintenance, together with that of such of his children as might live in that home with her.

It is hardly conceivable that a normal man with natural instincts would by his will put all of his property into a trust without intending any provision whatsoever for the support of his wife and the maintenance of the home over which he knew she presided; and that this testator had no such purpose is clear from his twice expressed wish that his widow and children should continue to live, as nearly as may be, as they had lived during his lifetime.

Nor can we agree with the conclusion of the chancellor that this will did not dispose of any profits that might have been derived from the conduct of such business during the life of the wife in excess of what was necessary to support and maintain her and such of the children as lived with her; in the manner they had been supported during his life. The fact, as we have seen, that the testator had the primary purpose in creating the trust to provide a support for the wife and such children, taken in connection with his subsequent disposition of his whole estate at the death or remarriage of his wife, seems

to necessarily embrace whatever excess may be remaining at such future period of distribution. The devise of a beneficial interest in such profits is during the life or widowhood of the wife, to her and those children living with her to the extent it may be necessary to provide them a support similar to the one he provided in his lifetime, and the devise of the excess is necessarily embraced in the provision for a distribution at her death or remarriage.

Nor do we agree with the chancellor that there was no beneficial provision for the widow in this instrument, and that therefore she was not required to renounce the will, as provided by statute, within one year. We have seen that the testator provided for his wife a support and maintenance during her life or widowhood, and he placed the title to all his property in her in trust during that period, so that she was in position to secure the support and maintenance provided for her. We think this is a substantial provision for the widow, and such provision as placed her upon her election within the statutory period to renounce the will if she sought to claim under the statute. *Cummings v. Daniel*, 9 Dana, 361; *Smoot v. Heyser*, 113 Ky. 81, 67 S. W. 21, 23 Ky. Law Rep. 2401. It follows from what has been said that the testator neither died intestate as to his wife nor as to any part of his property, nor as to the excess income from the trust.

[2] The chancellor's judgment that the trust was at an end because it was no longer profitable to manufacture whisky barrels for the reason that the manufacture and sale of whisky is now prohibited by law was proper in so far as it authorized the trustee to cease the operation of that business; but from what we have said in our interpretation of provisions of the will and the purposes of this trust it seems to follow that, while the trust is at an end in so far as the operation of the business is concerned, the corpus of the trust property being largely intact and the purpose for the creation of the trust still existing and the time fixed by the testator for the cessation of the trust not having yet arrived, there should be a continued enforcement of it.

While it is no longer advisable to use the trust property in the manufacture of whisky barrels, it is proper to carry out the purposes of the testator by the use of the trust property to carry out his intention to provide the support and maintenance for his wife and the children living with her. In this view of the case it is the duty of the trustee to invest this trust property and use the income from it just as she was authorized to use the same while it was employed in the cooperage business, and if it should appear that the income from the property is insufficient to furnish a support and main-

tenance for the wife and such of the children as may be living with her, she may even encroach upon the corpus of the trust estate for that purpose, for it will be observed that nowhere in his will does the testator confine the support and maintenance which he provides for his wife and those children living with her to the income from the trust property. We have seen that his chief concern in the creation of the trust was to furnish such support and maintenance; and, there being no restriction confining her to the income alone, she may, if it should become necessary for that purpose, encroach upon the corpus of the trust estate.

Especially do we take this view in the light of the fact disclosed by the record that the trustee has heretofore, by consent, made large advancements to each of her children and grandchildren out of the trust estate, of which there is no complaint in this record, and, therefore, if the income from the remaining trust property is insufficient to furnish her and the children living with her such support and maintenance as was contemplated by the testator, she may use out of the remaining trust estate in her hands not only the income, but the corpus in so far as it may be necessary for that purpose. The fact that the assets of the trust estate have, from the necessities of the case, been withdrawn from the coöperation business, will not be permitted either to defeat the prime purpose of the testator in creating the trust, or to accelerate the settlement of the trust before the time fixed by him.

It was obviously the purpose of the testator to place all of his property of every kind in trust during the life or widowhood of his wife, to the end that she, and those living with her, might have during that period the same support and maintenance that he had always furnished them, and that whatsoever might be left when the trust was terminated should be then divided as indicated in his will. The judgment is reversed, with directions to enter a judgment construing the will as herein indicated.

### KIRK v. COMMONWEALTH

(Court of Appeals of Kentucky. Oct. 11, 1921.)

#### 1. Homicide ⚡268—Evidence of murder sufficient to go to jury.

In a murder trial, evidence held to authorize a submission of the case to the jury.

#### 2. Criminal law ⚡753(2)—Peremptory instruction should be refused, if there is any evidence of guilt.

If there is any evidence, even though slight, which tends to prove accused's guilt of the

crime charged, or any degree thereof, a peremptory instruction should be refused, and the case allowed to go to the jury.

#### 3. Criminal law ⚡552(1)—Circumstantial evidence may convict.

A conviction may be had in a criminal case, whether for murder or a lesser crime, upon circumstantial evidence alone.

#### 4. Criminal law ⚡1159(2)—Verdict not wholly unsupported by evidence not reviewable.

Unless the verdict in a criminal case is flagrantly against or wholly unsupported by the evidence, it will not be disturbed on appeal.

#### 5. Homicide ⚡127—Indictment held sufficient.

In a murder trial, an indictment held to conform to the requirements of Cr. Code Prac. § 122, subsec. 2, where, although inartistically worded, it charged accused with murder in reasonably intelligible terms, sufficiently described the person killed, the acts or means by which the killing was accomplished, and alleged the malice and felonious intent with which it was done.

#### 6. Indictment and information ⚡93—Defects in form not fatal.

The law looks less to form than substance, and where an indictment states in unmistakable language all of the acts necessary to constitute the crime charged, it will be held sufficient.

#### 7. Criminal law ⚡1151—Ruling on application for continuance largely discretionary.

The matter of granting or refusing a continuance is largely in the discretion of the trial court, which, in the absence of abuse on the part of that court, will not be interfered with by the appellate court.

#### 8. Criminal law ⚡594(1)—Continuance held properly refused.

Refusal of continuance on account of absent witnesses was not an abuse of discretion, where their testimony would have been merely cumulative, and the affidavit failed to state that the witnesses were not absent by accused's procurement.

#### 9. Criminal law ⚡1144(12)—Error not presumed.

Where the record failed to show whether an accused availed himself of the right to introduce as evidence on the trial in the circuit court the affidavit for continuance regarding the testimony of his absent witnesses, subject to contradiction by the commonwealth, but he did not complain that he was not allowed the right, the Court of Appeals will not infer error on the part of the trial court regarding it.

#### 10. Homicide ⚡340(1)—Instruction referring to deceased as white man held not prejudicial.

On trial of a negro for murder, accused was not prejudiced by an instruction referring to deceased as a white man, where the color of deceased was material as a means of identifying him as the unknown person charged in the indictment to have been killed.



11. Homicide  $\S$ 300(11), 309(5)—instruction on manslaughter and self-defense unauthorized by evidence.

In a murder trial, where the evidence showed that deceased was an old man, brutally and premeditatedly killed for the purpose of robbery, and accused's defense was an alibi, an instruction on manslaughter or self-defense was unauthorized.

Appeal from Circuit Court, Edmonson County.

Herman Kirk was convicted of murder, and appeals. Affirmed.

Milton Clark, of Brownsville, for appellant.

Charles I. Dawson, Atty. Gen., Thos. B. McGregor, Asst. Atty. Gen., and J. H. Gilliam, Commonwealth's Atty., of Scottsville, for the Commonwealth.

SETTLE, J. The appellant, Herman Kirk, was tried in the court below under an indictment charging him with the crime of murder. The jury returned a verdict, finding him guilty as charged and fixing his punishment at confinement in the penitentiary for life. He was refused a new trial, and prosecutes an appeal from the judgment of conviction entered upon the verdict.

The victim of the homicide was an old man, apparently of the "hobo" class, wholly unknown to any resident of the community in which he was killed. Although called in the indictment John Doe, it is therein declared that was not his correct name, which was to the grand jury unknown. According to the facts furnished by the bill of evidence, he first appeared Saturday, February 12, 1921, shortly after 12 o'clock noon, at Rocky Hill Station, a village on the Louisville & Nashville Railroad, 18 miles north of Bowling Green, and  $5\frac{1}{2}$  miles south of Glasgow Junction, another village on the railroad. He was then walking on the railroad track, or in a path on the railroad right of way beside it, in the direction of the latter place. On the afternoon of the following day, Sunday, February 13, his dead body was found behind a log about 100 feet from the railroad track in a flat place or sink filled with bushes, half the distance between Rocky Hill Station and Glasgow Junction. His face was badly mangled and skull crushed to a pulp, evidently inflicted by terrific blows with some blunt and deadly instrument or instruments wielded by a powerful and merciless hand with intent to kill, and which produced death almost instantly. The pockets of his clothing were exposed, with the inside of each of them turned outward, and neither purse, money, nor other thing of value found on his person.

He evidently was killed on the railroad track, or in the path beside it, 100 feet from where his body was found. This was demon-

strated by the presence of blood stains in the path beside the railroad track at that distance from the body and on the ground toward where it was removed; also by the presence in the soft soil of the path of the tracks of two men, a few of which were made by heavy "hobnail" shoes such as, numerous witnesses testified, were worn by the deceased as he passed through Rocky Hill Station the day of the homicide, and were found on his feet after his death. The greater number of tracks, however, were made by rubber overshoes, such as were worn by appellant when arrested for the crime, and, according to several witnesses, worn by him the day of the homicide. Measurements of the tracks, made upon their discovery, when applied to the shoes on the feet of the deceased and the overshoes of appellant, showed a few of them of such size and character as were or could have been made by the shoes of the deceased; but the greater number of them were of such size and character as were or could have been made by the overshoes of the appellant.

The body of the deceased evidently was dragged by the feet and with his back to the ground from the place of the blood stains in the path beside the railroad track to the sink where it was found. This is demonstrated by the facts, as shown by the evidence, that no tracks were found leading from the blood stains in the path to the point where the body was found that could have been made by the shoes worn by the deceased, but there were tracks leading from the blood stains in the path to where the dead body lay, made by overshoes of the size and character of those worn by appellant, which tracks were made by the backward stepping of the wearer of the overshoes in dragging the body of his victim; the dragging of the body being further shown by the flattened or mashed condition of the grass and weeds on the ground over which it passed, the turning of the clothing the wrong way, and causing it to gather under the upper part of the back and head. When the body was discovered, the face was covered by the overcoat of the deceased, which had been pulled over his head for that purpose. The overcoat was rendered immovable by the placing on it of a large rock, which had been removed from its well-defined bed only a few feet away.

Just off the right of way of the railroad company, and near the blood stains in the path beside the railroad track, were found a heavy sassafras stick and rock, either of sufficient size and weight, if used in inflicting blows, to have produced the wounds causing the deceased's death, and each containing blood stains. The stick had the appearance of having been freshly broken from its parent tree or bush, and by investigation on the part of the several persons a

sassafras sapling, found near the railroad track at considerable distance from the body of the deceased, showed the loss of a freshly broken large limb, and upon comparing with the break in the tree the broken end of the sassafras limb or club found at the place of the homicide, it was identified as the limb broken from the tree.

Other than the man slain and his slayer, there were no eyewitnesses of the homicide, but in addition to the facts and circumstances above related, evidencing the killing and that it was murder, the following facts, also furnished by the evidence, were relied on by the commonwealth to connect appellant with the crime and prove its commission by him: These facts, in brief, were that a negro man, later identified by witnesses as the appellant, arrived at Rocky Hill Station Saturday afternoon, February 12, 1921, from the direction of Glasgow Junction on a freight train which got there at 12:30 or 1 o'clock p. m., and immediately after the deceased left Rocky Hill Station walking toward Glasgow Junction. The freight train passed the deceased just before or upon reaching Rocky Hill Station, and without stopping at that place greatly diminished its speed in approaching and passing it. Appellant was seen by the witnesses Bush and son to get off the train at the Bush crossing near the edge of the village, and a little later by Rigsby and Johnson near Hudson's store in the village. He was then dressed, as stated by the witnesses, in yellow or brown overalls, overshoes, and a fur cap. When arrested, he was dressed as thus described, and admitted that the same apparel was worn by him the day the homicide occurred. Upon quitting the train appellant started southward, as if to enter the village of Rocky Hill Station, but in a few minutes returned to the Bush crossing, then proceeded, walking on or beside the railroad track, toward Glasgow Junction, thereby retracing the route over which he had just come by the freight train. At that time the deceased was still in view, walking upon or beside the railroad track toward Glasgow Junction, when he and appellant were last seen by the witnesses near Rocky Hill Station, appellant, who walked faster than the deceased, seemed to have gotten in about 30 yards of him.

Another witness besides those at or near the Bush crossing, Eugene Madison, claimed to have seen both the deceased and appellant after they left the crossing. Madison's home is between Glasgow Junction and Rocky Hill Station, about  $1\frac{1}{2}$  miles from the latter place, which he visited in the afternoon of Saturday, February 12, 1921, walking from his residence across his farm to the Louisville & Nashville railroad track, thence down the track to Rocky Hill Station. According to his testimony he reached the railroad track at a point 300 or 400 yards above the Bush crossing, and before getting upon the rail-

road track he saw deceased at a distance of 60 or 65 feet, walking on the track, or path beside it, toward Glasgow Junction, but had no conversation with him. His description of him, however, was the same as that given of him by other witnesses. Madison next saw, about 30 yards in the rear of deceased, a negro man then unknown to him, but whom he later identified as the appellant. When the witness got to the negro man the latter was standing with one foot on a rail of the track rolling a cigarette. He requested of the witness a match, which was followed by a brief conversation between them respecting the tobacco crop in that vicinity, the market price of which he asked. During the conversation the witness stood near and immediately facing the negro, and had, as he testified, a good opportunity to observe, and did observe, his face, dress, and the quality of his voice.

This witness, as did others by whom the negro was described, declared that he was a much younger, larger, and heavier man than the deceased; that he wore, outwardly and in addition to whatever underclothing he may have had on, brown overalls, rubber overshoes, and a fur cap. When the conversation ended the witness proceeded on his way to Rocky Hill station, without looking back to see what became of the negro or deceased. On Monday afternoon, two days later and following the arrest of appellant, charged with the murder of deceased, the witness Madison was called to Glasgow Junction to inspect him and ascertain whether he was the negro man he met and with whom he talked on the railroad track near Rocky Hill Station the previous Saturday, and upon seeing appellant in the custody of the arresting officer he positively identified him as the same man he met on Saturday at the time and place indicated; the identification being made by means of his features, figure, voice, and also by the brown overalls, rubber overshoes, and fur cap he was then wearing, which the witness declared to be the same he wore at the time of his meeting with him the previous Saturday.

Gibson, a witness living near Rocky Hill Station to which he walked from Glasgow Junction down the railroad track the afternoon of Saturday, February 12, testified that he left Glasgow Junction at 2:30 o'clock p. m., and between that time and 3 o'clock a mile below the latter place, he saw a man approaching him, walking on the railroad track from the direction of Rocky Hill Station, but at such a distance as prevented him from ascertaining his color or apparel, except that he wore a cap. This man left the railroad track and walked toward a traveled road leading to Glasgow Junction, which at that point ran parallel with the railroad and at a distance of 100 or more yards from it.

Witnesses Ivey Ray and T. T. Rowntree,

the former residing two miles from Glasgow Junction on the turnpike leading therefrom to Rocky Hill Station, and the latter on the same road a mile from Glasgow Junction, testified that they together left Glasgow Junction, Saturday, February 12, at 3 o'clock p. m., in a buggy for Rocky Hill Station, and shortly after leaving Glasgow Junction they saw appellant walking toward them from the direction of Rocky Hill Station, but that just before reaching them he suddenly left the road in which they were driving, and taking another, which led from it and also into Glasgow Junction, passed them at a greater distance than would have separated him from the buggy if he had continued in the road he left. Both Ray and Rowntree were well acquainted with appellant, and he with them, and in passing both spoke to him, using the salutation customary among acquaintances. Only then did the appellant appear to take notice of them, as he returned the salutation, turning his face toward them for that purpose, when nearly past them. In passing him, Ray and Rowntree noticed that he had on brown overalls and a fur cap. They did not observe his feet, but both saw that his clothing was black and muddy.

It appears from the bill of evidence that appellant's mother is a resident of Glasgow Junction, and that he and his wife were with her several weeks preceding the homicide, during which time he had no known employment. In testifying in his own behalf on the trial, he claimed to be a resident of Bowling Green, and that he lived and worked there, or in that vicinity, for six months, he and his wife occupying the greater part of that time rented rooms, but he was unable to give the name of the owner of the rooms or tell where or for whom he had worked. Although a young and vigorous man, like the stranger of whose death he was accused, appellant, according to the evidence, was without occupation or home. The evidence introduced by him under his plea of not guilty was in support of the alibi constituting his only defense. It was his claim that he was not at Rocky Hill Station the day of the homicide, but that he went by freight train, early in the forenoon of February 12, from Glasgow Junction to Cave City, and returned, also in the forenoon, from that town to Glasgow Junction with and in the automobile of a man unknown to him, reaching Glasgow Junction at 12 o'clock; that he went at 1 p. m. to the stores of Jewel and James, and did not leave Glasgow Junction again that afternoon. He admitted, however, that he voluntarily stated to Officer Alexander and others, after his arrest, that after remaining in Glasgow Junction until 1 or 1:30 o'clock p. m., February 12, he went to Locust Grove, nearby, and engaged in a game of craps with certain other negroes. One witness testified that he saw appellant at

Cave City at 11 a. m., February 12, and two or three others, including his mother, that they saw him in Glasgow Junction about 1:30 p. m. that day.

Saying nothing of the lack of corroboration of many of the salient features of the appellant's own testimony, or the improbability of much of that of his witnesses, we can but remark that we have rarely found evidence as to the identity of an accused as strong as that furnished by five of the commonwealth's witnesses, the two Bushes, Rigsby, Johnson, and Madison, regarding the identity of appellant as the man seen at Rocky Hill Station February 12, and later following the victim of the homicide to the place where his life was taken. It is to be remarked, too, that these witnesses, upon again seeing appellant after his arrest, without hesitation or doubt, declared him the person they had seen on the day of and prior to the homicide at the place and under the circumstance already stated, which they were able to know by his voice, physical appearance, and apparel, which was the same worn by appellant on the day of the homicide. Moreover corroborative of this testimony of the witnesses named is that of the witnesses Ray and Rowntree, who met appellant near Glasgow Junction at, or shortly after, 3 o'clock p. m. on the day of the homicide. It cannot, therefore, be denied that the evidence of these seven witnesses, together with the circumstances attending the homicide, not only show that appellant had full opportunity to commit the homicide, but strongly conduced to prove that he alone is the guilty party, and that the crime was murder.

[1-3] Obviously the evidence referred to gives no support to the contention of appellant's counsel, assigned as error requiring a reversal, that the trial court should have sustained his motion, made at the conclusion of the evidence, for an instruction peremptorily directing a verdict of acquittal. The evidence as a whole authorized the submission of the case to the jury. It is a well-known rule that, if there is any evidence, even though slight, which tends to prove the defendant's guilt of the crime charged, or any degree thereof, a peremptory instruction should be refused, and the case allowed to go to the jury. *Gordon v. Com'lth*, 138 Ky. 508, 124 S. W. 806. Equally familiar is the rule that a conviction may be had in a criminal case, whether for murder or a lesser crime, upon circumstantial evidence alone. Indeed, such evidence has often been as convincing as that furnished by eyewitnesses to the commission of the crime. *Wendling v. Com'lth*, 143 Ky. 587, 137 S. W. 205; *Smith v. Com'lth*, 140 Ky. 599, 131 S. W. 499.

[4-6] Yet another well-recognized rule is that, unless the verdict in a criminal case is flagrantly against or wholly unsupported by the evidence, it will not, on appeal, be

disturbed. *Polley v. Com'lth*, 171 Ky. 307, 188 S. W. 400; *Allen v. Com'lth*, 176 Ky. 475, 196 S. W. 160. The reason supporting this rule is that, as it is peculiarly the province of the jury to pass upon the facts and determine whether the witnesses for the commonwealth or defendant shall be believed, their verdict should carry great weight. *Day v. Com'lth*, 173 Ky. 269, 191 S. W. 105.

Appellant's complaint of the overruling of his demurrer to the indictment by the trial court is without substantial merit. The indictment fairly conforms to the requirements of the Criminal Code (section 122, subsec. 2). Whatever defects appear in it are of form rather than substance; though inartistically worded, it seems to omit no allegation of fact essential to constitute the crime of murder, as it in reasonably intelligible terms charges appellant with the murder, sufficiently describes the person killed, the acts or means by which it was accomplished, and alleges the malice and felonious intent with which it was done. The law looks less to form than substance, and where an indictment states in unmistakable language all of the acts necessary to constitute the crime charged, it will be held sufficient. *Greer v. Com'lth*, 164 Ky. 396, 175 S. W. 665; *Burnett v. Com'lth*, 172 Ky. 397, 189 S. W. 460; *Turner v. Com'lth*, 187 Ky. 385, 180 S. W. 760, L. R. A. 1918B, 329.

[7-9] Appellant's contention that the refusal to him by the trial court of the continuance asked upon his affidavit was prejudicial error is untenable. The grounds set forth in the affidavit mainly were the absence of two named witnesses and the inability of his counsel to prepare his case for trial. The matter of granting or refusing a continuance is largely in the discretion of the trial court, which, in the absence of abuse on the part of that court, will not be interfered with by the appellate court. It is true more latitude is exercised in granting a continuance at the appearance term than a subsequent one. But in the case at bar we find no sound reason for holding the refusal of the continuance, asked by appellant, error. The testimony of the absent witnesses was as to the appellant's alibi, and would have been merely cumulative, as other witnesses used by him on the trial testified fully to the same facts claimed to be known to the absent ones; besides, the affidavit failed to state that the absent witnesses were not absent by appellant's procurement. It is also manifest that appellant's counsel had sufficient time to prepare for his trial. He by employment represented appellant at his examining trial, two weeks before the final trial, and then, and before the final trial, had reasonable time to find witnesses and prepare his

defense. In addition, appellant had under the statute the right to introduce as evidence on the trial in the circuit court the affidavit regarding the testimony of the absent witnesses, subject to contradiction by the Commonwealth. This right could not be, and does not appear to have been, denied him by the court, though the record fails to show whether he availed himself of it. He does not, however, complain that he was not allowed the right, and we will not, therefore, infer error on the part of the court regarding it.

[10, 11] Appellant complains that his rights were prejudiced by an instruction of the trial court, which referred to deceased as a white man, and insists that it committed reversible error in refusing to instruct the jury on the law of voluntary manslaughter and self-defense.

The first contention is without merit, as the color of the deceased was material as a means of identifying him as the unknown person charged in the indictment to have been killed. The second contention is equally lacking in merit, because all the facts and circumstances established by the evidence, such as the scarcity of tracks made by the deceased at the place of the killing, the greater number made by his assailant, the atrocious nature of his wounds, the dragging away and attempted concealment of the body, and character of the weapons employed to do the killing, all conduce to prove that the killing was premeditated on the part of the slayer, and, when considered with the evidence of the rifling of deceased's pockets, indubitably show that the motive of the slayer was robbery and the killing murder, in view of all which, and the proof connecting appellant with the crime, together with the insufficient proof of the alibi relied on by him, an instruction on manslaughter or self-defense was unauthorized.

The case comes within the rule announced in *Bast v. Com'lth*, 124 Ky. 747, 99 S. W. 978, 80 Ky. Law Rep. 967 and later cases, viz. that where the facts and circumstances in evidence are so convincing as to preclude any other theory of the homicide than that of murder, instructions on manslaughter or self-defense should not be given. We find in the record no incompetent evidence that could have prejudiced any substantial right of appellant; and while the remarks of the commonwealth's attorney, made to the jury in argument, complained of, were inflammatory and should not have been indulged in, they cannot be said to constitute reversible error.

As on the whole case no error justifying a reversal is apparent, the judgment is affirmed.

**STATE ex rel. ROLL et al. v. ELLISON et al.,  
Judges. (No. 22593.)**

(Supreme Court of Missouri, in Banc. July 22, 1921. Rehearing Denied Oct. 8, 1921.)

**1. Husband and wife §14(2) — Purchase of land by husband taking title in himself and wife makes them tenants by entirety.**

Where a husband bought land with his own money and took title in himself and wife, they became tenants by the entirety.

**2. Trusts §81(2)—No trust in favor of husband who bought land and took title in himself and wife.**

Where husband bought land with his own money and took title in the name of himself and his wife, no trust resulted in his favor at the time the deed was delivered.

**3. Divorce §322—On divorce of husband and wife, tenants by entirety, they become tenants in common.**

On divorce of husband and wife, tenants by the entirety through a purchase by the husband and taking title in the names of himself and his wife, they became tenants in common.

Certiorari by the State of Missouri, on the relation of Hattie Roll and others, against Hon. James Ellison, and others, Judges of the Kansas City Court of Appeals. Judgment and opinion of the Kansas City Court of Appeals (226 S. W. 590), quashed.

Pope & Lohman, of Jefferson City, for relators.

Irwin & Haley, of Jefferson City, for respondents.

**JAMES T. BLAIR, C. J.** The writ brings into this court the record of the Kansas City Court of Appeals in the case of Francis Elliott v. Hattie Roll et al. (App.) 226 S. W. 590. From the opinion in that case it appears that the facts are that Francis Elliott and Nancy S. Elliott were husband and wife; that during the marriage Francis Elliott bought and paid for a tract of land and caused the deed to be made to himself and Nancy S., his wife; that subsequently Nancy S. procured a divorce from Francis; they had no children. Soon after the decree of divorce was rendered Francis brought suit against his former wife to partition the land. She died, and these relators, her children by a former marriage, were made defendants. The parties agreed that the land should go to sale and the proceeds be divided according to the rights of the parties in the land. The trial court adjudged that Francis Elliott was entitled to a sum equal to the purchase price (\$950) he had paid and one-half the balance. The remainder, \$60.53, was adjudged to belong to defendants.

The Court of Appeals held: (1) That when Elliott bought and paid for the land and caused the deed therefor to be made to himself and his wife the two became tenants by

entireties; (2) that there was a presumption that Elliott intended a provision for his wife; (3) that if there had been no divorce she would have held her interest as tenant by the entirety "wholly free from any claim by him in advancement of purchase money"; (4) that the divorce "cut out survivorship and changed the estate into one in common, and after the decree they held it as tenants in common"; and (5) that, "when the estate becomes one in common and partition is sought, the party advancing the purchase money is entitled to the amount advanced, and the balance may be divided between them as was done by the circuit court." The judgment was affirmed.

[1] This last proposition is said to be in conflict with decisions of this court. There is no question that upon the purchase and execution of the deed to them Nancy and Francis Elliott became tenants by entireties. The purchase was made by the husband with his means, and the presumption is that he took the deed as he did as a provision for his wife. There is no evidence to rebut this presumption. In case he had died before the dissolution of the marriage the wife would have taken the whole, by her right of survivorship. The divorce dissolved the marriage, and the tenancy by entirety was thereby converted into a tenancy in common. A right to partition thereupon arose. *Russell v. Russell*, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581.

[2] The rights of Mrs. Elliott came from the deed her husband caused to be executed to her and to himself jointly. No trust resulted at the time the deed was delivered. The husband could not, on facts like those stated by the Court of Appeals, have had a trust declared in his favor during the marriage. *Wilhite v. Wilhite*, 224 S. W. 448, and cases cited: *Haguewood v. Britain*, 273 Mo. loc. cit. 93, 199 S. W. 950. In *Bender v. Bender*, 281 Mo. 473, 220 S. W. 929, the husband had bought land and caused it to be conveyed to himself and wife. The wife subsequently procured a divorce. The husband then sued and pleaded that he had purchased the land with his own means and caused it to be conveyed to himself and wife upon an agreement that in case of a separation in the future he and his wife would convey the property to their children. The court held that no trust resulted from the fact that the money of the husband paid for the property; that a resulting trust must arise, if at all, at the instant the deed is taken and caused to be created by subsequent occurrences. This holding is in point in this case. The facts of that case, in so far as their efficacy to raise a resulting trust is concerned, are like those in this case. This court held no such trust was raised. The Court of Appeals in this case held, in effect, the contrary. Thereby it brought the

opinion into conflict with the decision in *Bender v. Bender*. The holding in the *Bender Case* is in accord with decisions in other states. *Reed v. Reed*, 109 Md. 690, 72 Atl. 414, 130 Am. St. Rep. 552; *Hayes v. Horton*, 46 Or. 597, 81 Pac. 386.

[3] Divorce does not restore the parties to their former condition in all respects. "It vests in the wife her moiety." *Holmes v. Kansas City*, 209 Mo. loc. cit. 527, 108 S. W. loc. cit. 13, 123 Am. St. Rep. 495. It does not treat the marriage as a nullity. The law takes the parties where it finds them at the time of the divorce (2 *Bishop on Marriage and Divorce*, § 1023), and, unless a trust arises at the time the deed is taken or there be statutes which affect the case, an estate by entirety becomes a tenancy in common, and the husband's right to cut down the moiety of the wife is not increased or affected by the fact of divorce. The cases in which the wife has succeeded in impressing a trust upon property, though held by entirety, which her husband has bought with her money, and those in which there is fraud or the like, are not in point.

Because of the conflict pointed out the record of the Court of Appeals is quashed. All concur.

#### MILLER v. KANSAS CITY RYS. CO. (No. 22131.)

(Supreme Court of Missouri, Division No. 2. July 19, 1921. Motion for Rehearing Overruled Oct. 11, 1921. Motion to Transfer to Court in Banc Overruled and Opinion Modified Oct. 24, 1921.)

#### 1. Street railroads ⇨117(35)—Negligence under humanitarian rule held question for jury.

Where driver of disabled truck was killed by street car colliding with the rear of his truck while he was fixing chain leading to towing truck, evidence that motorman had he been looking could have seen the truck though it was after sundown held sufficient to take question of liability under humanitarian rule to the jury.

#### 2. Negligence ⇨119(4)—Evidence admissible under general allegation.

A general allegation of negligence is sufficient to let in evidence of any particular negligence coming within the content of the general statement.

#### 3. Street railroads ⇨110(2)—Petition held not sufficient to allege liability under humanitarian rule.

In action for death of driver of truck killed by street car colliding with the rear of his truck while he was fixing a chain leading to towing truck, petition alleging that while deceased was in the act of readjusting chain, and while standing on the ground between said trucks defendant's car approached from the rear and negligently collided with one of said trucks, etc., does not sufficiently plead liability under the humanitarian rule.

#### 4. Death ⇨68—Evidence that deceased was a good husband inadmissible on question of damages.

Under Rev. St. 1919, § 4217, fixing a penalty between \$2,000 and \$10,000 for wrongful death, to aid the jury in determining the amount to be awarded, evidence is not admissible that deceased was a good husband, helped his wife with the housework, and was thoughtful and very kind and loving towards his family, as such evidence showed loss of society alone, which is not an element of damages.

Walker, J., dissenting in part.

Appeal from Circuit Court, Jackson County; Willard P. Hall, Judge.

Action by Euphamie H. Miller against the Kansas City Railways Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

E. E. Ball, of Kansas City, and L. T. Dryden, of Independence, for appellant.

M. D. Aber, of Warrensburg, and C. W. Prince, E. C. Hamilton, E. A. Harris, and Jas. N. Berry, all of Kansas City, for respondent.

WHITE, C. The plaintiff's husband, Cletus E. Miller, was killed by one of the cars belonging to the defendant. On account of such death the plaintiff recovered judgment in the sum of \$10,000, November 6, 1919, in the circuit court of Jackson county, and the defendant appealed to this court.

Cletus E. Miller was a truck driver, employed by one Paul Patton, who conducted a general trucking business. Late in the afternoon of November 27, 1918, Miller was driving a truck which became disabled, and his truck was being towed to the Patton garage by another truck driven by one Clem Hollingsworth. While the two trucks were being taken along Troost avenue at Twenty-Seventh street the chain connecting them broke, and Miller got down between the trucks to fasten it. The two trucks stood astride the right-hand rail of the street railway track, and while Miller was "hunched down" between them a car of the defendant, approaching from the rear, struck his truck and drove it forward against the other truck, crushing Miller to death between them. Hollingsworth testified that it was light enough to see a block away; that the two trucks were about 6 feet apart, and the collision was of such force as to drive the rear truck about 10 feet from where it stood.

The defendant pleaded contributory negligence, and offered evidence to show that at the time of the collision it was rainy and quite dark. The observer of the weather bureau testified that there was one-hundredth of an inch of rainfall during that day, prior to 5 o'clock, and one one-hundredth of an inch between 5 and 6 o'clock. There was no light on either truck. The defendant

pleaded and offered in evidence an ordinance of Kansas City, providing that no vehicle shall be left in the street at night without light or lights so as to be visible from any direction for a distance of 200 feet. "At night" was defined in the ordinance to be "during the period of one-half hour after sunset and one-half hour before sunrise, and at all other times and places when and where there is insufficient light to clearly reveal all persons and objects 500 feet distant." All motor vehicles were required to display one red light from the rear and two white lights from the front. The weather observer testified the sun would set November 27, at 4:41 p. m., standard time, but that the solar time for the setting of the sun at Kansas City was 18 minutes later, which would make sunset at 4:59. Plaintiff introduced evidence to show that the watch which Miller carried at the time, and which was taken off his person after he was killed, had been stopped by some blow at 5:27½. The motorman testified for defendant that at the time of the collision he looked at his watch, and it was 5:27. The plaintiff introduced evidence to show that it was light enough to see 500 feet. Other facts important for consideration will be noticed in considering the points presented for reversal.

I. Appellant demurred to the evidence, and assigned error to the action of the trial court in overruling such demurrer. The demurrer was presented on the ground that the negligence of Miller himself in failing to keep the lights glowing on his truck contributed to his injury, and should bar his recovery. As appears from the statement of facts above there was substantial evidence tending to show that the collision occurred 28 minutes after sundown, and that it was light enough to reveal persons and objects 500 feet distant, from which the jury might properly find there was no violation of the ordinance in failure to display lights.

Other facts are mentioned which appellant claims show that Miller was negligent in going between the cars without guarding against the approach of vehicles, and in allowing the trucks to stop so that they were on the track of the street railway company when there was plenty of room on the side for them. Inasmuch, however, as the case was submitted to the jury on the humanitarian doctrine alone, it may be conceded that Miller was negligent in those particulars.

[1] II. It is objected that the case should not have been submitted under the humanitarian rule because there was no competent evidence which would authorize it.

Hollingsworth testified that a headlight was on the rear truck, which could have been used if they had needed it, but they did not have it turned on because it was not needed. He did not see the car until it was within 10 feet of the truck, because he had his mind

on tying the chain, although he could have seen the street car a block away; he called to Miller warning him of the approaching car, but Miller didn't appear to hear; it was not raining nor foggy; it was a little misty. The motorman said he was running at the rate of five or six miles an hour.

There was evidence for the plaintiff that the motorman was not looking ahead, but looking to one side as he approached the place where the trucks were; that the cars of the 900 series, equipped with sand and reverse, running at the rate mentioned, could be stopped within 2 or 3 feet, almost immediately.

It is claimed there is no evidence to show that the motorman saw or could have seen Miller before striking the truck; he was "hunched down" between the trucks, tying the chain. The motorman himself testified that he did not see the truck until within 10 feet of it, and he applied his sand and his reverse as soon as he saw it. He did not say he had no reason to think any one was between or about the trucks. He stopped as soon as he could after seeing the trucks, 10 feet away. His headlight was burning, but he said he was blinded by a street light at Twenty-Sixth street. If it was light enough to see a block, as Hollingsworth swore, or dark, as the motorman swore, it seems incredible that, if he had been looking, he could not have seen the truck much sooner than he did see it. He could hardly have supposed two motor trucks would be left across his track unattended by some one in a dangerous position. We think it was for the jury to say whether, in the exercise of ordinary care, the motorman could have discovered Miller's peril in time to avoid injuring him.

[2, 3] III. Appellant further complains that the case should not have been submitted to the jury on the humanitarian doctrine, for the reason that it was not pleaded. The only allegation of negligence in the petition is this:

"And while the said Cletus E. Miller was in the act of readjusting said chain and reconnecting said trucks, and while standing upon the ground between said trucks a car of defendant approached from the rear, and negligently collided with one of said trucks, causing the said Cletus E. Miller to be injured and mashed so as to cause his death."

A general allegation of negligence is sufficient to let in evidence of any particular negligence coming within the content of the general statement. *Degonia v. Railroad*, 224 Mo. loc. cit. 539, 123 S. W. 807; *Bergfeld v. Kansas City Railways Co.*, 227 S. W. loc. cit. 108, 109, and cases cited. On authority of the *Bergfeld* Case an allegation that the servants of defendant negligently operated the street car so as to cause it to collide with the truck ordinarily would permit evidence

of any particular negligent operation of the car. It has been held that such allegation would let in evidence under the humanitarian rule. *Frankel v. Hudson*, 271 Mo. loc. cit. 504, 196 S. W. 1121; *Fleming v. Railroad*, 268 Mo. loc. cit. 188, 172 S. W. 355; *Hanlon v. Missouri Pacific Railway Co.*, 104 Mo. loc. cit. 391, 16 S. W. 233.

The allegation of the petition quoted above does not clearly or sufficiently state facts which would bring the case within the humanitarian rule, so as to charge the defendant with negligence in failure to observe it. However, since the case is to be tried again, the plaintiff will have opportunity to amend her petition in that respect.

[4] IV. The plaintiff offered evidence to show that Cletus E. Miller was very kind, loving, and thoughtful towards his family; that he was a good husband; helped his wife with the housework when he was at home. This evidence was objected to, and exception saved. The instruction on the measure of damages told the jury that if they found for the plaintiff they must assess her damages at not less than \$2,000 nor more than \$10,000, and might take into consideration, if they found for the plaintiff, the loss of such pecuniary and financial benefits which they might find plaintiff had sustained, and the instruction then proceeds:

\* \* \* "And, in doing this you may consider the loss of personal attention, if any, of the husband tending to provide for her comfort and welfare and his helpfulness, if any, to her in the future."

This instruction is based on 4217 R. S. 1919, on the theory that that section is partly penal and partly compensatory. The court in banc in the recent case of *Grier v. Kansas City, C. C. & St. J. Ry. Co.*, 228 S. W. 454, held that the statute is entirely penal, and not compensatory as to any part of the amount recoverable. It fixes the penalty at "not less than \$2,000 and not exceeding \$10,000 in the discretion of the jury." The opinion in the *Grier* Case holds that in exercising their discretion in determining the amount to be awarded the jury should know the facts upon which to exercise their discretion. The opinion uses this language (228 S. W. loc. cit. 458):

"By striking out '\$5,000' and substituting in lieu thereof 'not less than \$2,000, and not exceeding \$10,000, in the discretion of the jury,' the lawmakers intended that the jury in fixing the forfeiture should take into consideration both the facts constituting the negligence or wrongful act, with the attending mitigating and aggravating circumstances, and those showing the extent of the pecuniary loss inflicted."

See, also, *Lackey v. United Rys. Co.*, No. 21691, 231 S. W. 956.

Then the question arises, What facts may the jury consider in determining the "pecu-

niary loss inflicted" upon a widow for the death of her husband, as affecting the penalty to be imposed? There is more or less vagueness and uncertainty in every case when the jury begins to figure the exact amount of pecuniary loss which the wife would suffer in the future by reason of being deprived of her husband's support. Several elements enter into it, such as the uncertainty of his life and the possible enhancement or depreciation of his earning capacity, which give the jury discretion to resolve such uncertainty in the best way they can. But the jury must be limited to facts which would necessarily constitute pecuniary loss. They could not, in the guise of considering money value, take into consideration a matter which cannot be estimated in money. When they are told they might take into consideration the loss of the husband's "personal attention" and the wife's deprivation of the husband "tending to provide for her comfort and welfare," and his helpfulness in saving her from trouble and responsibility in household management, the jury would not be likely to feel themselves limited to figuring the facts of actual and necessary loss in money, or its equivalent, which would accrue to the wife. They would be left to speculate upon the loss not susceptible of pecuniary measurement. One sometimes speaks of value in terms of money when pecuniary measurement is not meant at all. A mother would not take a million for her baby. That does not mean that she would be deprived in the slightest degree of any pecuniary value in losing the baby. It is an expression of a sentiment. In actions arising under the damage statutes, mental suffering arising from loss of companionship and society is not an element that can be considered in estimating the damages. *Barth v. K. C. Elevated Railway Co.*, 142 Mo. loc. cit. 557, 44 S. W. 778; *Calcaterra v. Iovaldi*, 123 Mo. App. loc. cit. 354-355, 100 S. W. 675; *Howard v. Scarritt Estate*, 161 Mo. App. loc. cit. 562, 144 S. W. 185. In the *Calcaterra* Case the opinion is written by Judge Goode, who reviews the authorities in this state at some length. In the case of *Bernhardt v. Perry*, 276 Mo. 612, 208 S. W. 462, 13 A. L. R. 1320, this court held that the wife could not recover for loss of her husband's society or consortium caused by injury to him. There is no evidence, and probably could be none, to show any amount of financial outlay, or any monetary values, of which the plaintiff would be deprived, by reason of the loss of her husband's personal attention; the instruction in effect places before the jury the loss of society and nothing else, and is therefore erroneous.

Other errors are assigned in the selection of a jurymen; in admitting testimony of an expert who had not qualified; in admitting testimony in rebuttal; in permitting certain comments of counsel for respondent in his



argument to the jury. We deem it unnecessary to review these, because it is unlikely that the same circumstances will recur on another trial.

The judgment is reversed and the cause remanded.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All concur, WALKER, J., in all except in the last paragraph of subdivision III.

# RAYL v. GOLFINOPULOS. (No. 20797.)

(Supreme Court of Missouri, Division No. 2.  
July 19, 1921. Motion for Rehearing  
Denied Oct. 11, 1921.)

## 1. Wills $\S$ 400—Defense of statute of limitations held abandoned.

In a married woman's action to contest a will, where defendant, though he set up in his answer the statute of limitations (Rev. St. 1899,  $\S$  4624) in force at the time of probate, now Rev. St. 1919,  $\S$  527, and filed a general demurrer to the evidence, did not mention the statute during the proceedings, nor in his assignment of errors, and argued solely the sufficiency of the evidence on the issue of undue influence and mental incapacity, he will be deemed to have abandoned such defense, and the question whether the disability of a married woman under such statute was removed by Married Woman's Act of 1899 will not be considered.

## 2. Wills $\S$ 303(4)—Testimony of one of three witnesses held insufficient to prove execution.

Testimony of one only of the three witnesses to the will as to the genuineness of his and their signatures, that, though he did not remember the circumstances of the execution of the will, he knew it was properly executed, because he signed it and the attestation clause, and that testator was of sound mind, else he would not have attested the will, was insufficient to prove the execution thereof, Rev. St. 1919,  $\S$  520-524, requiring the testimony of the witnesses themselves.

## 3. Wills $\S$ 52(1), 289—Burden on proponents to prove formal execution, and that testator was of sound mind.

The burden is on proponents throughout to prove formal execution of the will, and that testator was of sound mind at the time.

## 4. Wills $\S$ 55(1)—Evidence held insufficient to show mental capacity.

Testimony of witnesses 20 years after the execution of the will as to testator's mental capacity held insufficient, the condition testified to not being placed accurately at or near the time of the execution of the will, and their statements being mere opinions, unaccompanied by statements of facts on which based.

## 5. Wills $\S$ 324(2)—Proponent failing to make out prima facie case of mental capacity not entitled to peremptory instruction, though contestant produces no evidence of incapacity.

Where proponents of a will failed to make out a prima facie case of mental capacity, they were not entitled to a peremptory instruction, whether contestant produced evidence of incapacity or not.

## 6. Wills $\S$ 163(2)—Presumption of undue influence arises from any close or confidential relation.

The presumption of undue influence in cases of confidential relationship is not limited to one transacting donor's business, any trust relation by which one establishes an influence over the mind of another being sufficient, as where one makes a will in favor of his physician, lawyer, guardian, priest, or religious adviser.

## 7. Wills $\S$ 324(3)—Evidence held sufficient to submit question of undue influence.

In a will contest, evidence as to the control, management, and complete dominance of testator by his wife, throughout their marriage held sufficient to authorize submission of the question of undue influence, whether or not it was exercised at the exact moment the will was executed.

## 8. Wills $\S$ 285—No error in refusing permission to amend answer after evidence in, where fact on which amendment based denied by plaintiff on cross-examination.

In a will contest, the court did not err, after the evidence had been heard, in refusing to permit proponent to amend his answer to allege that contestant was estopped to attack the validity of the will because she had received a legacy thereunder, where she denied, on cross-examination, that she received such legacy, there being no abuse of the court's discretion in refusing such amendment after the trial was practically over and the evidence mainly in.

Appeal from St. Louis Circuit Court; Samuel Rosenfeld, Judge.

Action by Alice Rayl against Theodore Golfinopulos, individually and as administrator of Melissa Golfinopulos, deceased, to contest the will of Charles S. Dunford. From verdict and finding for contestant, defendant appeals. Affirmed.

Chas. F. Krone, of St. Louis, for appellant.

Frank A. Thompson, of St. Louis, for respondent.

WHITE, C. The action is to contest the will of Charles S. Dunford. There was a verdict and finding by the jury that the paper purporting to be the will of said Dunford was not in fact his will, and the defendant appealed.

Charles S. Dunford was engaged in the hat business in St. Louis, and in 1873 he was a widower with two children—a daughter, Alice, the plaintiff, who was then 7 years of age, and a son, William S., who was then 11 years of age. At that time Dunford

met and married Melissa Higgins; he was 48 years of age, and she was 22. He continued in the hat business until 1880, when he retired. Melissa from the first assumed absolute control of Dunford, who was a little, feeble, inoffensive, easily controlled man. Melissa's treatment of her stepchildren was so harsh and cruel that the boy ran away at 14 years of age. He returned at times after several years, and would stay for a while. The girl, the plaintiff, continued to live with her father and stepmother until she was married, in 1888, at 22 years of age. She then lived in Indiana for about 13 years, and after two or three moves went to Joplin, Mo., where she was living at the time of her father's death in 1903.

In 1897 Dunford executed the will in contest, in which he gave to each of his children the sum of \$10, and devised all the balance of his property to his wife, Melissa Dunford. The will was probated in February, 1903, about 6 years after its execution. Dunford had three pieces of real estate, the value of which is not given, nor does any description of its quality appear in the record. Two of these pieces in 1879 were conveyed to a trustee for the benefit of Melissa. In 1892 it was conveyed by the trustee through a third person to Dunford and his wife, investing them with an estate by entireties, and at his death the title survived in Melissa. The remaining piece of real estate was all the real estate affected by the will. It is to be inferred from the testimony that the Dunfords lived entirely off the rents of his property after he retired from business in 1880, which would indicate that it had considerable value.

A man named Ford was about the place at the time of Dunford's death. Very soon Melissa married him. She afterward divorced him and married the defendant Theodore Golfopoulos in 1914. She died in 1917, leaving no descendants, and Golfopoulos inherited her property. He was made the administrator of her estate, and is defendant in this case, in that capacity, and in his own right.

[1] I. The will was probated in 1903, and this suit was filed in 1917. The plaintiff was at all times a married woman. The answer sets up the statute of limitations (section 4624, R. S. 1899) which was in force at the time the estate was probated, now section 527, R. S. 1919, except that the limitation period then provided was 5 years, and now is 1 year. The appellant did not thereafter mention the statute of limitations in any part of the proceeding. He filed a general demurrer to the evidence which might cover that feature of the case. But it is not specifically mentioned in the assignment of errors. In his brief appellant's argument turns solely on the sufficiency of the evidence to sustain the issues of undue influence and mental

incapacity. He does not mention the statute of limitations at any point, and we conclude that he has abandoned that defense. Whether the disability of a married woman is here removed, as mentioned in the statute (section 4624, R. S. 1899), in view of the Married Woman's Act of 1899 (Rev. St. 1899, §§ 4327-4341) is not before us for consideration.

[2] II. Appellant asserts that error was committed in submitting to the jury the issues as to the mental capacity of the testator. The court submitted the issue and instructed the jury that the burden was upon the defendants to prove that Charles S. Dunford, at the time of executing the paper writing purporting to be his last will, was of sound and disposing mind. It is argued that proponents made out a prima facie case by proving the execution of the will, and that plaintiff produced no evidence of incapacity; therefore the issue should not have been submitted.

There were three witnesses to the will—Theodore Rassieur, Adolph Wislezenus, and M. C. Early. The defendant produced only one of those witnesses, Theodore Rassieur. He testified that his signature, and that of the other two witnesses to the will, were genuine; that he knew them. He didn't remember the circumstances of the execution of the will; didn't remember whether Mr. Dunford was white or black. He said, "I have no recollection of the occurrence at all." He knew the will was signed, published, and declared by Dunford as his last will, in the presence of himself and the other witnesses, and that the witnesses signed in his presence, "from the fact that he [the witness] signed the paper and the attestation clause upon it." He said further that Dunford was of sound mind, or else he would not have attested the will; that it was his uniform practice to satisfy himself of the competence of the testator in such case.

Neither of the other witnesses testified, nor was any effort shown to procure their testimony in the form of depositions.

This was not proof of the execution of the will at all. The testimony of Rassieur amounted to no more than the identification of his signature, which might as well have been done by some one else. The statutes and the authorities require the testimony of the witnesses. Sections 520-524, R. S. 1919; *Bell v. Smith*, 271 Mo. 619, 197 S. W. 128.

[3] The petition of the plaintiff in setting out her case alleges the formal execution of the will, so that it might be said the plaintiff could not now assert that it was not executed. In the same connection the petition alleges that the instrument so formally executed was not the will of Charles S. Dunford, because he was not of sound and disposing mind at the time. The formal execution of the will, and the possession of mental capacity to execute it, are quite dia-

tinct, and must be proven as separate facts. *Craig v. Craig*, 156 Mo. loc. cit. 362, 56 S. W. 1097; *Heinbach v. Heinbach*, 274 Mo. loc. cit. 322, 323, 202 S. W. 1123. In every will contest the burden is on the proponents, not only to prove the formal execution of the will, but, that the testator was of sound mind at the time (*Major v. Kidd*, 261 Mo. loc. cit. 619-623, 170 S. W. 879; *Bensberg v. Washington University*, 251 Mo. loc. cit. 655, 158 S. W. 330; *Goodfellow v. Shannon*, 197 Mo. loc. cit. 278, 94 S. W. 979; *Weber v. Stroble*, 194 S. W. loc. cit. 275); and that burden rests with the proponent throughout the case (*Huffnagle v. Pauley et al.*, 219 S. W. 373). See *Messick v. Warren*, 217 S. W. 94; *Bell v. Smith*, 271 Mo. 625, 197 S. W. 128.

[4] After the plaintiff had put in evidence for the purpose of showing want of mental capacity, defendant in rebuttal offered three witnesses who testified on that issue. As set out in the abstract of appellant, one of those witnesses, *Liegengleest*, testified that—

"Dunford knew what his property was, what it needed, and what had to be done, knew about prices, and showed no evidence of inability to take care of his affairs, and knew what he was doing."

Another witness, *Myerson*, testified that Dunford talked all right for a man of his age, understandingly, very clearly. "He understood everything all right about his property and what was needed." Another witness, *Fanny Wear*, said she talked to Dunford of public affairs and things of general interest; that he was not weak-minded in any way, "but talked very sensibly, I thought." That was about all the evidence proponents offered on the issues of capacity. This testimony was given 20 years after the execution of the will. The condition of Dunford, as those witnesses claimed to observe it 20 years before, is not placed with any degree of accuracy at or near the time of the execution of the will. They did not know anything about the will. Their statements were, at most, mere opinions, entirely without probative force, because not accompanied by any statement of the facts upon which the opinions were based. *Heinbach v. Heinbach*, 274 Mo. loc. cit. 316, 317, 202 S. W. 1123, and opinion of *Faris, J.*, 274 Mo. loc. cit. 325, 202 S. W. 1130. So there was no evidence either in chief or in rebuttal to show mental capacity.

[5] It is argued by the appellants that, where a prima facie case is made out for the proponents, and no substantial evidence is offered to sustain the contest on the ground of mental incapacity, the court should direct a finding for the proponents on that issue, or should withdraw that issue from the jury. It was held by this court in *Teckenbrock v. McLaughlin*, 209 Mo. loc. cit. 539, 108 S. W. 46, with many citations and elucidations of

the principle, that, while a will contest is *sui juris*, the court may instruct in such case upon the evidence as introduced, or the lack of evidence to sustain any issue as in other cases. If either party has failed to maintain an issue, the court may so instruct. The proponents in this case failed to make out a prima facie case of mental capacity, either in chief or in rebuttal; they were, therefore, not entitled to a peremptory instruction upon that issue, whether plaintiff produced evidence of incapacity or not. In other words, the trial court did not err against defendant in submitting that issue to the jury, and defendant cannot complain. *Bell v. Smith*, 271 Mo. 625, 197 S. W. 128.

[6, 7] III. The appellant also challenges the sufficiency of the evidence to submit to the jury the question of undue influence. At the time of the marriage of *Charles S. Dunford* to *Melissa Higgins*, in 1873, he was 48 years of age and she was 22. About a dozen witnesses, who had a more or less intimate acquaintance with the pair, testified to the conduct of the two with relation to each other, covering the entire period from the marriage until the will was written in 1897. Dunford went out of business in 1880, and after that was in no business; apparently he lived upon the rents of his property. He is described as a little man, about 5 feet high; always wore a plug hat and a Prince Albert coat. He was timid, and, as several of the witnesses stated, feeble-minded, easily influenced, and completely under the control of his wife, *Melissa*. Without interference from him, *Melissa* treated the children so harshly that the boy ran away from home at 14 years of age, and never returned except for a little while at a time. She often beat the children; whipped the plaintiff unmercifully when she was a girl; openly endeavored to prejudice the mind of Dunford against his children; at one time caused the plaintiff to be taken to the Good Shepherd's Home, though she stated that she was placed in the educational department, and not with the girls off the street. She charged the boy with having stolen his father's money. Several witnesses testified that *Melissa* was with him at all times; that she never let him get out of her sight. Wherever he went she went; she directed the conversations which they held with others, directed his movements, told him what to do, when to come; never allowed him a conversation alone with his children or anybody else.

According to the testimony of *W. S. Dunford*, the son, she "guarded him like a sheriff." She was always running down the girl, and even charged that the son was illegitimate. She would peremptorily order *Charlie*, her husband, to "shut up" when he began to say things of which she did not approve. Another witness said Dunford was a harm-

less little man, easily controlled, and could not do anything without her. When he would go out on the street she was always with him, and had complete control. She generally answered questions for him. She "butted in" to conversations when he attempted to talk business with others. She had a "terrible influence over him," in the language of another. According to another witness, "he did nothing without her consent, and she was always with him." "She had full control and he had no mind of his own," was the way another witness put it. "In things of importance she would do the talking and rule." "She could do anything with him; wrap him around her finger," one witness testified. He would say nothing when she would charge his daughter with pilfering, but just look worried. He would worry, "and just wipe his hat."

When the will was probated the plaintiff was notified by mail at Joplin. She immediately wired Melissa to postpone the funeral until she could come, but Melissa hurried through the funeral before the daughter possibly could arrive. Immediately after the death, on the same day, she hurried to the probate court with the will to have it probated.

The evidence as to the control and influence of Melissa Dunford over her husband in many instances did not definitely fix dates, but, taking it together, it covered the entire period from the marriage until the will was made, which was 26 years later. The people who testified were well acquainted with them, and lived near them for years. Many of the statements of witnesses are conclusions, and may have been objectionable for failure to give the facts more in detail upon which they were based, but there appears to have been no objection to the testimony as it was presented, and no errors assigned to the introduction of any of the evidence. Besides, in much of it the facts are given as to the control, management, and complete dominance over the man by his wife. Melissa's domination of her husband is of the character described in *Gay v. Gillilan*, 92 Mo. loc. cit. 262, 5 S. W. 7, 11 (1 Am. St. Rep. 712), where this court speaks of undue influence existing "whenever the mind of one person is reduced to a state of vassalage to that of another, and a gift is shown to have been made by the weaker party to the stronger."

The presumption of undue influence which arises in case of confidential relationship between the parties when a gift is made to the person in whom the confidence is reposed is not limited to a person who transacts the business of the person unduly influenced. Any trust relation by which one establishes an influence over the mind of another is sufficient. Such presumption arises when a person makes a will in favor of his physician,

a client in favor of his lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious adviser, or where any close and confidential relations exist, the law indulges the presumption that undue influence has been used. *Mowry v. Norman*, 204 Mo. loc. cit. 190, 103 S. W. 15; *Hegney v. Head*, 126 Mo. loc. cit. 628, 29 S. W. 587; *Sittig et al. v. Kersting et al.*, 223 S. W. 742 loc. cit. 748; *Balak v. Susanka*, 182 Mo. App. loc. cit. 488, 489, 168 S. W. 650; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Burton v. Holman*, Adm'r (No. 22083) 231 S. W. 630, not yet [officially] reported. In this case Melissa had already acquired by deed two pieces of property, and the will left her all that remained, to the exclusion of the testator's own children, the only blood relations he had. It is not necessary to show that the undue influence was exercised at the exact moment the will was executed. In this case there was absolute and continued domination of the mind of Charles Dunford by his wife during the entire period of his life after marriage. Only a feeble effort was made by defendant to offset the volume of testimony showing the extent and character of the influence which she exercised. There was sufficient evidence to go to the jury on the question of undue influence.

The instructions are quite full and complete in requiring a finding in detail of the facts necessary to constitute undue influence, and are in strict accord with the authorities on the subject. There was no error in such instructions.

[8] After the proponents had introduced their evidence and the plaintiff had introduced all their evidence in the case, the defendant asked permission of the court to amend his answer so as to allege estoppel on the part of the plaintiff in that she had received \$10, the legacy mentioned in the will, and therefore was estopped to attack its validity. The plaintiff in her cross-examination denied that she had received any such legacy. The court refused to permit the amendment to the answer, and error is assigned to that ruling. Amendments of that character are within the discretion of the trial court and will not be disturbed unless the discretion is abused. It is not an abuse of such discretion to refuse such amendment after the trial is practically over and the evidence mainly in. *State v. Reynolds*, 277 Mo. 14, 208 S. W. 618, loc. cit. 619, 620; *Carter v. Dilley*, 167 Mo. 571, 67 S. W. 232.

The judgment is affirmed.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur,

**STRODE v. HOLLAND. (No. 150.)**

(Supreme Court of Arkansas. Oct. 10, 1921.)

1. Pleading  $\S$ 248(17)—Amended complaint for replevin held not to state new cause of action.

Where original complaint alleged plaintiff owned the personal property, and replevin affidavit stated he had a special ownership under written lien, an amended complaint, alleging special ownership by virtue of a written lien, did not state a new cause of action, but merely amended the original complaint, which had been found defective in part.

2. Pleading  $\S$ 356(1)—Defendant in replevin should move to make allegation of special ownership more definite, rather than to strike amended complaint.

Where plaintiff in replevin alleged special ownership under written lien, if the defendant wished the facts set forth more in detail, he should have moved to make the complaint more definite, instead of moving to strike the amended complaint.

3. Trial  $\S$ 408—By withdrawing answer, defendant eliminates motion to transfer cause to equity.

Whether defendant's motion to transfer the case to equity should have been granted is not raised by an appeal, where the defendant obtained leave to withdraw his answer from the files, thereby eliminating such question.

4. Appeal and error  $\S$ 544(3)—In absence of bill of exceptions, only manifest errors on face of judgment can be considered.

There being no bill of exceptions, Supreme Court can only review the judgment for error manifest on its face, and can consider only the recital of facts in the judgment.

5. Appeal and error  $\S$ 907(3)—In absence of bill of exceptions, presumed that findings and judgment are warranted by evidence.

Where a replevin judgment was based on a mortgage from defendant to plaintiff, in the absence of a bill of exceptions and in view of the judgment recitation that the case was heard on defendant's written obligation and plaintiff's evidence, the presumption is that the evidence sustains the finding and warrants the judgment for plaintiff.

6. Chattel mortgages  $\S$ 255—Holder may, on default, sue to recover chattel or for its conversion, or foreclosure in equity.

The holder of a chattel mortgage may upon the mortgagor's default sue at law to recover the mortgaged chattel or for its conversion, or he may sue in equity for the foreclosure of the mortgage lien.

7. Set-off and counterclaim  $\S$ 19—Set-off of debt in replevin suit based on lien cognizable at law as well as equity.

In a replevin suit based on special ownership under written lien, a defense of debt due defendant from plaintiff is not exclusively cognizable in equity, but may be set off at law; proof of set-off or payment being authorized by our statutes to show full or partial discharge and balance due.

Appeal from Circuit Court, Arkansas County; W. B. Sorrells, Judge.

Action of replevin by O. J. Holland against H. A. Strode. Judgment for plaintiff, and defendant appeals. Affirmed.

On the 24th day of August, 1920, O. J. Holland brought suit in replevin against H. A. Strode to recover possession of one 15 DC-180 Western electric power and light outfit. Plaintiff also filed an affidavit for replevin, and in it alleged that he had a special ownership in said property by virtue of a lien in writing to secure the balance due on the purchase price. The defendant filed a demurrer to the complaint, which was sustained by the court. The defendant also filed an answer and motion to transfer the case to equity. Subsequently he filed an amendment to his answer, in which he pleaded a set-off of \$75 on the amount due by him to the plaintiff on the property sued for. The court refused to transfer the case to equity, and by leave of the court the defendant withdrew from the files his answer and amended answer. The plaintiff filed an amended complaint, in which he stated that by virtue of a lien in writing he had a special ownership in, and was entitled to, the immediate possession of one 15 DC-180 Western electric power and light outfit of the value of \$300. He stated further that the defendant had possession of said property, and unlawfully detained the same. The plaintiff prayed judgment for said sum of \$300, and that his lien on said property be enforced and the property sold to pay his debt. The defendant filed a motion to strike the amended complaint from the files on the ground that it stated a new cause of action or was inconsistent with the original cause of action and the relief sought in the original complaint. The court overruled this motion, and the defendant excepted to the ruling of the court, and refused to plead further. The judgment recites that—

The cause was submitted to the court sitting as a jury, "upon the amended complaint, affidavit, defendant's demurrer to the original complaint, and defendant's motion to strike and the obligation in writing of the defendant and the evidence of the plaintiff, O. J. Holland, and, the court being sufficiently advised as to the facts and as to the law, doth find that this is a suit in replevin for the possession of the following described property, to wit: One 15 DC-180 Western electric power and light outfit or the balance due on the lien or mortgage."

Judgment was rendered in favor of the plaintiff against the defendant for the property, or the balance due under the mortgage, which is found to be \$300. From the judgment rendered the defendant has duly prosecuted an appeal to this court.

Jno. P. Streepey, of Little Rock, for appellant.

H. L. Sternberg, of Stuttgart, and Lee & Moore, of Clarendon, for appellee.

HART, J. (after stating the facts as above). [1] The original complaint stated that the plaintiff was the owner of the property, and his affidavit for replevin stated that he had a special ownership by virtue of a lien in writing. The defendant interposed a demurrer to the complaint, which was sustained by the court. The plaintiff then filed an amended complaint, in which he stated that he had a special ownership in the property by virtue of a lien in writing.

It is contended by counsel for the defendant that the amended complaint stated a new cause of action, or, at least, that the amended complaint was inconsistent with the original complaint. We cannot agree with counsel in this contention. In *Climer v. Aylor*, 123 Ark. 510, 185 S. W. 1097, the court held that a complaint in replevin was defective because it was not shown by the allegations whether the plaintiff claimed under a general or special ownership. The court said that the complaint was not wholly defective, and that the defect could have been reached by a special demurrer, in which case the plaintiff could have amended his complaint to show whether his ownership was general, or special, and, if special, to set forth the facts upon which his claim of special ownership was based.

[2] In the instant case the plaintiff alleged a special ownership in the property by virtue of a lien in writing. If defendant wished the plaintiff to set forth the facts more in detail upon which his claim of special ownership was based, he should have filed a motion to make the complaint more definite, instead of a motion to strike the amended complaint from the files. *Wm. R. Moore Dry Goods Co. v. Ford*, 146 Ark. 227, 225 S. W. 320, 226 S. W. 139.

[3, 4] The question whether the defendant's motion to transfer the case to equity should have been granted is not raised by the appeal, for the reason that the defendant obtained leave to withdraw his answer from the files of the court, and thereby eliminated the question from the case. The case was heard before the court sitting as a jury. There was no bill of exceptions filed, and the judgment recites that the case was heard upon the pleadings, the obligation in writing of the defendant, and the evidence of the plaintiff.

The judgment recites that this is a suit in

replevin for certain specifically described personal property or the balance due under the lien or mortgage. The judgment further recites that the plaintiff have judgment for the property which is specifically described, or the balance due under the mortgage. There being no bill of exceptions, we can only review the judgment for error manifest upon the face of it, and in doing so can only consider the recital of facts contained in the judgment upon which it is based. *Baucum v. Waters*, 125 Ark. 305, 188 S. W. 802; *Sizer v. Midland Valley R. R. Co.*, 141 Ark. 369, 217 S. W. 6; *Carroll County v. Poynor*, 142 Ark. 546, 219 S. W. 9.

[5] It will be seen that the judgment recites that the replevin suit was under a mortgage of the property held by the plaintiff, from the defendant. In the absence of a bill of exceptions, and in view of the recitation in the judgment that the case was heard upon the written obligation of the defendant, and the evidence of the plaintiff, the presumption is that the evidence adduced at the trial sustained the finding of the circuit court and warranted the judgment rendered.

[6] The holder of a chattel mortgage may, upon the mortgagor's default, sue at law to recover the mortgage chattel, or for its conversion, or he may sue in equity for the foreclosure of the lien which he has by virtue of the mortgage. *Thornton v. Findlay*, 97 Ark. 432, 134 S. W. 627, 33 L. R. A. (N. S.) 491.

To reverse the judgment counsel for the defendant rely upon the case of the *Southern Cotton Oil Co. v. East*, 134 Ark. 404, 203 S. W. 1030. In that case the defendant set up an answer which was exclusively cognizable in chancery, and the court held that he was entitled to have the issue determined by the chancery court, and for that reason the trial court erred in not transferring the case to equity. As we have already seen, the defendant by leave of the court withdrew his answer from the files, and this action eliminated any alleged error in refusing to transfer to equity.

[7] Moreover, the defense interposed by the defendant in his answer was not exclusively cognizable in equity. He could have set off at law as well as in equity that the plaintiff was only due a certain amount under the mortgage. Our statute authorizes proof of payment of the mortgage indebtedness, or a set-off for the purpose of determining whether or not the debt has been discharged in full, or, in case of partial discharge, the amount of the balance due. *Jones v. Blythe*, 138 Ark. 81, 210 S. W. 348.

It follows that the judgment must be affirmed.

(223 S.W.)

**CUMMINS BROS. v. SUBIACO COAL CO.**  
(No. 165.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

1. Guaranty  $\S$  24(1)—Of royalty to mine lessors held not canceled by their execution of a subsequent deed.

Where a deed of an acre of land recited that it was conveyed to facilitate the opening of a coal mine on an adjoining forty acres leased by grantors to grantees, and that it conveyed only the surface, and thereafter grantees and a corporation organized by them to take over their lease agreed with grantors to guaranty a royalty until the coal was worked out, the agreement reciting that it was in consideration of the one-acre tract given for tripe purposes, and the same grantors, by a subsequent deed, conveyed to the corporation in fee several acres including the acres described in their former deed, but reciting that it was in addition thereto, and for the purpose of conveying additional land, *held*, that execution of the latter deed did not show an intention to cancel the guaranty contract, but that, reading all three instruments together, they showed an intention not to do so.

2. Appeal and error  $\S$  544(3)—Bill of exceptions not necessary, where decree recites testimony.

Where the decree itself contains a recital of the testimony, no bill of exceptions is necessary.

3. Appeal and error  $\S$  518(5)—Exhibits attached to pleadings in equity become a part of the record.

In an equity case, exhibits attached to pleadings become a part of the record, and may be considered, as well as the recitation concerning an admission contained in the decree itself.

Appeal from Logan Chancery Court; J. V. Bourland, Chancellor.

Suit by Cummins Bros. against the Subiaco Coal Company. From a decree in favor of defendant, plaintiffs appeal. Reversed and remanded, for proceedings consistent with opinion.

Appellants brought this suit in equity against appellee for the recovery of a sum of money alleged to be due them by appellee as royalty under a coal lease, and to cancel a coal lease and deed to one acre of land. The facts are as follows:

On February 19, 1917, appellants, by their deed, conveyed to Jas. P. Hoyer and R. B. Chitwood one acre of land in Logan county, Ark., described as follows:

"Beginning at a point (40) forty feet due east of the center of hoisting shaft sunk by Hoyer and Chitwood and running due north (60) sixty feet; thence west to west line of the 40 acres; thence south to a point directly west of the point, one hundred and twenty feet south of the point of beginning; thence east and north to beginning containing one acre more or less,

and which is located in the S. W  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 23, township 8 north, of range 24 west."

Immediately following this description is the following:

"It is expressly agreed and understood that the essence of this conveyance is to facilitate the opening of the mine and conducting mining operation, and when this land ceases to be used for this specific purpose for a continuous period of three years it shall thereupon revert to the within grantors, and this title shall be null and void. This conveyance covers only the surface, and gives no title to coal or mineral."

Then follows the habendum clause of the deed. The deed was duly recorded on the day of its execution, and filed for record on the 17th day of March, 1917.

Jas. P. Hoyer and R. B. Chitwood organized a corporation called the Subiaco Coal Company, to take over their lease to mine coal on a certain tract of land owned by appellants. On May 17, 1917, Jas. P. Hoyer, R. B. Chitwood, and the Subiaco Coal Company, by Jas. P. Hoyer, president, entered into the following agreement with appellants, Cummins Bros.:

"We, the undersigned, hereby agree to guarantee to the Cummins Bros., owners of the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 23, township 8 north, of range 24 west, a minimum royalty of two hundred and fifty dollars per annum, commencing January 1, 1918, until all of the coal under the above-described land is worked out or can be worked at a profit from the shaft to be sunk on land adjoining. The above obligation is made in consideration of certain tract of land given to us for tripe purposes."

On the 14th day of May, 1918, appellants conveyed to the Subiaco Coal Company, for the consideration of \$200 recited in the deed, 4.2 acres of land in Logan county, Ark. The land described in the deed, also, includes the one acre described in the deed of February 19, 1917. Immediately after the description of the land in the deed is the following:

"This deed is in addition to former deed executed by the grantors herein to Jas. P. Hoyer and R. B. Chitwood on the 19th day of February, 1917, and for the purpose of conveying the additional land described herein and not described in the deed to Hoyer and Chitwood."

Then follows the habendum clause of the deed.

The complaint alleges that appellee had refused to mine the coal on the 40 acres of land leased from appellants, and had refused to pay appellants the minimum royalty of \$250 per year for the years 1918 and 1919. The appellee answered, denying all the material allegations of the complaint, and asked that the complaint be dismissed. The lease and deeds above described were made exhibits to the complaint and answer. The

decree recites that the parties come by their respective attorneys and that the cause—

"is submitted to the court upon the exhibits attached to the pleadings, which were introduced in evidence, and the admission of the parties as to the deed to one acre, and the court, being well and sufficiently advised in the premises, doth find the fact to be that, after the execution of the plaintiffs of the conditional deed conveying to the defendants the right to use the surface of a certain one-acre tract of land described in the deed for mining operations, which became and was the consideration for instrument executed by R. B. Chitwood and Jas. P. Hoye and Subiaco Coal Company guaranteeing a minimum royalty of \$250 per annum, that the defendants purchased from the plaintiffs additional tract of land, and the plaintiffs executed and delivered to the defendants their warranty deed conveying four acres, which is admitted includes the acre mentioned in said conditional deed, for the consideration of \$200 paid in cash."

The court declared the law to be that the deed conveying the four acres of land was controlling, and that under it the title to the land, including the one acre conveyed by the first deed, passed to appellee, and that it was thereby released from its agreement of guaranty to pay a minimum royalty of \$250 per annum, which was the only consideration for the first deed of the date of February 19, 1917.

From the decree entered of record the plaintiffs, who are the appellants in this court, have duly prosecuted their appeal.

Pryor & Miles, of Ft. Smith, for appellants.  
Anthony Hall, of Paris, for appellee.

HART, J. (after stating the facts as above). In *Jackson v. Lady*, 140 Ark. 512, 218 S. W. 505, the court held that a deed must be so constituted that all of its parts may be harmonized and stand together, if the same can be done, and yet carry out the manifest intention of the parties. The court held further that to ascertain the intention of the parties, not only must the contents of the deed as a whole be considered, but also the relation of the grantor to the property conveyed.

[1] In the application of this well-known rule of construction, we think the decision of the chancellor was wrong. Under the terms of the lease from appellants, appellee became entitled to sink a shaft and mine the coal on a certain 40-acre tract of land of appellants, for a certain stipulated period. On the 19th day of February, 1917, appellants conveyed to the grantors of appellee one acre of land to establish a tippie to better mine the coal on said 40-acre tract. In the deed it was expressly stipulated that the object of the conveyance was to facilitate the opening of the coal mine and the conducting of the mining operation on the leased 40-acre tract, and that when the land ceased to be used for this purpose the title should revert

to the grantors. It further provided that the conveyance only covered the surface of the earth, and gave no title to the coal or minerals under the surface. On May 17, 1917, appellee and its grantors, Hoye and Chitwood, executed an instrument whereby they guaranteed to appellants a minimum royalty of \$250 per annum, commencing January 1, 1918, until all the coal on a certain 40-acre tract is worked out from the shaft to be sunk on the adjoining 40 acres. The agreement also recites that it is made in consideration of a certain tract of land given to the grantors for tippie purposes.

Under this clause it is insisted that this obligation became void when the deed of May 14, 1918, from appellants to appellee was executed. In making this contention, however, counsel have not given full effect to the entire deed conveying the 4.2 acres of land. It is true the latter deed includes the one-acre tract in the description of the 4.2 acre tract; but, immediately following the description, the deed recites that it is in addition to the former deed conveying the one-acre tract, and for the purpose of conveying the additional land described in the latter deed and not described in the former deed. Moreover, the deed is a deed in fee simple, and does not contain any clause whereby the land reverts to the grantor when the land ceases to be used for the purpose of opening up the mines and conducting mining operations on the leased premises. So it will be seen by the latter deed that three additional acres of land are conveyed and the title to the one-acre tract is granted in fee simple to appellee.

There is nothing in the language of the instrument to indicate that it was the intention of the parties to cancel the guaranty agreement whereby the minimum royalty was fixed at \$250 per annum. It is true the guaranty obligation recites that it is made in consideration of the one-acre tract for tippie purposes; but it will be noted that the second deed, as above stated, grants the fee-simple title to the one-acre tract, as well as the additional three acres. There is no language in the deed, nor is there anything from the surrounding circumstances that indicates that it was the intention of the parties to cancel the guaranty contract by the execution of the later deed. On the contrary, when all three instruments are read and considered in the light of each other, we think that it was not the intention of the parties to cancel the guaranty agreement by the execution of the later deed conveying 4.2 acres of land and that the chancellor erred in so holding.

[2] But it is insisted that the decree must be affirmed, because it recites that the cause was heard on the pleadings and the attached exhibits, and the admission of the parties as to the deed to the one-acre tract. There is no bill of exceptions, and the insistence is that, on this account, there is a presumption



that the admission of the parties as to the deed to the one-acre tract supports the finding and decree of the court. This would be true, if the decree did not recite what the admission of the parties was. The decree specifically recites that the admission was that the warranty deed subsequently executed to the 4.2-acre tract also includes the one-acre tract mentioned in the first deed. It is well settled that, when the decree itself contains a recital of the testimony, no bill of exceptions is necessary. *Baucum v. Waters*, 125 Ark. 305, 188 S. W. 802, and *Strode v. Holland*, 233 S. W. 1073, and cases cited.

[3] So in the present case, the record itself having recited what the admission as to the one-acre tract was, it was not necessary to bring the facts relating to the admission into the record by bill of exceptions. This being an equity case, the exhibits attached to the pleadings became a part of the record, and might be considered as well as the recitation concerning the admission contained in the decree itself. The decision of the chancellor was based upon the pleadings, the exhibits thereto, and the recital of the decree as to the admission of the parties that the deed to the 4.2-acre tract also included the one-acre tract.

Upon this state of the record the court erred in holding for appellee, and in dismissing the complaint of appellants for want of equity. It follows that the decree must be reversed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

#### WOOD v. STATE. (No. 122.)

(Supreme Court of Arkansas. Sept. 26, 1921.  
Rehearing Denied Oct. 31, 1921.)

**Homicide §336**—Prosecuting attorney's exhibition of overalls worn by deceased at time of killing, not in evidence, held not reversible error.

In a prosecution for manslaughter, the action of the prosecuting attorney in displaying overalls worn by deceased at the time of the killing, though they had not been admitted in evidence or identified as those worn by the deceased, was not ground for reversal where objection by defendant's counsel was sustained, and the prosecuting attorney was ordered to remove the overalls from the presence of the jury.

Appeal from Circuit Court, Hempstead County; Geo. R. Haynie, Judge.

Will Wood was convicted of voluntary manslaughter, and he appeals. Affirmed.

R. P. Hamby, of Prescott, and Steve Carrigan, of Hope, for appellant.

J. S. Utley, Atty. Gen., and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

SMITH, J. Appellant was indicted for killing Tom Noland, and upon his trial was convicted of voluntary manslaughter, and from the judgment of the court sentencing him to the penitentiary for a period of 3 years and 6 months, has prosecuted this appeal.

The parties had disagreed about the settlement of an account between them. The state contended that appellant invited Noland to come to the mill yard, where the timber had been stacked over which the dispute had arisen, to remeasure it; that after appellant and Noland had met at the mill yard appellant provoked a difficulty with Noland, and shot him when no demonstration of any kind was being made against appellant, and while the parties were standing 8 or 10 feet apart.

Appellant contends that he went to the mill by agreement to recheck the timber in dispute; that, after he had gone with Noland to the place where the timber had been piled, they found that part of it had been removed, and that it could not be rechecked; that Noland became angry, drew his knife, and opened it, and grabbed appellant in the collar with his left hand, and attempted to cut appellant with the knife, but appellant broke loose from Noland's hold, and pulled his pistol and shot Noland in his necessary self-defense.

It is recited in the bill of exceptions:

"That during the closing argument of Hon. Steve Carrigan, one of the attorneys for the defendant, he argued to the jury that, if the overalls of the deceased, worn at the time he was shot, had been introduced in evidence, they would have shown powder burn where the bullet went through them, and said, 'Why didn't they introduce them in evidence?' During the course of the argument of Hon. O. A. Graves, who concluded the argument for the state, he referred to the argument of Mr. Carrigan with regard to the overalls, and as to whether they would show powder burn; at this instant the prosecuting attorney unwrapped a bundle and removed therefrom a pair of overalls, and walked around behind Mr. Graves and hung the overalls on the back of a chair in the presence and in front of the jury, but neither he nor Mr. Graves referred to the overalls hanging on the chair. Immediately Hon. Steve Carrigan, one of the attorneys for defendant, arose and objected to said overalls being brought in, for the reason they had not been identified as being the overalls worn by deceased at the time he was shot, and requested the court to order said overalls removed from the courtroom, and to instruct the jury not to consider the same. Thereupon the court ordered the prosecuting attorney to remove the overalls from the presence of the jury, which he did."

No testimony had been offered by either side concerning the overalls, and they had not been offered in evidence, and the first reference made to the overalls appeared in Mr. Carrigan's argument.

It is earnestly insisted that the acts of the prosecuting attorney in producing in court a pair of overalls and exhibiting them to the jury constituted error so prejudicial that—

"Nothing the court could have said or done at the time could shut out from the jury's view or wipe out from their minds the impression made by what they had seen with their own eyes."

In answer to this insistence, it is said on behalf of the state that, if error was committed, it was invited by the conduct of appellant's counsel in making the affirmative statement set out above concerning the condition of the overalls when the overalls had not been offered in evidence. But, without deciding that question, we dispose of the assignment of error by saying that the action of the prosecuting attorney does not call for the reversal of the judgment. The overalls were not admissible in evidence, because they had not been identified, and had not been offered in evidence. This was the objection made by counsel for appellant, and that objection was sustained. The court ordered the prosecuting attorney to remove the overalls from the presence of the jury, and this he did.

Other exceptions were saved at the trial, but they are not discussed in the brief and do not appear to be of sufficient importance to require discussion. Judgment affirmed.

#### HATCHER v. BALLARD et al. (No. 170.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

**Landlord and tenant**  $\Leftrightarrow$  332—**Finding that landlord furnished supplies to tenant establishing lien sustained.**

In a suit to enforce a mortgage lien against defendant's cotton crop for supplies furnished, wherein defendant's landlord filed a cross-bill asserting his lien as landlord on account of supplies furnished to the defendant to make a crop, evidence held to sustain a finding that the supplies were sold to the landlord for defendant upon the landlord's credit, thus establishing his lien.

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Suit by Henry A. Hatcher against James M. Ballard and others on a note and to enforce a mortgage lien, with cross-bill by defendant Carl Nelson. Judgments for plaintiff and cross-plaintiff against defendant Ballard, with a decree establishing the priority of

liens, and, from that part of the decree subordinating his lien to that of defendant Nelson, plaintiff appeals. Affirmed.

Emerson, Donham & Shepherd, of Little Rock, for appellant.

Lewis Rhodon, of Little Rock, for appellees.

**HUMPHREYS, J.** This suit was instituted by appellant against the appellees in the Pulaski chancery court to recover judgment against James M. Ballard upon a note for \$418, with interest, and to enforce a mortgage lien for said sum against two mules, a wagon, and 20 acres of cotton raised by Ballard on the Carl Nelson farm.

As a defense against the enforcement of the mortgage lien on the cotton Carl Nelson asserted a landlord's lien on account of supplies furnished to Ballard, his tenant, for the purpose of making a crop. He also filed a cross-bill asking judgment in the sum of \$433.53 against Ballard for supplies, and that said judgment be declared a lien on the cotton paramount to Hatcher's mortgage lien.

James N. Ballard made default, and P. L. Blazer answered that he had no interest in the controversy either as to the respective amounts claimed against Ballard or the issue joined as to priority of liens, stating that the supplies furnished by Nelson to Ballard were purchased at his store on Nelson's credit.

The cause was submitted upon the pleadings and the evidence, which resulted in judgments in favor of appellant, Hatcher, and appellee Nelson against James M. Ballard for the respective amounts claimed by each, and a decree declaring liens upon the cotton crop in favor of each, and establishing the lien of appellee Nelson as prior and paramount to that of appellant. From that portion of the decree declaring appellant's lien second to that of appellee Nelson an appeal has been duly prosecuted to this court.

There is no disagreement as to the law. It is conceded by appellant that a landlord's lien is paramount to that of a mortgagee's lien on crops raised by tenants for advances of the landlord to the tenant for necessary money supplied, stock, etc., to make a crop. The insistence of appellant for reversal is that the supplies in question were purchased by James M. Ballard from P. L. Blazer upon credit, with Nelson as surety.

The testimony is in conflict as to whether Nelson bought the supplies from Blazer and furnished them to Ballard, or whether Ballard purchased the goods from Blazer upon the security of his landlord, Nelson.

P. L. Blazer testified that the supplies were sold and charged to Nelson on his ledger by him; that Nelson requested him at the beginning of the crop season to let Ballard have supplies absolutely necessary to make the

crop and to charge the supplies to him, Nelson. Blazer adhered to this statement throughout the cross-examination.

A bill for supplies which had been furnished by P. L. Blazer to James M. Ballard was introduced in evidence. The account was made out against J. M. Ballard. The evidence showed that other accounts in a similar form had been presented to Ballard by Blazer. Blazer's explanation was that the account was made out by his wife or daughter, and that he did not know how the mistake occurred.

Carl Nelson and J. M. Ballard both testified in their direct examination that the supplies furnished to make the crop were purchased from Blazer by Nelson upon Nelson's own credit. It is true upon their cross-examination that they varied their testimony so as to state that the goods were purchased from P. L. Blazer by Ballard, with Nelson as his surety. We think this conflict in their evidence was the result of not understanding the meaning of the terms used rather than an intention on their part to change or modify their direct evidence upon cross-examination.

Our impression from the evidence as a whole is that it was the intention of the parties, at the time the arrangements were made for the supplies, that they were sold by Blazer to Nelson for Ballard upon Nelson's credit. At least we are unable to say that the finding of the chancellor to that effect was contrary to a clear preponderance of the evidence.

No error appearing, the decree is affirmed.

## GARRETT v. BIG BEND PLANTATION CO. et al. (No. 164.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

### 1. Bankruptcy § 200(3)—Garnishment lien obtained within four months of adjudication, invalid.

Where plaintiff garnished money belonging to defendant and within four months thereafter defendant was adjudged a bankrupt, the garnishment lien was rendered void and the garnishee released, under Bankruptcy Act, § 67f (U. S. Comp. St. § 9651).

### 2. Pleading § 376—Fact of adjudication need not be proved where admitted.

In a garnishment proceeding wherein defendant's adjudication in bankruptcy within four months was set up, the fact of adjudication, being admitted by plaintiff's attorney, did not require further proof.

### 3. Garnishment § 157—Withdrawal of money garnished immaterial where deposited in registry of court.

That defendant has withdrawn and spent the money garnished held immaterial, where it

appeared that defendant had filed bond and later deposited a sufficient amount of money with the garnishee, which thereupon paid it into the registry of the court.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by R. B. Garrett, receiver of the First National Bank of Judsonia, against the Big Bend Plantation Company, the Bald Knob State Bank, garnishee, wherein Avery M. Blount, as receiver in bankruptcy for defendant, intervenes. Judgment for intervenor, and plaintiff appeals. Affirmed.

R. B. Garrett, receiver of the First National Bank of Judsonia, brought suit by attachment against the Big Bend Plantation Company, a corporation duly organized under the law of the state of Arkansas, and as grounds for the attachment alleged that said corporation was disposing of its property with the intention of delaying and hindering the plaintiff in the collection of his debt.

A writ of garnishment was issued against the Bald Knob State Bank alleging that it had in its possession money belonging to the said corporation.

The garnishee filed an answer in which it admitted that it was indebted to the Big Bend Plantation Company in the sum of \$1,105.69. Avery M. Blount intervened in the action and asked that the money garnished be turned over to him, as receiver for the Big Bend Plantation Company, which has been adjudged a bankrupt by the federal court.

On the trial it was shown that at the time the garnishment was issued, a bond was given, and the Big Bend Plantation Company drew the money out of the bank. Subsequently the Big Bend Plantation Company deposited in the bank \$1,105.69 to procure the release of the bond, and the bank paid that money to the circuit clerk and authorized him to release the bond. This was some time before the Big Bend Plantation Company went into bankruptcy. The writ of garnishment was issued on August 19, 1920, and the answer of the garnishee was filed on September 11, 1920.

According to the testimony of Avery M. Blount, the Big Bend Plantation Company filed a petition in bankruptcy on the 4th day of December, 1920. We quote from his testimony the following:

"Q. Has the Big Bend Plantation Company been adjudged a bankrupt? A. They have. (We object to that because they cannot prove it in that way.) A. I have the original record.

"Q. Do you know what date the petition was filed? A. Yes, sir; I know the date.

"Q. What date was it? A. December 4, 1920.

"Q. Has the Big Bend Plantation been ad-

judged a bankrupt? A. Yes, sir. (I object to it. The objection is sustained. Note the exception.)

"Q. Do you know whether or not the Big Bend Plantation has been adjudged a bankrupt. (We object; it is a matter of record. The objection is sustained. Note the exception.)

"Mr. Barber: I want to call the court's attention to the fact that when this question came up last Monday the attorneys admitted that the voluntary petition had been filed and that the Big Bend Plantation Company had been adjudged a bankrupt.

"Mr. Brundidge: That may be true, and I guess they have been adjudged a bankrupt, but we object to that way of proving it."

The circuit court found that the garnishment proceedings in this cause were commenced within four months prior to the filing of the petition in bankruptcy against the defendant Big Bend Plantation Company, and that the Big Bend Plantation Company was duly adjudged a bankrupt in the federal court.

The court further found that the garnishee, the Bald Knob State Bank, had turned over to the clerk of the circuit court \$1,105.69 belonging to the Big Bend Plantation Company. Judgment was rendered turning it over to Avery M. Blount, receiver of the Big Bend Plantation Company, bankrupt, in the federal court.

The case is here on appeal.

Brundidge & Neelly, of Searcy, for appellant.

Rogers, Barber & Henry, of Little Rock, for appellee.

HART, J. (after stating the facts as above). Section 67f of the Bankrupt Act of 1898 (U. S. Comp. St. § 9651) provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

In the case of *Clarke v. Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, it was contended that inasmuch as the sheriff had sold the goods levied upon before filing the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt at the time of the adjudication, and that the trustee therefore had no title to the same. The contention involved the construction of the section of the Bankruptcy Act quoted above.

Mr. Justice Brewer in construing the section, and disposing of the contention made, said:

"This contention cannot be sustained. The judgment in favor of petitioner against Kenney was not like that in *Metcalf v. Barker*, 187 U. S. 165, one giving effect to a lien theretofore existing, but one which with the levy of an execution issued thereon created the lien; and as judgment, execution and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy. This nullity and invalidity relate back to the time of the entry of the judgment and affect that and all subsequent proceedings. The language of the statute is not 'when' but 'in case he is adjudged a bankrupt,' and the lien obtained through these legal proceedings was by the adjudication rendered null and void from its inception. Further, the statute provides that 'the property affected by'—not the property subject to—the lien is wholly discharged and released therefrom. It is true that the stock and fixtures, the property originally belonging to the bankrupt, had been sold, but having, so far as the record shows, passed to a bona fide purchaser for value, it remained by virtue of the last clause of the section the property of the purchaser, unaffected by the bankruptcy proceedings. But the money received by the sheriff took the place of that property."

[1] In the application of the rule there announced to the present case, when the Big Bend Plantation Company was adjudged a bankrupt, the bankruptcy statute quoted above operated to nullify and render void the garnishment lien obtained by the plaintiff garnishing the Bald Knob State Bank and to wholly release and discharge the debt due the Big Bend Plantation Company from such lien. The plaintiff obtained his garnishment lien subject to the lien being defeated if a petition in bankruptcy was filed against the defendant Big Bend Plantation Company within four months from the date the garnishment lien was obtained and it was adjudicated a bankrupt. In such cases the invalidity relates back to the inception of the lien so that for all purposes the lien may be said never to have existed.

Therefore it was not necessary to prove that the Big Bend Plantation Company was insolvent at the time the garnishment lien herein was obtained. See *Remington on Bankruptcy* (2d Ed.) vol. 2, par. 1467.

[2] It is admitted that the record shows that the petition in bankruptcy was filed within four months from the time the garnishment lien was obtained, but it is insisted that the record does not show that the Big Bend Plantation Company was adjudged a bankrupt and that on this account the motion of Avery M. Blount to dismiss should have been overruled. The court expressly found that the Big Bend Plantation Company had been adjudged a bankrupt upon a petition filed in the federal court, and we are of the opinion that the record fairly supports its finding. We have copied in our statement of facts the record on this phase of the case. It is true the record of the bankruptcy court was the best evidence of the rendition of the judgment. The record here shows that upon objection being made to the oral testimony of Avery M. Blount, the receiver in bankruptcy, to the effect that the Big Bend Plantation Company had been adjudged a bankrupt, he answered that he had the original record of the bankruptcy court.

The court sustained an objection to the adjudication being proved by oral testimony. The attention of the court was then called to the fact that the question had already been before the court in the case and that the attorneys for the plaintiff had admitted that a voluntary petition in bankruptcy had been filed and that the Big Bend Plantation Company had been adjudged a bankrupt in the federal court. The attorneys for the plaintiff then responded that this might be true. Under this state of the record, it was not necessary to prove the fact again. If it had already been admitted in the case, this avoided the necessity of again proving the fact and the court might find that an adjudication of bankruptcy had been made in the federal court. The record clearly shows that the petition was filed within four months after the garnishment lien was obtained. Therefore the court properly sustained the motion to dismiss filed by the receiver in bankruptcy.

[3] It is further insisted, however, that the judgment should be reversed because the Big Bend Plantation Company had withdrawn and spent the money which was the subject-matter of the garnishment proceedings.

Under the state of the record here presented, it is fairly inferable that the plaintiff in this action deposited \$1,105.69 with the Bald Knob State Bank to take the place of the bond it had filed when the attachment proceedings were sued on, and that with the consent of the plaintiff the Bald Knob State Bank deposited this money with the circuit clerk to be paid out under the orders of the court. In short, the parties treated this as the deposit of the money into the registry of the court to be ordered

paid by the court after a judicial ascertainment of the proper person to receive it.

It follows that the judgment must be affirmed.

### SMITH v. STATE. (No. 166.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

#### 1. Rape §59(23)—Refusal of instruction on simple assault error.

In a prosecution for assault with intent to rape, where defendant admitted putting his arms around prosecutrix, but testified that she consented to intercourse, it was error to refuse to instruct as to simple assault; the undisputed evidence not showing that defendant was guilty of assault with intent to rape or nothing.

#### 2. Rape §40(1)—Character of prosecutrix in prosecution for assault with intent may be impeached to show consent.

In a prosecution for assault with intent to rape, the character for chastity of the injured party may be impeached, not to justify or excuse the offense, but to raise a presumption of consent.

#### 3. Rape §40(1)—Evidence of good character of prosecutrix held inadmissible in prosecution for assault with intent.

In a prosecution for assault with intent to rape, where defendant did not introduce evidence as to the reputation of prosecutrix, it was error to permit the state to show her good character for chastity.

Appeal from Circuit Court, Benton County; W. A. Dickson, Judge.

Huel Smith was convicted of assault with intent to rape, and he appeals. Reversed and remanded.

J. S. Utley, Atty. Gen. and Elbert Godwin and W. T. Hammock, Asst. Attys. Gen., for the State.

HART, J. Huel Smith prosecutes this appeal to reverse a judgment of conviction against him for the crime of assault with intent to rape. Smith was indicted for the crime of assault with intent to rape, and was convicted of the crime; his punishment being fixed by the jury at a term of three years in the state penitentiary.

The first assignment of error is that the judgment should be reversed because the court refused to instruct the jury on the lower offenses embraced in the indictment. The defendant was indicted for the crime of assault with intent to commit a rape, and the court fully and fairly instructed the jury on that phase of the case. The court, however, refused to instruct the jury on the crime of simple assault.

The prosecuting witness was between 18

and 19 years of age at the time the offense is charged to have been committed. According to her testimony she was well acquainted with the defendant, and went buggy riding with him on the night in question. The defendant first put his arms around her against her will, and rode in that position for some distance. She would scream for help when they passed houses, but failed to attract the attention of anyone. Finally the defendant stopped the horse, wrapped the buggy lines around the whip, and told her that he intended to have intercourse with her. She resisted him with all her power. He took both of her hands in one of his, pressed her down on the buggy seat, struck her on the face and neck, and forced her to yield to his embraces. She resisted him in every manner possible. The defendant then proceeded to drive on, and presently she dropped her handkerchief out of the buggy. She asked the defendant to get out of the buggy to get the handkerchief and when he did so, the prosecuting witness whipped up the horse and left him. The horse in turning a corner overturned the buggy. The prosecuting witness then scrambled out and went for assistance to a nearby house. In a short time the defendant came there and asked if she wanted to go home with him. She refused to go, and telephoned for her relatives to come, or send, for her. She reported the fact of the assault as soon as she reached the house.

The defendant admitted that he had intercourse with the prosecuting witness on the night in question, but claimed that it was with her consent. He described in detail their conversation during the ride, and said that there was no resistance whatever on the part of the prosecuting witness.

[1] Under this state of the record, we think the court erred in refusing to give the instruction. This is not a case where the undisputed evidence shows that the defendant was guilty of the crime of assault with intent to rape or nothing, and the case does not come within the rule announced in *Rogers v. State*, 136 Ark. 161, 206 S. W. 152.

The jury were the judges of the credibility of the witnesses and the weight to be given to their testimony. According to the testimony of the prosecuting witness, the defendant first put his arms around her and held them there while they rode for some distance, although she screamed for help whenever they passed a house. The defendant did not deny putting his arms around the prosecuting witness, but said that she consented thereto. This action of the defendant as testified to by the prosecuting witness constituted a simple assault, and would warrant the jury in finding him guilty of that

offense if it should not believe the subsequent testimony of the prosecuting witness to the effect that the defendant had connection with her forcibly and against her will.

As we have already seen, the jury were the judges of the credibility of the witnesses, and might have believed all, or a part of, the testimony of either witness. They might have believed that under the testimony of the prosecuting witness and of the defendant himself the latter was guilty of the crime of simple assault, and that he was not guilty of the graver offense. In any event, the defendant had the right to have his theory of the case submitted to the jury; for it cannot be said that the undisputed evidence showed that he was guilty of assault with intent to rape or nothing. *Allison v. State*, 74 Ark. 444, 86 S. W. 409; *Bruder v. State*, 110 Ark. 402, 161 S. W. 1065; *Hankins v. State*, 103 Ark. 28, 145 S. W. 524.

It is next insisted that the judgment should be reversed because the trial court erred in permitting the state to introduce testimony tending to show the good character of the prosecuting witness for chastity over his objections.

[2] We think counsel for the defendant is correct in this contention. In a prosecution for assault with an intent to rape, the character for chastity of the injured party may be impeached, not to justify or excuse the offense, but to raise a presumption of her consent. *Pleasant v. State*, 15 Ark. 624, and *Jackson v. State*, 92 Ark. 71, 122 S. W. 101. It is only when the accused attacks the chastity of the prosecuting witness by evidence of reputation for unchastity that the prosecution may introduce evidence of her reputation for chastity to discredit such testimony. *Underhill on Criminal Evidence* (2d Ed.) § 418, p. 702.

[3] In the present case the defendant did not introduce any evidence as to the reputation of the prosecuting witness for unchastity, or of illicit intercourse on her part. Hence the court erred in admitting the state to prove the reputation of the witness for chastity because her reputation in that respect had not been assailed by the defendant.

It is also insisted that the court erred in permitting to go to the jury the record of the testimony of an absent witness for the state on the examining trial of the defendant. We need not consider this assignment of error. The record shows that the witness was only temporarily ill, and the question will not likely arise on the retrial of the case.

For the errors in the opinion, the judgment must be reversed, and the cause remanded for a new trial.

**FERRELL et al. v. MASSIE et al.**  
(Nos. 161, 173.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

1. Municipal corporations  $\S$  571—Appeal in proceedings to enforce benefit assessment dismissed for failure to file transcript within 20 days.

Crawford & Moses' Dig. § 5687, providing that the transcript on appeal from the decree in proceedings to enforce assessments shall be filed in the office of the clerk of the Supreme Court within 20 days, is mandatory, and an appeal from a decree of assessment will be dismissed if the transcript is not filed within 20 days.

2. Municipal corporations  $\S$  571—In suit to enforce collection of assessment, cross-complaint to restrain enforcement does not affect requirement as to time of filing of transcript.

In a complaint to enforce collection of a benefit assessment, the filing of an answer and cross-complaint to restrain collection and declare the district invalid does not take the case out of the operation of the statute with respect to the limitation of time for filing a transcript on appeal.

3. Municipal corporations  $\S$  570(1)—Statute authorizing vacation decrees on stipulation not in conflict with statute providing that chancery court be open at all times for enforcing assessments.

Crawford & Moses' Dig. § 5681, providing that the chancery court shall always be open for suits to enforce collection of assessments, is not in conflict with section 2190, authorizing vacation decrees on stipulation of counsel; both sections being applicable to suits to enforce collection of assessments.

Hart and Wood, JJ., dissenting.

Appeal from Prairie Chancery Court; John M. Elliott, Chancellor.

Suit by J. E. Massie and others against Hamp Ferrell and others. Cause heard by the chancellor in vacation on stipulation of counsel. Decree for plaintiffs, and defendants appeal. Appeal dismissed.

Mehaffy, Donham & Mehaffy, of Little Rock, for appellants.

J. F. Holtzendorff, of Hazen, and Chas. B. Thweatt, of Little Rock, for appellees.

McCULLOCH, C. J. Appellees constitute the members of the board of improvement of an improvement district, created under the general statutes in the town of Hazen for the purpose of improving certain streets and sidewalks, and this action was instituted in the chancery court of the county to enforce the payment of assessments and penalties thereon. The complaint contains allegations in general terms setting forth the creation of the district, the assessment of benefits, etc., and the nonpayment of the assessments by

the defendants. A list of the unpaid assessments was exhibited with the complaint.

Appellants, who were defendants below and are the owners of property in the district, filed a joint answer, in which they denied all the allegations of the complaint with respect to the creation of the district, and the levy of assessments, and the non-payment thereof. They also incorporated in the answer a cross-complaint attacking the validity of the district and the assessment of benefits on numerous grounds, alleging failure to comply with the statute with respect to the original petition for the creation of the district, the second petition, the publication of notice, the enactment of the ordinances, and various other things required by the statute. Crawford & Moses' Digest, § 5647 et seq. The prayer of the answer and cross-complaint is that the ordinances in regard to the district be declared invalid, and that the commissioners be restrained from attempting to collect assessments and from further proceeding under the ordinances.

The cause was heard by the chancellor in vacation on stipulation of counsel, and a decree was rendered in favor of appellees for the collection of the unpaid assessments and for the sale of the property of appellants if the assessments be not paid, and also dismissing the cross-complaint for want of equity. An appeal was prayed and granted by the chancellor; but the transcript was not filed in this court within 20 days.

[1] There is a motion to dismiss the appeal on the ground that the transcript was not filed within the time required by statute. The statute in regard to improvement districts situated wholly within municipalities provides that, if the assessments on the property be not paid within the time required, the board of improvement shall "straightway cause a complaint in equity to be filed in the court having jurisdiction of suits for the enforcement of liens upon real property, for the condemnation and sale of such delinquent property"; that the courts shall always be open for the purpose of taking every necessary step in such suits; that in the decree of condemnation the court "shall direct that, if the sum adjudged shall not be paid within ten days, the property shall be sold by a commissioner, appointed for that purpose"; that no appeal shall be prosecuted from such decree "after the expiration of the twenty days herein granted for filing the transcript in the clerk's office of the Supreme Court"; and that the transcript "shall be filed in the office of the clerk of the Supreme Court within twenty days after the rendering of the decree appealed from." Crawford & Moses' Digest, § 5673 et seq.

We have held that this statute is mandatory with respect to the time for obtaining

the appeal and for filing the transcript. *Crandell v. Harrison*, 105 Ark. 110, 150 S. W. 580; *Miller v. White*, 108 Ark. 253, 157 S. W. 934.

[2] This is a suit for the collection of delinquent assessments as provided in the statute; but the contention is that the cross-complaint of appellants attacking the validity of the district and the assessment of benefits takes the case out of the operation of the statute with respect to the limitation of time for taking an appeal and filing the transcript.

The majority of the court are of the opinion that this contention of counsel is not well founded. The manifest purpose of the statute is to expedite the final disposition of suits to enforce collection of assessments in improvement districts of this kind (*Miller v. White*, supra); and when a suit is instituted for that purpose it still retains its character notwithstanding an effort, by way of cross-complaint, to adjudicate invalidity of the district. The statute prescribes the form of the decree in such cases and fixes a limitation upon appeals "from any such decree." The decree in the present case falls squarely within the terms of the statute, and the effect of this limitation is not avoided by the fact that appellants, in presenting a defense against the enforcement of the assessments, pleaded new matter by way of cross-complaint.

[3] It is further contended by counsel that, since the statute provides that the chancery court shall always be open for the purpose of taking necessary steps in suits to enforce the collection of assessments (*Crawford & Moses' Digest*, § 5681), the statute authorizing vacation decrees on stipulation of counsel (*Crawford & Moses' Digest*, § 2190) has no application, and that if the vacation decree in this case be valid the suit must be treated as one not falling within the statute in regard to suits for the enforcement of assessments. The two statutes are not at all inconsistent with each other and are both applicable to suits of this character. The fact that under the statute the court is open at all times for the hearing of such cases does not affect the application of the other statute providing for vacation decrees on stipulation.

The transcript not having been filed within the time specified in the statute, it follows that the appeal must be dismissed.

It is so ordered.

HART, J. (dissenting). Judge WOOD and myself do not think that the majority opinion is sound when all the material facts contained in the record are considered. Not only did the defendants file a cross-bill assailing the validity of the improvement district on numerous grounds, as stated in the majority

opinion, but in addition it may be said that no objection was made by the plaintiffs to the filing of the cross-bill. On the contrary, they filed an answer in which they specifically denied every allegation of the cross-bill seeking to assail the validity of the district.

The court below then made an order allowing the defendants to take proof on the issues thus raised. Proof was taken, and the case was heard in the chancery court upon the pleadings and the proof made. The court made specific findings sustaining the validity of the organization of the district and specifically dismissed the cross-bill of the defendants for want of equity.

The parties and the court below having all treated the case as a suit to test the validity of the district, it is manifestly unjust for this court on appeal to characterize the case as one brought under the statute solely to collect assessments. If objection had even been made to the filing of the cross-bill, the case might be different, but we cannot perceive how the case still retains its character solely as a suit to collect assessments under the statute, when both parties by their pleadings made it a suit to test the validity of the district, and the court below so treated it.

The chancery court had jurisdiction of a suit to test the validity of the district, and the parties having submitted themselves to the jurisdiction of the court in such a suit, and the court below having treated it as a suit to test the invalidity of the district, and having decided the issues thus raised, we think that the statute governing appeals in general should control, instead of the special statute relating to appeals upon proceedings to collect assessments.

Therefore Judge WOOD and the writer respectfully dissent.

#### DALLAS v. MOSELEY. (No. 172.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

1. Frauds, statute of §116(5)—Inapplicable to broker's contract for sale of real estate.

The statute of frauds is inapplicable to contracts for the sale of real estate by a broker to third parties for the owners of land.

2. Pleading §217(2) — Demurrer to answer relates back to complaint.

A demurrer to an answer relates back to the complaint.

3. Brokers §37—Denial in answer of broker that a payment to him by a purchaser was for benefit of owner of land held not sufficient.

A denial in the answer of defendant broker that an alleged payment to him by a purchaser of land listed with him was made to him for the benefit of plaintiff owner was not sufficient,



where it was limited by an explanation that under a side agreement with the purchaser it was to be regarded as compensation for his trouble and expense in the event of a sale not being consummated by payment of the balance of the purchase price.

**4. Brokers ¶76 — Agreement that earnest-money payment to broker should compensate him for trouble and expense held not binding on owner.**

In view of the loyalty required of an agent to his principal, an agreement between a broker and a purchaser of land that an earnest-money payment received by him should be regarded as compensation for his trouble and expense in the event of the sale not being consummated by payment of the balance was beyond his authority, and without the owner's full knowledge and consent could not bind him, and it was the broker's duty to account to the owner therefor.

**5. Principal and agent ¶66—Agent must account for money received for principal.**

It is the duty of an agent to account for money of his principal received by him.

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Action by A. R. Moseley against D. E. Dallas. Judgment for plaintiff, and defendant appeals. Affirmed.

A. Curl, of Hot Springs, for appellant.

Calvin T. Cotham, of Hot Springs, for appellee.

**HUMPHREYS, J.** This is an appeal from the judgment of the Garland circuit court rendered on the pleadings in the case. The court overruled the demurrer of appellant to the complaint, and sustained appellee's demurrer to appellant's answer. Appellant stood upon his answer, and, refusing to plead further, the court rendered a judgment against him for \$200, which had been received by appellant as part payment on the purchase price for certain land.

The gist of the complaint is that appellee, owner of the south half of the west half of the southwest quarter of section 12, township 8 south, range 20 west, listed it with appellant, a real estate dealer, for sale at the price of \$4,500, \$500 of which was to be paid in cash as part payment on the purchase price of said property to bind the trade, agreeing to pay appellant as a commission for effecting the sale the sum of \$300; that pursuant to the agreement a sale was effected to a Mr. Wood, from Houston, Tex., who paid appellant \$200 as part of the purchase price, for the use of the appellee, agreeing to pay the remainder of the purchase price as soon as he could move from Texas to Arkansas; that a week or two later appellant informed appellee that Wood, the prospective purchaser, declined to consummate the deal and pay the balance of the purchase price; that thereupon appellee requested appellant to pay

him the sum of \$200, which he had received as part of the purchase price for said land to bind the trade, but that appellant refused to pay said sum to him, wrongfully converting the same to his own use. The gist of the answer was that Mr. Wood verbally agreed to purchase the property through appellant, the agent, from appellee for \$4,500; that Wood paid appellant \$200, with the understanding and agreement between Wood and appellant that if Wood failed to pay for the place and take it the \$200 was to be the compensation of appellant for trouble and expense incurred in the transaction; that Wood failed to pay the \$4,500, and that no sale was consummated, and for that reason appellant had not received the sum of \$200, or any other amount, for the use and benefit of appellee. The answer also embraced a plea that the entire transaction was not in writing, and was therefore void under the statute of frauds. The ground of demurrer to the complaint was that the facts stated therein did not constitute a cause of action. The ground of the demurrer to the answer was that the facts stated therein did not constitute a defense to the allegations of the complaint.

[1] Appellant first contends that the court erred in rendering judgment in favor of appellee against appellant because the alleged agreement between appellee and appellant in the complaint related to the sale of a piece of real estate, and, not being in writing, was void under the statute of frauds. Appellant insists that nobody was bound by the alleged oral agreement, and for that reason no rights or liabilities in favor of or against either party could grow out of the agreement. We do not think the statute of frauds applicable to contracts for the sale of real estate by a broker to third parties for the owners of land.

This court said, in the case of *Kempher v. Gans*, 87 Ark. 221, 111 S. W. 1123, that "a contract for the employment of an agent to find a purchaser of lands is not within the statute of frauds." This doctrine has been reannounced and adhered to in later cases. *Forrester-Duncan Land Co. v. Evatt*, 90 Ark. 301, 119 S. W. 282; *Vaught v. Paddock*, 98 Ark. 10, 135 S. W. 331; *Barr v. Johnson*, 102 Ark. 377, 144 S. W. 527.

[2-4] Appellant also contends that the court erred in overruling the demurrer to the complaint, and sustaining the demurrer to the answer. The demurrer to the answer relates back to the complaint, and we find no sufficient denial of the allegations of the complaint to the effect that appellant was acting in the capacity of agent for appellee to sell the tract of land in question upon terms therein specified, and that the \$200 sued for was received by appellant as part payment of the

purchase price for the land by Wood. It is true the answer denies that the initial payment was made to appellant for the benefit of appellee, but this denial is limited by an explanation which does not negative the allegations in the complaint that it was received for appellee's benefit. The explanation is that under and by virtue of a side agreement between appellant, appellee's agent, and Wood, the purchaser, the \$200, in the event the sale was not consummated by the payment of the balance of the purchase money, should be regarded as compensation of appellant for the trouble and expense incurred by him in the transaction. Appellee was not apprised of any such agreement nor a party to it. It could in no wise bind him.

The gravamen of the complaint was an allegation to the effect that an agency was created for the sale of lands. The sufficiency of the answer to the issues tendered must be determined by the rules governing principal and agent in contracts for the sale of lands.

It was alleged in the answer that the initial payment of \$200 was received by appellant as a forfeit for his personal use by way of reimbursement if the sale was not consummated. It was not alleged that appellee knew anything about this arrangement or authorized it. Under the rules of principal and agent such an agreement was beyond the authority conferred by appellee on appellant.

Loyalty is one of the first duties an agent owes to his principal. An arrangement such as is pleaded in the answer between the agent and the purchaser, without the knowledge and consent of appellee, could not be regarded as loyalty of the agent to the landowner.

The rule is well expressed in the text in *Ruling Case Law*, vol. 21, p. 828. It is said there:

"In the exercise of good faith, skill and diligence, the agent is bound to keep his principal informed of all matters that may come to his knowledge concerning the principal's rights and interests. For example, if after receiving instructions to sell property on certain specified terms, the agent learns that other and more advantageous terms can be obtained, it is his plain duty, and he is under every legal and moral obligation, to communicate the facts to the principal, that he may act advisedly in the premises."

The following enunciation at page 829 of the same work is applicable:

"The doctrine is familiar that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal."

[5] The matter pleaded by way of defense to the allegations in the complaint was not

and could not constitute a defense without full knowledge and consent of the appellee. Knowledge and consent on the part of the appellee was not pleaded. Under the pleadings as framed, therefore, the \$200 received could have been received for no other purpose than the use and benefit of appellee. Under the allegations, it was not proper for appellant to appropriate the amount paid. It was his duty to account for it to his principal. It is the duty of an agent to account for money for his principal received by him. 21 R. C. L. p. 832.

The allegations in the answer not being sufficient to meet the issue tendered in the complaint, it was proper to sustain a demurrer to the answer. We think the allegations of the complaint constituted a cause of action, and it was therefore proper to overrule the demurrer to the complaint.

No error having been committed by the court in its ruling on the demurrers, nor in the rendition of a judgment against appellant when he stood upon his answer and refused to plead further, the judgment is affirmed.

#### GRIFFITH v. HICKS. (No. 167.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

1. Account stated  $\Leftrightarrow$  1—Existence of determined under law of state in which statement of account was mailed and received.

Where the statement of an account was mailed and received in the same state, the question of whether there was an account stated will be determined under the law of such state.

2. Account stated  $\Leftrightarrow$  6(2)—Account rendered not objected to in reasonable time becomes an "account stated."

Where one party to mutual dealings renders to the other a statement purporting to set forth all the items of indebtedness on the one side and credit on the other, the account so rendered, if not objected to within a reasonable time, becomes an account stated, and cannot afterwards be impeached except for fraud or mistake.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Account Stated*.]

3. Account stated  $\Leftrightarrow$  6(2)—Retention of account apparently beyond reasonable time open to explanation.

The retention of an account apparently beyond a reasonable time is open to explanation in action involving issue as to whether it became an account stated.

4. Account stated  $\Leftrightarrow$  6(4)—Debtor could not excuse failure to object within two years by showing that objection was made to third person thinking third person creditor's agent.

In an action on an account stated, defendant could explain delay in objection to state-

ment of account by showing that he objected to statement of account to plaintiff's law partner thinking the partner plaintiff's agent in the premises, but could not explain his failure to object during a period of two years by such evidence, since it was his duty to ascertain the authority of the partner within a reasonable time and to object to statement to plaintiff or his duly authorized agent within a reasonable time, and since such period was not a reasonable time.

**5. Account stated §6(2)—Objection to statement of account must be made to creditor or duly authorized agent.**

Debtor's objection to statement of account to prevent it from becoming an account stated must be made to creditor or his duly authorized agent.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Suit by John T. Hicks against George C. Griffith, in which defendant filed a counterclaim. Judgment for plaintiff, and defendant appeals. Affirmed.

John E. Miller and C. E. Yingling, both of Searcy, for appellant.

J. N. Rachels, of Searcy, for appellee.

SMITH, J. This is a suit filed by appellee, Hicks, against appellant, Griffith, upon a statement of an account which is alleged to have become an account stated.

Hicks was a resident of this state until 1916, when he removed to St. Louis, where he has since resided. Griffith is also a resident of that city. Hicks was for many years the attorney in this state for Griffith, whose interests here were varied and valuable. The professional relation was mutually satisfactory and the personal relation was close and cordial, as shown by the correspondence between the parties offered in evidence.

Griffith is shown to be a man of large affairs, and from time to time loaned Hicks considerable sums of money. One such loan was evidenced by a note dated February 23, 1913, for the sum of \$1,781.25, due one year after date. This note was executed jointly by Hicks and one E. A. Robbins, of Searcy, Ark.

Finally an estrangement grew up between Hicks and Griffith, and on November 19, 1917, Hicks rendered Griffith what Hicks testified was a complete statement of the account between them, in which he embraced all the items of professional service for which charges had been made, and credited the account with payments received and also with the note signed by himself and Robbins. Griffith received the account the day after it was mailed. No objection of any kind to the account was made by him except as hereinafter stated.

Griffith saw Robbins in Searcy and demanded payment of the note, and Robbins

communicated that fact to Hicks in July, 1919. When advised of this demand on Robbins, Hicks told Robbins that he would attend to the note, as that was an affair between himself and Griffith. This assurance satisfied Robbins, and he gave the matter no further attention. Robbins died in August, 1919, and some months thereafter Griffith filed the note with the administrator of Robbins' estate for allowance and classification. This proceeding was had in the probate court of White county, the county in which Robbins lived and in which the administration on his estate was pending.

On January 5, 1920, which was immediately after Hicks had been advised that the note had been filed as a claim against Robbins' estate, Hicks brought this suit. On January 20, 1920, Griffith filed an answer, denying liability for the items comprising Hicks' account. At the same time he filed a counterclaim and prayed judgment against Hicks.

In the direct examination of Griffith in the trial from which this appeal comes he was asked if he had talked with any one about the statement he had received from Hicks. He answered that shortly after he got the statement he had a talk with Mr. Cornwell, who was Hicks' law partner. This conversation occurred in Griffith's office, where Cornwell had come as the representative of Hicks to discuss a matter of business between Hicks and Griffith but which had no relation to the items covered in the account which Hicks had mailed to Griffith. Griffith was asked:

"What, if anything, did Cornwell represent to you about the contract; I mean about the statement, and about the amount due or claimed to be due Mr. Hicks?"

An objection to this question was sustained. Griffith was further asked:

"Did Cornwell come there to see you as the representative of Hicks?"

And, also:

"Did Cornwell state to you that he wanted to talk to you about the account which Hicks had rendered to you?"

Objections were sustained to both these questions. Thereupon Griffith offered to show that—

"Mr. Cornwell, the law partner of Mr. Hicks, came to see Mr. Griffith about the account, and asked to talk to him about it, and at that time he denied owing Mr. Hicks anything on the items charged to him."

This offer of proof was by the court refused, and Griffith excepted.

Griffith gave testimony sufficient to raise an issue for the jury as to the correctness of Hicks' account, if the account was not in fact an account stated.

Hicks denied that Cornwell had any authority to represent or act for him in adjusting or settling his account against Griffith.

The court directed the jury to return a verdict in favor of Hicks, and this appeal is prosecuted to review that action.

[1] The statement of the account was mailed and received in Missouri, and we must therefore look to the law of that state to determine whether the account became stated. The case of *Bloss v. Aurora Milling Co.* (Mo. App.) 229 S. W. 833, is said to be the latest expression of an appellate court of that state on the question of an account stated. This decision is by the Springfield Court of Appeals, and, in defining an "account stated," the court quotes from the case of *Powell v. Pacific R. R.*, 65 Mo. 658, the following language of the Supreme Court of that state:

"An account settled between the debtor and creditor therein in which a sum of money or balance is agreed on and an acknowledgment by one in favor of the other of a balance or sum certain to be due and an express or implied promise to pay the sum by one to the other."

Continuing, Cox, P. J., speaking for the court, said:

"To constitute an account stated, the debtor and creditor must both agree to the correctness of the account, and in addition thereto the debtor must agree to pay or satisfy the amount agreed upon and the creditor must agree to accept the payment of the agreed sum in satisfaction of the account.

"The agreement may be proven by evidence either direct or circumstantial as any other fact may be proven, or, if the party to whom the account is rendered retains it without objection for an unreasonable length of time, his so retaining it will justify the inference that he has approved it, and in such a case other proof of his acceptance and agreement to pay is not required. *Kenneth Inv. Co. v. Bank*, 96 Mo. App. 125, 135, 70 S. W. 173; *Mo. Pac. Ry. Co. v. Coombs & Bro. Com. Co.*, 71 Mo. App. 299."

Under this test, the majority are of the opinion that the account rendered became an account stated for the following reasons:

[2] Where parties have had mutual dealings, and one renders to the other a statement, purporting to set forth all the items of indebtedness on the one side and credit on the other, the account so rendered, if not objected to in a reasonable time, becomes an account stated, and cannot afterwards be impeached, except for fraud or mistake. *Lawrence v. Ellsworth*, 41 Ark. 502, and *Dunavant v. Fields*, 68 Ark. 534, 60 S. W. 420.

[3-5] The law requires an objection within a reasonable time. The retention of the account apparently beyond a reasonable time is open to explanation, and Griffith might have explained his waiting for a time by showing that he thought the law partner of Hicks was the latter's agent in the premises,

The objection, however, must be something more than a mental operation on the part of the person receiving the account. The objection must be made to the party rendering the account, or his duly authorized agent. Hence Griffith could not excuse his delay of two years in failing to object to the account by showing that he thought he had made objection to a duly authorized agent of Hicks.

In determining what was a reasonable time within which to object, the court might permit Griffith to explain the delay by showing that he made objection to Hicks' law partner, thinking he was Hicks' agent. He could not excuse himself indefinitely on this account. It was his duty to ascertain the authority of Hicks' law partner in the premises within a reasonable time, and he could not retain the account for 20 months without objection and excuse his delay by showing that he thought he had objected to a duly authorized agent of Hicks. This would be to allow his mental attitude in the premises to govern and would excuse the communication of his objection to the other party for an indefinite length of time. This is not the law. The objection must be made to the party rendering the account, or his duly authorized agent, within a reasonable time.

It is the opinion of the CHIEF JUSTICE and the writer that the excluded testimony of Griffith should have been admitted, and that the actual agency and authority of Cornwell is not of controlling importance. An account rendered becomes an account stated only by the admission of its correctness by the debtor. This admission may be made expressly, or it may arise by implication from the circumstances of the case. But an account cannot become an account stated unless the debtor, expressly or by implication, admits its correctness. The proper inquiry, therefore, is: What did Griffith do? Was his conduct such as that it must be said that he has impliedly assented to the correctness of the account? The assent of the debtor is ordinarily implied from the length of time during which the account is retained by the debtor without objection made. The courts therefore hold that the debtor may show any fact or circumstance which repels the implication that he has assented to the correctness of the account.

So, here, we think the question of Griffith's assent was for the jury. In determining whether Griffith has, by implication, assented, we view the circumstances from his perspective, for it is his acquiescence or nonacquiescence that we seek to determine. Did he believe, and was it reasonable for him to believe, that, in his conversation with Cornwell, the law partner of Hicks, he had denied liability; it being borne in mind that Griffith supposed that Cornwell had been sent to him by Hicks to discuss the account and that no further communication between

Hicks and Griffith occurred after the receipt of the account through the mails and Griffith's repudiation of liability for any of the items covered by it in his conversation with Cornwell? Or, to state the proposition conversely, must we say, as a matter of law, that, because of the lapse of time herein shown, Griffith must be held to have assented to the correctness of the account, notwithstanding his denial of liability to Cornwell and the absence of any further communication on the subject from Hicks? We think the question of Griffith's assent is one of fact which should have been submitted to the jury.

As has been said, Griffith gave testimony questioning the accuracy both of the charges and credits on Hicks' account; but if the account is, in fact, an account stated, these last questions pass out of the case.

As before stated, the majority are of the opinion that the account rendered became an account stated. The judgment is therefore affirmed.

### WRIGHT v. BENNETT, (No. 160.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

1. Appeal and error  $\S$ 1009(3)—A chancellor's findings on evenly balanced testimony will not be disturbed.

Where in a suit to restrain a real estate broker from collecting a note for commissions on the ground of fraud, the testimony was evenly balanced, the Supreme Court will not disturb the findings of the chancellor.

2. Brokers  $\S$ 65(1)—Principal held entitled to rely on broker's representations.

In a suit to restrain a broker from collecting a note representing commissions on the ground that he had made false representations as to the demands made by the other party to the exchange of lands, held that the principal was entitled to rely on the statements made to him by the broker as his agent, and was not bound to inquire of the other party to the transaction.

3. Brokers  $\S$ 65(6)—Consummation of deal after learning of broker's misrepresentations no bar to enjoin collection of commissions.

In a suit to restrain a broker from collecting a note representing commissions, that plaintiff consummated the deal after learning of his broker's false representations regarding the demands of the other parties to the transaction held no bar, he being bound regardless of such misrepresentations.

Appeal from Benton Chancery Court; Ben F. McMahan, Chancellor.

Suit by M. G. Bennett against M. H. Wright to restrain the collection of a note. Decree for plaintiff and defendant appeals. Affirmed.

Duty & Duty, of Rogers, and Lee Seamster, of Bentonville, for appellant.  
Appellee pro se.

McCULLOCH, C. J. Appellee owned a farm in Benton county, and listed it with appellant for sale or exchange, agreeing to pay a commission. A. L. Pickerall and L. A. Dykes also owned a farm in Benton county, and listed same with appellant, who negotiated an exchange between appellee and those parties. Under the terms of the exchange Pickerall and Dykes were to pay the sum of \$800 to appellee. They executed a note to appellant for said amount, and appellee instituted this action against appellant to restrain him from collecting the note, on the ground that he had misrepresented the terms of the sale to appellee. The controversy between appellant and appellee relates to the amount of the commission and certain alleged representations made by appellant to appellee concerning the terms of the trade between the appellee and Pickerall and Dykes. The contention of appellee is that he first demanded the sum of \$1,000 in the trade, but finally agreed to accept \$600 on condition that appellant would only require him to pay \$200 commission; but that appellant subsequently represented to him (appellee) that Pickerall had refused to consummate the trade unless he should receive \$300 of the \$600 that was paid in the exchange, and that appellee, in order to consummate the trade and in reliance upon the representations of appellant concerning the demand of Pickerall, consented to this arrangement. The allegation of the complaint is that the representations made by appellant concerning the demand of Pickerall were false; and there was testimony tending to sustain appellee's contention on that point. Appellant contends, on the other hand, that he made no such representations to appellee in regard to such demand from Pickerall; that appellee agreed to pay him a commission of \$500 on the exchange, and that he had tendered to appellee the sum of \$100—the difference between the amount of the note and his commission.

The testimony is sharply conflicting, and is confined mainly to the testimony of the two parties themselves—appellant and appellee. There was another witness, named Holcomb, a nephew of appellant, who testified that he was present when the parties went out to look at the farms, and heard appellee agree to pay a commission of \$500. The contention, however, of appellee is that, at that time, he was holding out for a difference of \$1,000 in the exchange, and that afterwards, when Pickerall and Dykes offered \$600, he consented to the reduction on condition that appellant would reduce his commission to \$200. Pickerall testified that he made

no demand on appellant that he should be paid \$300 out of the note when collected, and he testified that he and Dykes gave the note for the difference with no expectation that any of it would be returned.

[1] Viewing the testimony in the record, it appears to be about evenly balanced, and under those circumstances it is our duty not to disturb the finding of the chancellor.

[2] The point is made that appellee had no right to rely on alleged representations of appellant, but should have pursued the inquiry and ascertained from Pickerall that no such demand had been made. The answer to that contention is that appellee had the right to rely upon the representations of appellant as his agent, and the fact that he did so rely upon those representations without inquiring further does not deprive him of relief against the fraud of his agent.

[3] Again, it is contended that appellee should be denied relief on the ground that he consummated the exchange after ascertaining the falsity of the alleged representations made to him. This contention is not sound, for the reason that Pickerall and Dykes were not parties to the misrepresentation, and appellee was bound by his contract with them notwithstanding the misrepresentations of his agent, and appellee's only remedy was to consummate the sale and seek a remedy against his agent.

The state of the record is, as before stated, such that we cannot say that the preponderance of the evidence is against the finding of the chancellor. The decree is therefore affirmed.

#### MISSOURI PAC. R. CO. v. MILTON et al. (No. 171.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

##### 1. Railroads — 484(3)—Origin of fire held for jury.

In action against railroad company for corn and cotton seed destroyed by fire set by sparks from defendant's locomotive, evidence as to the origin of the fire held to take that issue to the jury, being sufficient to support verdict for plaintiffs.

##### 2. Railroads — 484(1)—Evidence held to take to the jury issue whether cotton was delivered to the gin which burned.

In action against railroad company for corn and cotton seed destroyed by fire set by sparks from defendant's locomotive, evidence as to delivery to the gin which burned of plaintiff's cotton, and its presence there at the time of the fire, held to warrant refusal to peremptorily instruct for defendant.

##### 3. Evidence — 21—Common knowledge of giving of weight slips by cotton gins.

It is common knowledge that weight slips are given by cotton gins when cotton is actually weighed in to be ginned and baled.

Appeal from Circuit Court, Cross County; R. H. Dudley, Judge.

Separate actions by John Milton and by eight others against the Missouri Pacific Railroad Company, consolidated for trial. Judgments for plaintiffs, and defendant appeals. Affirmed.

Thos. B. Pryor, of Ft. Smith, and Daggett & Daggett, of Marianna, for appellant.

Killough, Lines & Killough, of Wynne, for appellees.

HUMPHREYS, J. Nine parties instituted separate suits against appellant in the Cross circuit court to recover the value of cotton, one of whom sought to recover the value of 80 bushels of corn and 1,150 bushels of cotton seed, in addition to the value of the cotton, alleged to have been destroyed by fire set out by sparks emitted from appellant's locomotive while being operated through the town of Levesque, Ark., on the night of October 20, 1917.

Appellant filed an answer to each suit, denying that the property was destroyed by sparks emitted from its locomotive, and affirmatively pleading that the fire which destroyed the property of the appellees originated within the gin building of the Bay Road Mercantile Company, adjacent to appellant's tracks, at Levesque. By consent the cases were consolidated and submitted on the pleadings, evidence, and instructions of the court, under the style of John Milton et al. v. Missouri Pacific Railroad Company, which resulted in verdicts and judgments for each of the appellees. An appeal has been duly prosecuted to this court from the several judgments rendered in the consolidated case.

[1] At the conclusion of the evidence appellant's request for an instructed verdict was refused, and the refusal of the court to so instruct is urged as reversible error. Appellant's passenger train of six coaches, pulled by engine numbered 7511, equipped with a standard spark arrester, coming out of Memphis in a westerly direction, passed through the town of Levesque at 11:40 o'clock, 10 minutes behind schedule time on the night of October 20, 1917. West of the depot and adjacent to appellant's right of way a gin was being operated by the Bay Road Mercantile Company. The main cotton platform owned by the gin company, between the railway track and the gin, was 62 feet from the center of the track. Another platform was immediately north of the gin door, some 85 feet from the north side of the large gin platform. The gin and platform were located about 150 feet west of the road crossing. Appellant's own cotton platform was near the track. The fire which destroyed the gin, its contents, and the cotton on the

platforms began about 12 o'clock, 20 minutes after the west-bound passenger train passed.

There was evidence tending to show a strong wind out of the northwest, towards the southeast, or from the tracks towards the platform and gin. There was evidence tending to show that the wind was blowing from exactly the opposite direction. There was evidence tending to show that the fire first started in the cotton on the platform and spread to the gin. Other evidence, however, tended to show that it first started inside the gin house and spread to the platform. All agree that the first outward signs of the fire appeared about 20 minutes after the train passed. Four of the witnesses, on their way home in an automobile, stopped at the road crossing for the train to pass. They were looking at the engine as it approached and passed the road crossing. None of them observed the emission of sparks as it passed, but one of them, Lee Jackson, said he saw a good many sparks fall out of the smokestack when the engine puffed at the cattle gap, 300 feet east of the road crossing. Two of them, Jasper Catlett and Tom Simmons, said the engine was pulling or working steam as it passed the road crossing. None of the witnesses observed the engine after it passed the road crossing and as it passed the gin. The evidence reflects that an engine, though equipped with a spark arrester, will emit sparks when in action and "working steam."

Appellant insists that, because the train was running at a rapid rate down grade, and because the four witnesses in the automobile saw no sparks falling from the smokestack when it passed the gin and cotton platforms, and because the origin of the fire was otherwise accounted for, that the evidence negated the inference that the fire originated from sparks emitted from the engine, under the rule of this court that such an inference might be drawn where inflammable property situated near a railroad track is discovered to be on fire shortly after a train has passed. After a careful analysis of the evidence we cannot agree with this contention of learned counsel for appellant. In the first place, the origin of the fire was not definitely accounted for by the appellant. The evidence as to how it originated is in sharp conflict.

In the next place, the witnesses who were at the road crossing when the train passed did not testify positively that sparks were not being emitted, but say that they saw none, and none of them attempted to say whether the engine was emitting sparks at the time it passed the gin and platforms, located 150 feet or more west of the road crossing. Again, two of the four witnesses testified that as the engine passed the road crossing it was working steam, and one of them that when it passed the cattle gap,

300 yards east of the road crossing, the engine was puffing and emitting a good many sparks. We cannot say that the evidence of these four witnesses was positively to the effect that the engine was not throwing sparks when it passed the platforms and gin. Not being able to so find, the rule of inference arising out of the facts and circumstances of the case was properly submitted to the jury, and the court did not err in refusing to instruct a verdict for appellant.

It is next contended by appellant that the verdict is contrary to the evidence and should have been set aside; the reason assigned being that there was no substantial evidence on which to found the verdict. A number of witnesses testified that the fire was discovered on the platform about 20 minutes after the train passed Levesque, that a strong wind was blowing from the direction of the track towards the platforms and gin when the train passed, and that the fire originated in the cotton on the platforms and not inside the gin. The evidence also reflected that a large number of sparks was emitted from this particular engine when it "puffed" at the cattle gap crossing, about 450 feet from a point on the track opposite the gin; that the engine was working steam when it passed the road crossing 150 feet east of the gin; that an engine would emit sparks, although equipped with a spark arrester, when working steam. We think there was sufficient substantial evidence to support the verdict, under the rule of inference laid down by this court in cases of this character. *Railway Co. v. Dodd*, 59 Ark. 317, 27 S. W. 227; *Cairo T. & S. Co. v. Brooks*, 112 Ark. 298, 166 S. W. 167; *St. L. & S. F. Ry. Co. v. Black*, 142 Ark. 41, 218 S. W. 377; *May v. Mo. Pac. Ry. Co.*, 143 Ark. 75, 219 S. W. 756.

[2] The last contention of appellant is that the court erred in refusing to instruct the jury peremptorily to return a verdict for appellant as against J. W. Williams, Wes Porter, Charles Allison, Princedale Development Company, and James Masterson. The insistence of appellant for a reversal of the judgment in favor of these parties is that the evidence failed to show that the cotton claimed to have been destroyed was ever delivered to the gin, or that it was still there when the gin burned. While the record is somewhat scant in these particulars, after a careful reading thereof, we are convinced that it was sufficient to carry the cases of the respective parties to the jury. For example, Wes Porter, one of the parties against whom a peremptory instruction was requested, testified that his boy, Jim Porter, had a bale of cotton at Levesque in 1917 and turned it over to him for rent. The bale weighed 505 pounds; its value, 40 cents per

pound. It got burned up in the gin fire. On cross-examination he testified as follows:

"Q. How do you know that it was burned? A. Well because the boy turned it over to me, and it was burned up. We didn't haul it away.

"Q. Who took it to the gin? A. My boy did.

"Q. Did you go with him? A. No, sir; I come on to town.

"Q. How do you know that he took it to the gin? A. It was our gin place, and he carried it there.

"Q. Who gave you this receipt you have filed here? A. My boy gave it, I guess, to Mr. Kilough."

[3] The evidence with respect to the delivery of the cotton of the other parties to the gin, and to the effect that it was there at the time of the fire, is as strong as the evidence that Porter's cotton was there, when proper consideration is given to the gin weights. We think the gin weights a strong circumstance tending to show the delivery of the cotton at the gin. It is common knowledge that weight slips are given by cotton gins when cotton is actually weighed in to be ginned and baled.

No error appearing, the judgment is affirmed.

#### MODEL WINDOW GLASS CO. v. MOODY et al. (No. 156.)

(Supreme Court of Arkansas. Oct. 10, 1921.  
Rehearing Denied Oct. 31, 1921.)

**Master and servant — 70(1)—Union wage scale held binding under contract.**

Where union workmen worked a season for a glass company under a national agreement providing that workmen reporting for duty on notification should receive certain pay until plant started, and next year they were offered employment and notified to be ready on a specified date, the offer and their acceptance had reference to the terms of the old contract, and therefore the fact that no wage scale was fixed before the date specified was immaterial in determining their right to such pay, and they were not bound to inquire before coming concerning the new wage scale.

Appeal from Circuit Court, Sebastian County; John Brizzolara, Judge.

Action by the Model Window Glass Company against William Moody and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. Dunblazier and Jas. B. McDonough, both of Ft. Smith, for appellant.

Webb Covington, of Ft. Smith, for appellees.

HUMPHREYS, J. This case is before us on a second appeal. The appellees were appellants in the former appeal. This court

ruled on that appeal that the trial court had erred in peremptorily instructing a verdict in behalf of the Model Window Glass Company, and remanded the cause for a new trial. The case was quite fully stated in the former opinion, and the statement there found is adopted as the statement in this case, in so far as the facts in the two cases are alike. For the statement, see *Moody v. Model Window Glass Co.*, 145 Ark. 197, 224 S. W. 436. The additional evidence introduced on the new trial was to the effect that the wage scale in effect up to December 8, 1918, expired on that date, by reason of the inability of appellant and the union, of which appellees were members, to agree upon a wage scale for the ensuing year. The witnesses introduced testified that the failure to agree upon a wage scale on that date for the ensuing year rendered the old contract nugatory, and that none of the provisions in the old contract were binding upon the parties after that time, and until a new wage scale was agreed upon by and between the representative of the union and the appellant, or its representative. At the conclusion of the evidence, the court peremptorily instructed a verdict for appellees, and rendered judgment in accordance therewith, from which judgment is this appeal.

Appellant contends that the additional evidence adduced made an entirely different case from what it was when here before. In rendering the opinion on the former appeal, after reciting the facts, this court said:

"The facts stated constituted an implied contract, if not an express contract, to settle with appellants according to the terms of the national agreement. The correspondence set out above warranted appellants in believing, under the circumstances of the case, that they would be given employment, or be paid in accordance with the provisions of the national agreement, with reference to which the parties must be held to have contracted."

Appellees had worked for appellant during the preceding year under the provisions of the contract denominated the "national agreement." Article 5 of the agreement reads as follows:

"Any company hiring a member, and said member, upon arriving and reporting for duty, finding no vacancy existing or plant not ready to operate, as per notification, shall pay said member at the rate of \$20 per week until place is vacant or plant in operation, or, at the option of the member, said company shall defray all expenses incurred by said member from the time he left his home or place of starting until his return to destination."

Both parties were familiar with this clause in the contract. The invitation of appellant to appellees to return to Ft. Smith and go to work was an offer to give them their positions under the terms of the old contract



The letter of September 6, 1918, urging appellees to work for appellant the coming season, contains the following statement:

"Will say I am depending on you and Moody in your old places this coming season. Please advise me by return mail if you will be on hand."

The subsequent letter of November 19, 1918, notifying appellees to be at Ft. Smith on December 9th, and asking whether the company could depend on them being ready to work on that date, was tantamount to saying to appellees that the new wage scale, which must, under the evidence, be a basis for the contract for the ensuing year, had been, or would be, settled and agreed upon by that time. The offer and acceptance of employment had reference to employment under the terms of the old contract. Therefore the new evidence offered, to the effect that no wage scale had been fixed for the ensuing year, was immaterial. Being immaterial, it was not incumbent upon appellees to inquire before leaving California, as argued and contended by appellant, concerning the new wage scale.

No error appearing, the judgment is affirmed.

#### WILLIAMS v. SANDERSON. (No. 159.)

(Supreme Court of Arkansas. Oct. 17, 1921.)

1. Brokers  $\S$ 85(6)—Conversation between a broker and vendor in absence of the purchaser admissible to show performance of service.

In an action against an administrator for services in purchasing a farm for decedent, testimony of a third person as to conversations between plaintiff and the vendor in the absence of decedent, relating to the purchase, offered solely to show that plaintiff was attempting to purchase the farm for decedent, was admissible; there being no attempt to bind decedent, but to show that plaintiff's effort brought about the purchase, and that the commission was earned.

2. Executors and administrators  $\S$ 221(3)—Testimony of joint grantees that broker made no claim on them for compensation inadmissible on broker's claim against administrator of one grantee.

In an action against an administrator for services performed in purchasing a farm for decedent, testimony of two other grantees, to whom with decedent a joint deed was executed, that plaintiff had not presented any bill to them for compensation for making the purchase was properly excluded; there being no contention that plaintiff had performed the service for any other than decedent.

3. Brokers  $\S$ 86(7)—Evidence held not conclusive that broker was acting for two principals.

In an action against an administrator for services in purchasing a farm for decedent from

P., evidence that shortly after the transaction was consummated P. paid plaintiff \$500 was not conclusive that plaintiff was acting for both parties, both P. and plaintiff testifying that the payment was for other service.

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

Claim by J. D. Sanderson against H. B. Williams, administrator, presented in the probate court and tried in the circuit court on appeal. Judgment for claimant, and defendant appeals. Affirmed.

Henry Moore, of Texarkana, for appellant.  
Jones & Head, of Texarkana, for appellee.

MCCULLOCH, C. J. Appellee presented in the probate court of Miller county a claim for allowance against the estate of appellant's intestate, and the case was tried in the circuit court on appeal, resulting in a verdict and judgment in favor of appellee for the allowance of the claim.

The claim of appellee is for the sum of \$500 as commissions for services alleged to have been performed by him for the decedent in the purchase of a farm from W. W. Paup. There was no attempt in the trial below to establish an express agreement between appellee and appellant's intestate for the payment of a commission, but the testimony adduced by appellee tended to prove that decedent engaged his services in an effort to buy the farm from Paup, that appellee's services procured the purchase from Paup, which was duly consummated, that the price of the farm was about \$50,000, and that the amount sued for was reasonable compensation for the services rendered. These issues were submitted to the jury upon correct instructions and the verdict settled the issues in appellee's favor.

[1] Error of the court is assigned in permitting witness Tom Hinton to testify concerning a conversation between appellee and Paup in the absence of appellant's intestate. The witness testified concerning interviews, at which he was present, between deceased and appellee, and between deceased, appellee, and Paup, and also between appellee and Paup. The witness testified that he had two conversations with decedent in regard to appellee's services in this matter, in the first one of which witness advised decedent to get appellee to handle the matter with Paup, and in the second conversation decedent stated to witness that appellee was working on the matter, and "was still trying to get it lined up." The witness also testified to being present at a conversation between decedent and Paup and appellee, in which Paup said, in connection with stating the price, that he would not pay any commission on the sale. The witness was then permitted to testify, over the objection of appellant,

that he was present at an interview between appellee and Paup concerning the purchase of the farm for appellant's intestate. Counsel for appellee had offered this testimony merely for the purpose of proving that appellee was attempting to purchase the farm for decedent, and not for the purpose of proving the statements of Paup and appellee to each other. The court admitted the testimony for that purpose alone, and we are of the opinion that there was no error committed in that respect. There was no attempt to bind appellant's intestate by the statements made by appellee and Paup to each other, but this testimony tended to establish the fact that the efforts of appellee brought about the purchase of the farm from Paup, and that the commission was earned.

[2] The sale of the land by Paup was consummated by a joint deed to appellant's intestate and to C. R. Crank and Allen Winham. Appellant offered to prove by Crank and Winham that they were interested with appellant's intestate in the purchase of the farm, and that appellee had not presented any bill to them for compensation for making the purchase. The court was correct in excluding this testimony, for the reason that there was no contention on the part of appellee that he had performed the service at the instance of or for the benefit of Crank or Winham. The fact that he had not made any claim against those gentlemen for compensa-

tion had no probative force in determining whether or not appellee's claim against the estate of the decedent Williams was well founded.

[3] It was developed in the testimony that shortly after the consummation of the sale Paup paid appellee the sum of \$500, and the contention of appellant was that this was paid as commission on the sale, that the payment thereof demonstrated the fact that appellee was attempting to act for both parties, and was claiming commission from each of them. Appellee and Paup each testified that the payment of \$500 by the latter to the former was not as commission on this sale, but was for other services; and the court submitted that issue to the jury in instructions which told the jury that if appellee was acting as agent for both parties in the transaction, he could not recover against the estate of Williams, unless there was an express promise on the part of Williams to pay a commission, with knowledge of the fact that appellee was acting as agent for both parties, but that if the payment of \$500 was not made as compensation for services in making this sale, it would not affect appellee's right to recover compensation from appellant's intestate.

We find no error in the proceedings, and since the evidence is legally sufficient to sustain the verdict, the judgment must be affirmed; and it is so ordered.

**STEWART et al. v. POINBOEUF et al.\***  
(No. 2903.)

(Supreme Court of Texas. Oct. 12, 1921.)

1. Courts  $\S$ 474—Application for letters of administration to county court of one county held to preclude court of other county from entertaining probate proceedings.

An application to a county court for letters of administration containing all statutory averments to show the court's jurisdiction to grant the letters held to vest the court with jurisdiction over the decedent's estate, and to preclude county court of other county from entertaining proceeding to probate an instrument as the decedent's will, and to render proceedings in such court void for want of jurisdiction, though process was first issued and served out of such court, and though appointment of administrator with will annexed was made therein prior to appointment of administrator by the first court, since jurisdiction attached upon the filing of the application averring jurisdictional facts in view of *Vernon's Sayles' Ann. Civ. St. 1914, arts. 3209, 3255-3257, 3279.*

2. Appeal and error  $\S$ 1039(16)—Overruling of plea in abatement reversible error where proceedings are void for want of jurisdiction.

Where county court of one county acquired jurisdiction over decedent's estate by application for letters of administration, error of court of other county in overruling plea in abatement in subsequent proceedings to probate will held reversible error, even though evidence fully supported the court's finding that the deceased was domiciled in such other county, the proceedings in the court of such other county being absolutely void for want of jurisdiction.

**Certified Question from Court of Civil Appeals of First Supreme Judicial District.**

Proceeding by Elizabeth Poinboeuf and another to probate the last will and testament of Mrs. Laura Stewart Hardy, deceased. Pleas to the jurisdiction of the court and in abatement filed by E. B. Stewart and others overruled by the county court, and, on appeal, by the district court, and E. B. Stewart and others appealed to the Court of Civil Appeals, by which questions were certified to the Supreme Court. Questions answered.

See, also, 201 S. W. 1025.

J. Llewellyn, of Liberty, C. A. Toler, of Dallas, Fisher, Campbell & Amerman, of Houston, and W. N. Foster, of Conroe, for appellants.

Moody & Boyles and Thos. H. Ball, all of Houston, for appellees.

**GREENWOOD, J.** The certificate of the honorable Court of Civil Appeals discloses the following facts:

On May 14, 1914, Mrs. Laura Stewart Hardy died in the county of Harris, in the state of Texas. On May 15, 1914, E. B. Stewart

filed in the county court of Montgomery county, Tex., an application for letters of administration on the estate of Mrs. Laura Stewart Hardy, deceased, which contained all statutory averments to show jurisdiction in that court to grant the letters. The application also showed a necessity for the appointment of a temporary administrator of the estate.

On May 15, 1914, on presentation of the application, the county judge of Montgomery county, in writing appointed E. B. Stewart temporary administrator of the estate, and on the same day he qualified by filing the bond and oath required by the order for his appointment. The temporary administrator was empowered to locate, collect, protect, and hold intact the property of the estate, pending the appointment of a permanent administrator.

On June 9, 1914, Mrs. Elizabeth Poinboeuf filed in the county court of Harris county, Tex., an application to probate an instrument, filed with the application, as the last will and testament of Mrs. Laura Stewart Hardy, deceased; and this application contained all averments to show jurisdiction over the estate in the county court of Harris county. On June 10, 1914, the county clerk of Harris county issued notices on the application of Mrs. Elizabeth Poinboeuf and delivered same to the sheriff of Harris county, who served same by posting, completing such service on June 27, 1914. On June 24, 1914, the county clerk of Montgomery county issued notices on the application of E. B. Stewart for letters of permanent administration, which were delivered to the sheriff of Montgomery county on June 25, 1914, and he duly posted same.

On July 6, 1914, E. B. Stewart and others, claiming to be heirs of Mrs. Laura Stewart Hardy, deceased, filed in the county court of Harris county a plea to the jurisdiction of that court and a plea in abatement of the proceeding instituted by Mrs. Elizabeth Poinboeuf, alleging the pendency since May 15, 1914, of the proceedings in the county court of Montgomery county. On July 28, 1914, a few days in advance of the first term of the county court of Montgomery county, subsequent to the filing of Stewart's application, the county court of Harris county overruled the pleas in abatement and to the jurisdiction, and granted the application of Mrs. Elizabeth Poinboeuf admitting the instrument filed by her to probate and appointing her administratrix of the estate of Mrs. Laura Stewart Hardy, deceased, with the will annexed.

On appeal to the district court of Harris county, the pleas to the jurisdiction and in abatement were again urged, and were again overruled, the trial judge finding, from evidence warranting the finding, that Mrs. Har-

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied November 30, 1921.

dy's domicile at the time of her death, was in Harris county; and judgment was rendered admitting to probate as Mrs. Hardy's last will and testament the instrument presented by Mrs. Elizabeth Poinboeuf, and appointing Mrs. Elizabeth Poinboeuf administratrix with the will annexed. From the judgment of the district court of Harris county, an appeal was perfected by E. B. Stewart and others to the Galveston Court of Civil Appeals.

On the foregoing facts, the following questions arise, which have been duly certified to this court, viz.:

"(1) Did the district court of Harris county properly overrule the pleas in abatement and to the jurisdiction presented by the contestants, appellants here, in the court below?"

"(2) If the court erred in overruling the plea in abatement, in view of the fact that the evidence fully supports the finding of the trial court, that the domicile of the deceased was in Harris county, ought the judgment to be reversed for this error?"

[1, 2] We answer the first question in the negative, and the second question in the affirmative.

The county court of Montgomery county had the general jurisdiction of a probate court, with power to grant letters of administration or to probate a will and grant letters testamentary. The court's jurisdiction over the estate of the decedent, Mrs. Laura Stewart Hardy, was invoked by the application of E. B. Stewart for letters of administration. It was necessary for the court in the proper exercise of its jurisdiction to determine whether the decedent resided in Montgomery county, and whether she died intestate. Articles 3209, 3255, 3279, Vernon's Sayles' Texas Civil Statutes. The purpose of Stewart's application was to subject the property belonging to Mrs. Hardy's estate to the custody and control of the probate court of Montgomery county, and its jurisdiction attached when the application was filed. The court's jurisdiction to determine the application in no wise depended on the applicant establishing the truth of the averments of his application. A correct determination might involve the finding that the averments of the application were untrue, whereupon the application would be refused.

Though appellees were devisees under a valid will of the decedent they were parties to the proceeding begun by Stewart (Crawford v. McDonald, 88 Tex. 630, 33 S. W. 325); and the potential jurisdiction of the county court of Montgomery county was the same as that of the county court of Harris county. The former court having first acquired jurisdiction of the property belonging to Mrs. Hardy's estate, by the due commencement of a proceeding which it was empowered to adjudicate, and which sought to have the court seize and exercise dominion over the property, it was entitled to exercise its jurisdiction

without interference from any other court, and its judgments could not be reviewed, vacated, or avoided by orders entered in the subsequent proceeding in the county or district court of Harris county. Jurisdiction of Stewart's application involved full power in the county court of Montgomery county to execute the judgment which might be rendered thereon. Such execution would be impossible if effect were given to an adverse judgment of another probate court assuming original jurisdiction over the estate. The truth of the jurisdictional averments in Stewart's application could not be contested in a collateral proceeding.

Burdett v. Silsbee, 15 Tex. 615, 616, determined that, after the grant of administration by the probate court of one county, its orders could not be collaterally drawn in question in a subsequent administration in the probate court of another county. In that case, the ground of attack was that the jurisdictional averments of residence, on which the first administration was sought and granted, were untrue. But it was determined that, since it was competent for the court which first acquired jurisdiction over the estate to decide the truth of the averments as to the decedent's residence, its decision was conclusive and was not subject to collateral attack and, that the authority of the administrator, under the first grant of letters, was wholly unaffected by the proceedings in the subsequent administration.

No contention is made that the estate of Mrs. Hardy is subject to administration in any other probate court than that which first acquired jurisdiction of the estate. The claim of appellees is that the probate court of Harris county first acquired jurisdiction over the estate because it made the first order appointing an administrator, and because process was first issued and served out of that court. We do not think that priority of right to exercise jurisdiction, in a proceeding of this character, ought to be determined by either priority of judgment or priority in the issuance or service of process. The fairest and most reasonable test is priority in invoking the exercise of jurisdiction. An applicant for letters of administration or for letters testamentary is entitled to have citation on his application forthwith issued and served. Articles 3256, 3257, Vernon's Sayles' Texas Civil Statutes. The date of an adjudication on his application may be delayed by circumstances beyond the applicant's control, such as the number of causes on the court's docket or time taken by the court to render a decision. One ought not to lose his right to an adjudication properly sought, because a clerk or sheriff is delayed in issuing or serving process duly applied for, nor because an earlier adjudication is secured from another court.

One of our earliest statements of the law

governing the answer to the first question certified was made in *Clepper v. State*, 4 Tex. 245, where it is said to be a well-known rule that "the jurisdiction that was first called in to exercise would have the right to go on to judgment."

In *Bonner v. Hearne*, Receiver, 75 Tex. 253, 254, 12 S. W. 38, it was held that the court's jurisdiction over a railroad in receivership proceedings dated from the first application to the court for a receiver's appointment.

The opinion of Chief Justice Stayton in *Texas Trunk Ry. Co. v. Lewis*, Sheriff, 81 Tex. 7, 8, 16 S. W. 647, 26 Am. St. Rep. 776, points out that there is much force in the proposition, not necessary to be determined in that case, that, where custody of property is essential in the adjudication of a controversy within the court's jurisdiction, the filing of a petition, presenting such controversy for the court's adjudication, subjects the property to the court's jurisdiction, and prevents the interference of any other court of co-ordinate jurisdiction. We have no doubt of the correctness of the proposition.

Since the adjudication of the county court of Montgomery county as to Mrs. Hardy's residence, as to whether she died testate or intestate, and as to the grant of letters of administration, was entitled to be given conclusive effect, unless reversed by an appellate court, the county or district court of Harris county could make no binding adjudication relative thereto, no matter what might be the state of the evidence as to Mrs. Hardy's true domicile. As said by the Supreme Court of Massachusetts:

"When different courts have concurrent jurisdiction, the one before whom proceedings may be first had, and whose jurisdiction first attaches, must necessarily have authority paramount to the other courts; or rather, the action first commenced shall not be abated by an action commenced between the same parties, in relation to the same subject, in the same, or any other court." *Stearns v. Stearns*, 18 Mass. 170.

The plea challenging the authority of the county and district court of Harris county to determine the proceeding instituted by Mrs. Poinboeuf, during the pendency of the proceedings in Montgomery county, was well taken, and should have been sustained. It was reversible error to overrule the plea.

#### PATTERSON v. STATE. (No. 6524.)

(Court of Criminal Appeals of Texas. Oct. 12, 1921.)

**Criminal law** §113(1)—Appeal dismissed on appellant's request.

Where defendant in criminal prosecution makes personal affidavit in proper form to dismiss his appeal, the request will be granted.

Appeal from Ft. Bend County Court; C. D. Myers, Judge.

M. Patterson was convicted of crime, and he appeals. Appeal dismissed.

C. I. McFarlane, of Richmond, for appellant.

**HAWKINS, J.** Since this court obtained jurisdiction of this case, appellant has filed a personal affidavit requesting that the appeal be withdrawn.

The affidavit seeming to be in proper form, the request will be granted, and the appeal is ordered abated.

#### SCOTT v. STATE. (No. 5965.)

(Court of Criminal Appeals of Texas. Oct. 5, 1921.)

**1. Highways** §186—Act requiring motorist striking a person to render assistance construed and upheld.

Vernon's Ann. Pen. Code Supp. 1918, art. 820M, compelling the driver of an automobile striking a person to stop and render assistance, must be construed to mean that the party shall render all the aid which would reasonably appear to him as an ordinary person at the time to be necessary, and when so construed is valid.

**2. Highways** §186—Indictment of motorist for failing to render aid to person struck held not defective.

An indictment under Vernon's Ann. Pen. Code Supp. 1918, art. 820M, held not defective for failing to allege that accused "knowingly" struck the person with his automobile, or that "knowing" he had struck him, failed to stop and render aid.

**3. Highways** §186—Motorist's ignorance of injury a defense for failing to render aid.

In a prosecution of a driver of an automobile under Vernon's Ann. Pen. Code Supp. 1918, art. 820M, for failing to stop and render aid to a person struck, defendant's lack of knowledge that he had injured some one is a defense.

Appeal from Criminal District Court, Tarrant County; Geo. E. Hosey, Judge.

M. W. Scott was convicted of violating the motor vehicle law, and he appeals. Affirmed.

Baskin & Eastus and David Greines, all of Fort Worth, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

**HAWKINS, J.** Appellant was convicted under a prosecution based on article 820M, Vernon's P. C., and his punishment assessed at a fine of \$100 and 90 days' confinement in the county jail.

No statement of facts accompanies the

record, and the case is presented here on the sole question as to whether said article is sufficiently specific in defining the offense sought to be denounced. In 1917 the Legislature passed an act which has sometimes been called the "Highway Law," but more properly speaking one "Regulating Operation of Motor Vehicles." This law was amended at the same session, and again in 1919, and with these amendments is brought forward in Vernon's P. C. as articles 820A to 820Z. We have already had occasion to review this law, upholding some of the provisions, and holding article 820D, relating to glaring headlights, void for indefiniteness (*Griffin v. State*, 86 Tex. Cr. R. 498, 218 S. W. 494), and also that a portion of subdivision (a), article 820K, is likewise inoperative and unenforceable in a criminal proceeding for the same reason (*Russell v. State*, 228 S. W. 566).

We quote so much of article 820M as may be necessary, deleting for convenience the portions not here required:

"Whenever an automobile strikes any person, the driver of, and all persons in control of such automobile, shall stop, and render to the person struck all necessary assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment, if such treatment be required, or if such carrying is requested by the person struck."

Appellant was charged under this law. If the law can be held good, the indictment is sufficient.

Counsel for appellant, in his brief, admits the article is commendable in purpose. This is true with reference to the whole of the act in question. Not until 1917 did our Legislature undertake general legislation on the subject, but in many states the necessity for statutory enactments to supplement the common-law rules was recognized many years before. With the constantly increasing use of motor vehicles both for business and pleasure purposes, the demand for road regulations in their use had become imperative. The driver who may strike a person or vehicle to-day may to-morrow himself be the victim.

The general rule for the construction of statutes, of course, applies, and has been recognized not only by the courts of our own but of other states, as well as by the text-writers on motor vehicles.

The following quotation is from Black's Interpretation of the Law, § 115, and is copied as section 130, p. 93, in "The Law Applied to Motor Vehicles," by Blakemore:

"Statutes enacted by the Legislature in the exercise of the police power, for the promotion or preservation of the public safety, health, or morals, may sometimes impinge upon the liberty of individuals, by restricting their use of their property, or abridging their freedom in the conduct of their business. When this is

the case, such statutes ought always to receive such a construction as will carry out the purpose and intention of the Legislature with the least possible interference with the rights and liberties of private persons;" such enactments being "designed to further the general welfare by derogating from the liberty of a few."

Likewise, in Huddy on Automobiles, § 68, we find the following:

"A statute creating a criminal offense is entitled to a strict construction so that the application of the act will not be extended beyond the clear intention of the lawmakers. But, nevertheless, the guiding principle in the interpretation of statutes is the ascertainment of the legislative intent, and a statute should not receive such a narrow construction as to exclude those acts intended to be included within its application.

"A common sense interpretation must be given to a statute, considering the whole statute in construing a part thereof. In construing a motor vehicle law, the court should give force and effect to every part of it to carry out the intent of the Legislature, if possible, such intent to be ascertained from the language in its plain and natural meaning."

Also part of section 241:

"A highway is for the use of the public at large; indeed it has been defined to be a road which every citizen has a right to use. This being so, it is necessary that the travel and traffic on the highway shall be governed by certain laws, so that the rights of each citizen may be certain of protection."

Section 775 from same author:

"Statutes have been enacted in some jurisdictions requiring an automobilist, upon causing injury to property or to another traveler, to stop his machine, and furnish his name or other means of identification to the traveler injured or to a police officer, or to give assistance to the person injured. The flight of an automobilist after causing injury to another is deemed such a serious offense that it is made a felony in some jurisdictions. The constitutionality of such a statute is affirmed by the courts, though there is a strong argument that it compels one to give evidence against himself. Such a law is affirmed on the ground that it is within the police power of the state."

Since motor vehicles have become a common means of travel upon the public highways, many statutes have been enacted in an effort to protect the public health and safety from the consequences of the use of automobiles upon the roads and streets. Some of these statutes have been assailed upon the ground that they manifested an exercise of power not inherent in the legislative department of the government, and others have been attacked upon the ground that in them are found unreasonable requirements. Ruling Case Law, vol. 6, p. 397; *Berry on Automobiles*, § 1601; *Ex parte Parr*,

82 Tex. Cr. R. 528, 200 S. W. 404; *State v. Mayo*, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512; *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, Ann. Cas. 1915A, 161; *State v. Sterrin*, 78 N. H. 220, 98 Atl. 482.

In some of these decisions, statutes requiring that one causing an injury by collision with an automobile shall do some affirmative act, such as furnishing information showing his name and address, have been upheld for the reason thus stated in one of the opinions.

"The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the state. It has been so held in *State v. Mayo*, 106 Me. 62, 26 L. R. A. (N. S.) 502, 75 Atl. 295, 20 Ann. Cas. 512, and *Com. v. Kingsbury*, 199 Mass. 542, 127 Am. St. Rep. 513, 85 N. E. 843. Doubtless the Legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person must be exercised in a mode consistent with the equal rights of others to use the highway. That the motor vehicle, on account of its size and weight, of its great power, and of the great speed which it is capable of attaining, creates, unless managed by careful and competent operators, a most serious danger, both to other travelers on the highway and to the occupants of the vehicles themselves, is too clearly a matter of common knowledge to justify discussion." *People v. Rosenheimer*, supra.

And in another, the conclusion is stated in the following language:

"The defendant also claims that the statute is unconstitutional, in that it requires him to furnish evidence which might be used against him in a criminal proceeding. Bill of Rights, art. 15. The same question has been raised in other states, and in each the conclusion has been reached that the statute is valid. *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, Ann. Cas. 1915A, 161; *Ex parte Kneeder*, 243 Mo. 632, 147 S. W. 983, 40 L. R. A. (N. S.) 622, Ann. Cas. 1913C, 923; *People v. Diller*, 24 Cal. App. 799, 142 Pac. 797. In each of these cases it is pointed out that the operation of an automobile upon the public highways is not a right, but only a privilege which the state may grant or withhold at pleasure (*Commonwealth v. Kingsbury*, 199 Mass. 542, 85 N. E. 843, L. R. A. 1915E, 264, 127 Am. St. Rep. 513), and that what the state may withhold it may grant upon condition. One condition imposed is that the operator must in case of accident, furnish the demanded information. This condition is binding upon all who accept the privilege.

"The statute confers a privilege which the citizen is at liberty to accept by becoming a licensee or not as he pleases. Having accepted the privilege, he cannot object to any conditions which have been attached thereto by a grantor with power to entirely withhold the privilege." *State v. Corron*, 73 N. H. 434, 445,

62 Atl. 1044, 1045 (6 Ann. Cas. 496). *State v. Sterrin*, 78 N. H. 220, 98 Atl. 482.

We have just recently received a supplemental brief from appellant, citing the *Russell Case*, supra, and urging that it and the *Griffin Case*, supra, and other authorities cited by him, are decisive of this case. In the subsequent discussion we are not unmindful of the principles upon which these cases were disposed of, but have reached the conclusion that the law in question can be upheld without doing violence thereto.

A party operating an automobile which may injure another in collision ought to be impelled by humanitarian motives, in the absence of any law, to tender aid in an effort to minimize the result of the injury. In doing this he would naturally and instinctively do the thing which to him, under the circumstances, appeared to be proper and necessary to alleviate suffering. If his own car was uninjured so that it might still be operated, perhaps the most natural thing for him to do would be to try and get the injured persons to a physician or surgeon as quickly as possible.

The statute ought not be given such a construction as would or might result in manifest harm to a person accused of violating it. It would be impracticable for the Legislature to undertake to say that in a certain kind of accident this particular kind of aid should be extended, and in another accident aid of some other character would be proper. Every case must be governed by the circumstances attendant upon it. What would appear to be "all necessary aid" in one case might not so appear in the next one, likewise it might reasonably appear to be necessary to get the injured person to a physician or surgeon for treatment in one instance and not in another; hence the fact that it would be futile for the lawmakers to undertake to be specific in particularizing what aid should be rendered becomes apparent. That the statute contains a humane provision cannot be gainsaid. If it can be construed to require that to be done which ought to be done even in the absence of the law, and without hurt to the individual, it ought, as so construed, to be upheld.

It would be manifestly unfair in measuring the extent of the aid rendered to have the court or jury pass upon that issue in the light of developments subsequent to the time of the accident. An injury might appear slight at the time, suggesting little necessity for aid of any kind, but internal injuries of serious nature might develop later. An accused could not be held criminally liable for a failure to do what was not reasonably apparent to him as necessary at the time. One acting in apparent necessary self-defense does so from what appears to him, viewed from his standpoint at the time, with all the

facts and circumstances within his knowledge, and not from the viewpoint of somebody else, or the jury, in the light of subsequent events.

[1] We have reached the conclusion that a fair and reasonable construction of the statute in question is that the party should render all the aid which would reasonably appear to him as an ordinary person at the time to be necessary, including taking the injured persons to a physician or surgeon, if so requested by them, or if it reasonably appears to accused that medical treatment be necessary. We think the word "required" in the connection used means only "necessary." The jury ought to be so instructed (if it be an issue) that, if accused gave all the aid which under the circumstances reasonably appeared to him to be necessary, he should be acquitted, and that, if under all the circumstances it did not reasonably appear to him to be necessary to carry the injured parties to a physician or surgeon for treatment, he could not be convicted for a failure to do so, unless he was requested by them to be so taken, and declined.

We can perceive no violence to the general rule of construction in reaching this conclusion. No new provision has been read into the law. We only construe what "all necessary aid" means in the statute, and say it must be determined from an accused's standpoint as to how much and what character of aid appeared to be necessary under any given state of facts. Surely the driver of an automobile should have no trouble in understanding in advance that in case of an accident he was expected and required to do what appeared to him to be necessary to alleviate suffering.

We think no error was committed by the trial judge in overruling the motion to quash the indictment and in arrest of judgment, because of the matters urged against the sufficiency of the statute in question.

[2, 3] Appellant complains that the indictment is defective in not alleging that accused "knowingly" struck the party injured, or that, "knowing" he had struck him, he failed to stop and render aid. We cannot agree to this contention. The word "knowingly" or "knowing" does not appear in the description of the act denounced as an offense, and it is not necessary for the state to so allege. If it becomes an issue on the trial, lack of knowledge on the part of a defendant that he had injured some one would excuse him and be a defense to a prosecution under the article in question. The trial judge recognized this as the law, and submitted that issue to the jury.

Believing the article of the statute should be upheld as construed in this opinion, the judgment of the trial court is affirmed.

### Ex parte HICKOX. (No. 6506.)

(Court of Criminal Appeals of Texas. Oct. 12, 1921.)

1. Ball  $\S$  43—A matter of right in capital cases, except where proof is "evident."

Bail is a matter of right in capital cases, except when the proof is "evident," which means that, if the evidence is such as to lead a dispassionate mind to the conclusion that accused is guilty, and that if the law is properly administered a conviction would be had of a capital offense, bail should be denied, otherwise it should be granted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Evident.]

2. Ball  $\S$  48—Decision of trial judge as to proof of capital offense entitled to weight on appeal.

The decision of the trial judge that the proof of a capital offense was "evident," justifying the refusal of bail, is entitled to weight on appeal, but has not the standing of a verdict, and it is the duty of the Court of Criminal Appeals to examine the evidence and determine whether bail should have been denied.

3. Ball  $\S$  49—Evidence held to warrant refusal of bail.

On application for bail in a murder prosecution, held that proof of a capital offense was "evident," so that a refusal of bail was justified.

Morrow, P. J., dissenting.

Appeal from District Court, Tom Green County; C. E. Dubois, Judge.

T. F. Hickox was charged with murder, and he appeals from a judgment refusing him bail. Affirmed.

Snodgrass & Dibreil, of Coleman, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. [1] This is an appeal from a judgment of the district court of Tom Green county, refusing bail to appellant, T. F. Hickox, who is charged with the murder of one Lamar Schrier.

The rule is that bail is a matter of right in capital cases, except when the proof is evident, which is taken to mean that if the evidence is such as to lead a dispassionate mind to the conclusion that the accused is guilty, and that if the law is properly administered a conviction would be had of a capital offense, in such an event bail should be denied, otherwise it should be granted.

In the instant case deceased was in a garage in the town of Rankin in company with one Nevell. Appellant and his son Tom came into said building while said other parties were there. Tom said to deceased,



"Lamar, you beat up my little brother, but you cannot beat me." Deceased replied, "I did not," and Tom said, "You are a G—d—n liar," and deceased said, "Let's not have any trouble," and appealed to appellant to speak to Tom and "let's not have any trouble," and about this time Tom slapped deceased, and they began fighting. Nevell immediately left the building, going to look for an officer to have him stop the trouble, and says he heard the shooting not longer than a minute after he left the building. A witness named Poole said he was standing a few feet from the parties, and saw Tom and deceased clinched, the latter having his arms about Tom's shoulders; that the deceased was backing and Tom following him, and that in this position the deceased went backward 7, 8, or 10 feet; that appellant was walking along beside them as deceased was backing, and at this juncture witness said he saw appellant put out his hand and heard the report of a pistol and saw deceased fall. Another witness said that he saw appellant approach deceased with a pistol in his hand, and when within 2 or 3 feet of him he shot deceased in the back; that deceased fell, and appellant and his son turned and walked out of the garage, and witness did not hear them say a word to any one. The physician who examined the body of deceased said he was shot in the small of the back, the shot ranging downward.

The only witness who testified for the appellant was his wife, and her evidence bore upon the question apparently of his ability to make bond.

It thus appears that appellant's son attacked deceased in the presence of the appellant; that deceased had remonstrated with Tom, and had asked appellant also to speak to Tom and prevent trouble; that deceased was retreating; that he was not making any demonstration with any weapon of any kind; that appellant kept pretty close to his son and deceased as the latter was going backward, and that, after deceased had backed from 7 to 10 feet, appellant shot him in the back with a pistol, setting fire to the clothing of deceased; and that then, without a word of explanation or statement of any kind, appellant and his son left the building.

[2, 3] The decision of the trial judge that the proof of a capital offense was "evident" is entitled to weight on appeal, but has not the standing of the verdict of a jury. The

duty rests upon this court to examine the evidence and for itself determine whether bail should have been denied. *Ex parte Stephenson*, 71 Tex. Cr. R. 380, 160 S. W. 77. We have carefully examined the testimony, and find nothing in the record suggesting that the conclusion reached by the trial judge was not the proper one.

The judgment refusing bail is affirmed.

**MORROW, P. J. (dissenting).** The burden is upon the state to produce "proof evident" of a capital offense. To discharge this burden, proof of express malice is required. *Firmin v. State*, 60 Tex. Cr. R. 370, 131 S. W. 1113; *Ex parte Townsley*, 87 Tex. Cr. R. 252, 220 S. W. 1092; *Ex parte Young*, 87 Tex. Cr. R. 413, 222 S. W. 242.

That appellant shot deceased while he and appellant's son were fighting does not alone suffice. Account should be taken of the state of appellant's mind. He may have been wholly unjustifiable, and still not guilty of a capital offense. *Cordono v. State*, 56 Tex. Cr. R. 459, 120 S. W. 471; *Rice v. State*, 51 Tex. Cr. R. 283, 103 S. W. 1156; *Farrer v. State*, 42 Tex. 271. Inferences adverse to the accused are not to be drawn from the absence of evidence which the state could have produced. Express malice is not presumed, but must be proved. *Hamby v. State*, 36 Tex. 523; *Dougherty v. State*, 59 Tex. Cr. R. 464, 128 S. W. 401; *Potts v. State*, 56 Tex. Cr. R. 44, 118 S. W. 535.

The state revealed the claim that appellant's son had been "beat up" by deceased. The effect of the beating on appellant's mind would depend upon the nature and cause of the beating, and its proximity in time to the homicide. Evidence of these matters was at the command of the state.

The idea of conspiracy with Tom Hickox seems not proved, but negatived, by the finding of the trial judge that Tom Hickox was entitled to bail in a small sum. The inferences from the state's evidence that appellant's passion was aroused to a degree preventing deliberation by the previous conduct of deceased in connection with the present encounter are not overcome by any evidence found in the record. If facts to the contrary existed, they should have been introduced by the state. In their absence, the presumption that they did not exist should obtain.

In my opinion, the judgment should be reversed.

**HADNOT v. STATE. (No. 6271.)**

(Court of Criminal Appeals of Texas. Oct. 5, 1921. On Motion for Rehearing, Nov. 23, 1921.)

1. Criminal law §982—One convicted of possession of equipment for making liquor may be given a suspended sentence.

One convicted of having possession of equipment for making liquor may be given a suspended sentence.

2. Criminal law §982—To be entitled to suspended sentence, evidence must show accused has never before been convicted of felony.

To entitle an accused to a suspended sentence, the evidence must affirmatively show that he has never before been convicted of felony.

3. Criminal law §982—Proof of good reputation not sufficient to submit question of suspended sentence.

The right of an accused to submit his right to a suspended sentence cannot be raised except by proof that he had not theretofore been convicted of a felony, and proof of good reputation is not sufficient, though evidence of reputation may be introduced as matter of inducement when the issue has been properly raised.

4. Intoxicating liquors §224—Burden of proof of matters contained in exceptions in the Dean Law rests upon accused.

In prosecution under the Dean Law for unlawful possession of equipment used in making liquors, the burden of proof that equipment was for medicinal, sacramental, etc., purposes, as excepted in the law, is upon accused.

On Motion for Rehearing.

5. Criminal law §132—Amendment held to amount to repeal of statute, and to require dismissal of prosecutions thereunder.

An amendment to the Dean Law (Acts 37th Leg. 1921, 1st Called Sess., c. 61), omitting therefrom the making penal of the possession of equipment for the making of intoxicating liquor, amounts to a repeal of the provisions of that law making possession of such equipment a crime, and, under the provisions of other statutes, prosecutions under this law must be dismissed.

Appeal from District Court, Jasper County; Geo. E. Hoiland, Special Judge.

Arthur Hadnot was convicted of having unlawful possession of equipment for making intoxicating liquor, and he appeals. Reversed and dismissed on rehearing.

Blake & Neel, of Jasper, for appellant.

R. H. Hamilton, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Jasper county of unlawfully having in his possession certain equipment for making intoxicating liquor, and his punishment fixed at one year in the penitentiary.

By his bill of exceptions No. 1 appellant complains of the refusal of his special charge submitting his right to a suspended sentence. The record discloses that an application for suspended sentence was filed and presented to the trial court by appellant, and that no reference thereto appeared in the main charge, and that a special charge submitting said issue was refused.

[1, 2] There is no question but that one on trial for a violation of the Dean Law (Laws 1919, c. 78) may have an application of

the law of suspended sentence filed and presented, and in a proper case may be given a suspended sentence as in other felony cases. There is, however, no better settled rule than that to entitle the accused to a suspended sentence, and the submission of such issue, the evidence before the trial court must affirmatively show that he has never before been convicted of a felony. An examination of the record in the instant case reveals the fact that there is not a word of proof supporting the proposition just mentioned. But two witnesses gave testimony, one for the state and one for appellant.

[3] Nothing appears in the testimony of the state witness in any wise relating to the question of appellant's former conviction, and the only matter appearing in the testimony of appellant's witness, one Hancock, is that he had known appellant for many years, and that his reputation was good. This is not enough to raise the issue or justify the submission of the right to a suspended sentence to the jury. They are the arbiters as to whether such sentence shall be given, and appellant's right thereto cannot be raised in a given case except upon proof of the fact that he had not theretofore been convicted of a felony. Under our statutes, when the issue is thus raised, evidence of reputation may be introduced as a matter of inducement to the jury, but in no case should the issue of suspended sentence be submitted in the charge when the only evidence bearing upon the question is that the accused has borne a good reputation. *Simonds v. State*, 76 Tex. Cr. R. 487, 175 S. W. 1064; *Onestott v. State*, 75 Tex. Cr. R. 72, 170 S. W. 301. It thus appears that no error was committed in the refusal of said special charge.

[4] Special charge No. 1 given at the request of the state was to the effect that the state need not offer proof of the fact that the equipment found in the possession of appellant was had by him for medicinal, sacramental, scientific, etc., purposes. After mature reflection we have come to the conclusion that the burden of proof as to matters contained in the exceptions set forth in the Dean Law rests upon the accused, and that the state need offer no proof of the negatives necessary in the indictment. *P. Robert v. State*, 234 S. W. 89, this day decided.

No other complaint appearing in the record, and finding no error, the judgment of the trial court will be affirmed.

On Motion for Rehearing.

[5] Our attention was not called, at the time the original opinion herein was handed down, to the fact that the special session of our Legislature, in its recent amendment to the Dean Law (Acts 37th Leg. 1st Called Sess. 1921, c. 61), omitted therefrom the making penal of the possession of equipment for the making of intoxicating liquor. This of necessity amounts to a repeal of the provisions of said law making possession of such equipment a crime, and other provisions of our statute require that all pending cases against parties charged with violations of such repealed statute, be dismissed. This question was passed upon by this court in *Cox v. State*, 234 S. W. 531, recently decided.

For the reasons stated, and upon the authority of that case, the motion for rehearing is granted, and the judgment is reversed, and prosecution ordered dismissed.

**PAYNE, Director General, v. BRADLEY.**  
(No. 2375.)

(Court of Civil Appeals of Texas. Texarkana. July 1, 1921. Rehearing Denied Oct. 6, 1921.)

**1. Railroads §441(3)—Burden on plaintiff to show negligent killing of animal.**

In an action for the killing of plaintiff's mule by a railroad company, where as a matter of law defendant was not required to fence its right of way at the place of injury, it devolved upon plaintiff to establish negligent killing of the mule.

**2. Railroads §441(5)—Killing of mule held not actionable.**

Where plaintiff's mule, which was at a place not required to be fenced, got on the track ahead of the engine suddenly and in so short a distance in front as to make it impossible for the engineer to avoid striking it, the facts as to defendant's negligence were insufficient as a matter of law to establish legal liability.

Appeal from District Court, Cass County;  
H. F. O'Neal, Judge.

Action by J. J. Bradley against John Barton Payne, Director General, as Agent. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

King & Mahaffey, of Texarkana, for appellant.

Lincoln & Smitha, of Texarkana, for appellee.

LEVY, J. [1, 2] A reconsideration of the record has convinced us of error in affirming the judgment upon the facts of the case. A fair interpretation of the facts now lead us to conclude that it should be said as a matter of law that the railway company was not required to fence its right of way at the place of injury. Therefore it devolved upon the plaintiff to establish negligent killing of the mule. And the facts as to negligence, we conclude, are insufficient as a matter of law to establish legal liability. The case depended for negligence entirely upon whether or not the engineer could have avoided injury to the mule after the mule got on the track. The mule got on the track ahead of the engine suddenly and in so short a distance in front as to make it impossible to avoid striking it. The facts were not as we now conclude understood in the first opinion, and the facts then stated are not correctly stated.

The decision as to attorney's fees is also withdrawn, and not now decided.

The judgment is reversed, and judgment is

here rendered in favor of appellant, and for costs of the trial court and of appeal.

NOTE.—In the above cause it is ordered by the Court that the opinion heretofore filed on the 16th day of June, 1921, and recorded in Opinion Record No. 7, p. 1188, be retired and withdrawn, and not published, and that the opinion on rehearing be filed and recorded in place of said original opinion.

**LOTT et al. v. DASHIELL et al. (No. 6588.)**

(Court of Civil Appeals of Texas. San Antonio. June 28, 1921. Rehearing Denied Oct. 12, 1921.)

**1. Vendor and purchaser §308(7)—Failure of title defense to purchase-money notes.**

Vendee in possession under an executed warranty deed may defeat a vendor's suit upon purchase-money notes, in whole or in part, by showing that there has been a failure or partial failure, of title to the land, that there is a valid existing outstanding title, that there is danger of eviction, and also such facts as would prima facie repel the presumption that at the time of purchase he knew and intended to assume the risk of the defect, especially where vendors are nonresidents of the state.

**2. Reformation of instruments §16 — Deed corrected to effectuate intent of parties.**

Where a deed does not convey the tract intended to be conveyed, parties are entitled to have correction effectuated by judgment; proper parties being before the court, and there being proof establishing mutual mistake.

**3. Pleading §376—Admission of facts by one defendant did not establish them as against other defendants and interveners.**

Admission by one defendant of every fact alleged in petition necessary to establish plaintiff's case did not relieve plaintiff of her onus of establishing facts admitted as against other defendants and interveners.

**4. Vendor and purchaser §308(1)—Threat of eviction not essential to defense of partial failure of title.**

There need be nothing more than an actual claim under an outstanding paramount title, or else danger of eviction by it, to warrant defense of failure of title in an action on vendor's lien notes, and there need not be an actual threat of eviction, and a like rule is applied where, through a mutual mistake in a deed, the legal title stands in the name of a third person, as vendee will not be relegated to mere chance to make title through a suit for reformation.

**5. Judgment §101(2) — Not entered against defaulting party under pleadings and proof.**

One making a sale of land to which he has no title cannot foreclose a vendor's lien for the price and cannot go into court confessing in his pleadings that he conveyed no vestige of title

and at the same time obtain a judgment for the purchase money, notwithstanding default of some of the defendants:

**6. Deeds §93—Nothing passes except what is described.**

Nothing passes by a deed except what is described in it, whatever the intention of the parties may be.

**7. Deeds §13—Grants to deceased persons void.**

Generally a deed to a deceased person, "her heirs or assigns," is void for want of a grantee; but, where the intention of the parties is clear and the persons intended by the terms "heirs or assigns" of the grantee are ascertainable beyond a doubt, the fact that the grantee is dead should not defeat such intention.

**8. Estoppel §15—Evidence §215(1)—Correction deed executed after action commenced admissible to estop grantor and as admission.**

In action involving title to land, a correction deed, even though not passing legal title to heirs or grantees of deceased grantee, would be sufficient to estop grantor and her heirs from claiming title to land intended originally to be conveyed, and also was admissible as an admission upon grantor's part as to a mistake of description in the original deed, even though executed after the institution of the suit.

**9. Reformation of Instruments §33—Parties to chain of title necessary to correction back to source of error.**

In order to reform deed not conveying property that parties had in mind, it is necessary to correct the title back to the source of the error, and the parties to all deeds in the chain of title are necessary parties to the proceeding.

**10. Trial §141—Uncontroverted facts need not be submitted to jury.**

Where by reason of a record admission of one party, confession of liability by another, and default of another, certain facts were not controverted, court erred in submitting such facts to the jury; there being no issue to be determined by it.

**11. Evidence §134—Showing of similar acts to show intent inadmissible where intent is immaterial.**

It is only where the intent prompting an act in issue is material that it is competent to resort to a showing of similar acts as circumstantial proof of the act in issue as a part of a system or scheme.

**12. Vendor and purchaser §281(2)—Sheriff's deed held properly admitted in evidence.**

In action to foreclose vendor's lien notes where title to land was involved, held, that court properly admitted in evidence a sheriff's deed which formed a link in chain of title under which certain parties claimed.

**13. Adverse possession §47—Suit held not to break peaceable possession.**

A suit did not break peaceable possession of land, where it was not prosecuted to final effect and ouster.

**14. Adverse possession §47 — Suit did not break peaceable possession as to persons not interested.**

A suit involving real estate did not break peaceable possession thereof as against persons not before the court in the suit, and limitations would continue to run as against their interests.

**15. Vendor and purchaser §279—Holder of vendor's lien may protect title of vendees.**

It was the right and duty of one seeking to foreclose vendor's lien notes, where third parties intervened and injected into the suit an action of trespass to try title, to protect the title both for herself and the vendees, and one of the vendees could not by willful default to interveners defeat her recovery.

**16. Adverse possession §54—Party may set up adverse possession no matter how remote.**

A party may establish title by adverse possession in his chain of title, however remote from the present time it may have ended.

**17. Adverse possession §100(6) — Bond for title sufficient to comply with 10-year statute.**

A bond for title was sufficient memorandum of title to comply with the 10-year statute of limitations, where it obligated the conveyance of the entire title, though recognized claims of interest by heirs of a third person.

Dickson, Special Justice, dissenting in part.

Error from District Court, Bexar County; J. T. Sluder, Judge.

Suit by Jas. Polk against D. D. Harrigan and J. N. Lott, in which Mrs. C. L. Dashiell was substituted as plaintiff and in which Sabino Sandoval and others intervened. From judgment for plaintiffs, J. N. Lott and others bring error. Affirmed in part, and reversed and remanded in part.

Don A. Bliss, and Douglas, Carter & Black, all of San Antonio, for plaintiffs in error.

T. F. Mangum, of San Antonio, for defendants in error.

BALL, Special Chief Justice. This suit was originally instituted by one Jas. Polk against D. D. Harrigan and plaintiff in error J. N. Lott, seeking recovery against them on vendors' lien notes aggregating \$4,500, together with foreclosure of lien on a certain 18½-acre tract situated in an outlying part of the city of San Antonio, Tex. Later defendant in error Mrs. C. L. Dashiell was substituted as plaintiff, she having acquired the notes after they were declared due. In her third amended original petition, besides declaring upon her notes, Mrs. Dashiell alleged that the 13½-acre tract described in the warranty deed from B. K. and W. R. Edwards, the original vendors, to the defendants Lott and Harrigan, was not the tract actually purchased by the latter, and

that the error in description arose in this wise: Mrs. M. J. Martin, by deed dated March 2, 1887, conveyed to Isabella Steves a certain 15-acre tract described as commencing at the southeast corner of a tract of land conveyed by Mrs. M. J. Martin to Tarleton & Keller, and after the death of Isabella Steves, intestate, P. O. Steep acquired through guardian's deed and otherwise, the title of her four heirs at law to a 13½-acre tract, a part of the aforesaid 15-acre tract and described as having the same starting point, and W. O. Edwards acquired through Steep and his grantee of a one-half interest, Madge Waring, the same property by the same description, and by will of Edwards, upon his death, title to same passed to B. K. and W. R. Edwards who conveyed by the same description to the defendants Lott and Harrigan; that Mrs. Martin intended to convey to Isabella Steves 15 acres with the same metes and bounds, except that the beginning point was to be at the southeast corner of a tract conveyed by her to C. A. Keller (instead of Tarleton & Keller), and the other grantors named in the succeeding deeds each intended to convey to their several grantees the same 13½ acres, commencing as intended in the Martin deed, and that the error in the description in all of said deeds arose through mutual mistake on the part of the several grantors and grantees; that the defendants Lott and Harrigan took and hold actual possession of the last-described 13½-acre tract, actually intended to be conveyed. And plaintiff made all of these grantors and grantees parties defendant and asked that their several deeds be corrected, and that she have recovery on her notes against Lott and Harrigan, with foreclosure on the 13½-acre tract intended to be conveyed, on the basis of this correction.

Harrigan filed simply a formal answer, and in the course of his testimony in behalf of plaintiff admitted his liability. Lott, for the purpose of obtaining the right to open and close the case, under rule 31 governing district courts (142 S. W. xx), admitted of record that the plaintiff "has a good cause of action as set forth in her petition except in so far as it may be defeated in whole or in part by the facts of his answer constituting a good defense which may be established." These facts in avoidance specially pleaded by Lott are, briefly stated, as follows: That W. R. and B. K. Edwards, the original vendors of the land involved, represented to Lott, acting for himself and Harrigan, that they had a good and perfect title and would furnish an abstract of title to cover, and that any apparent clouds would be immediately cleared; that it was contemplated by all concerned that the land would be cut up by defendants and sold out as cheap lots, obtaining guaranty of title by

a responsible title guaranty company; that Lott had no knowledge or notice of the actual condition of title and that he relied on the Edwardses, with whom he was intimate; that the deed was given and the defendants proceeded to clear the land, but the Texas Guaranty Title Company refused to guarantee the title upon the advice of their attorneys. As specific defects in title he alleged: First, that there was an outstanding undivided one-half interest to said land in the heirs of the first wife of Mariano Rodriguez, which was now being asserted; second, that there were certain incumbrances and legacy charges; third, that Mrs. Norton has had actual and peaceable possession of about 2½ acres of this tract, claiming the same as her own, for more than 10 years, thereby acquiring title thereto by limitation; fourth, that prior to the time Mrs. Martin conveyed this land to Isabella Steves, under whom the Edwardses derive title, Mrs. Martin had already conveyed the same land to C. A. Keller. He averred that none of these outstanding titles had been acquired by the Edwardses; that he had asked the Edwardses to clear these defects, which they had failed to do, and that by reason of such defects in title the land could not be sold for more than one-half of the amount of the notes, in which amount he was damaged. Finally, he alleged certain schemes on the part of the Edwardses, Polk, Mrs. Dashiell, and Harrigan in the transfer of the notes to defraud him, and that Harrigan maliciously procured his aunt, Mrs. Dashiell, to buy and enforce the notes, himself being the real owner of same. He asked that the Edwardses be required to clear the title before recovery be allowed on the notes, and in the alternative that the transaction be rescinded in toto, the notes canceled, and the title divested, offering to convey the land back to the Edwardses or their assigns or if the transaction be not rescinded allowance be made on the notes to the extent that their consideration had failed.

Plaintiffs in error other than Lott, namely, Sabino Sandoval et al., intervened in the suit, setting up a separate and distinct cause of action in trespass to try title to the same land, claiming a one-half interest in same as the heirs of Maria de Jesus Carvajal, first wife of Mariano Rodriguez; it being her community interest in same.

Mrs. Dashiell, by supplemental petitions, as against the interveners' claim of title, as well as against Lott's plea of failure of title, pleaded the three, five, and ten years' statutes of limitation, and in defense against the interveners' action alleged that there was an outstanding legal and equitable title not held by interveners, and specifically pleaded ten-year limitation title in M. L. Merrick. She also alleged that Lott waived the defects in

the title and his right to rescission by taking and holding possession of the land.

Prior to trial Mrs. Dashiell dismissed as to all the parties to the deeds as to which she sought reformation except the Edwardses and Lott and Harrigan. The cause was then submitted to the jury upon numerous special issues, and upon the basis of the answers thereto the court rendered judgment correcting only the deed from the Edwardses to Lott and Harrigan (the Edwardses having been served with nonresident notice and defaulted), and in favor of Mrs. Dashiell upon her notes as against both Lott and Harrigan, and for foreclosure of the vendor's lien against the property covered by the corrected description and as intended to be conveyed, and decreeing that the interveners take nothing by their suit as against Mrs. Dashiell, Lott, Harrigan, or the Edwardses.

[1] It is the settled rule in this state that a vendee in possession under an executed warranty deed may defeat his vendor's suit upon the purchase-money notes, in whole or in part, by showing that there has been a failure or partial failure of title to the land, that there is a valid, existing outstanding title, that there is danger of eviction, and also such facts as would prima facie repel the presumption that at the time of purchase he knew and intended to assume the risk of the defect. *Cooper v. Singleton*, 19 Tex. 260, 70 Am. Dec. 333; *Brown v. Montgomery*, 89 Tex. 250, 253, 34 S. W. 443; *Blewitt v. Greene*, 57 Tex. Civ. App. 588, 122 S. W. 914, 916, and cases there cited. There would seem to be a special and stronger reason for this where, as here, vendors, liable on their covenants of warranty, are nonresidents of the state. The defense in such case is really an affirmative showing of equitable considerations entitling the vendee to a rescission, and must accordingly be tested by the strict rule applicable to that doctrine. Clearly plaintiff in error Lott did not discharge his peculiar burden of proof, under this rule, in such manner as to entitle him to a peremptory instruction; and his first assignment is overruled. In order to make ourselves plain in the subsequent discussion, we will even go further and say that, under the jury's findings on some issues and the undisputed testimony on others, Lott failed to establish the defenses pleaded by him so as to defeat plaintiff's right to the judgment rendered.

In our view of the record it is necessary to accept as an absolute fact, from the standpoint of the defendant in error, as well as from Lott's under his record admission, the existence of the mutual mistake in the deed from Mrs. Martin and similarly throughout in subsequent chain of title, because it is so alleged in plaintiff's petition, not in the alternative but absolutely, and

her foreclosure is asked only upon a totally different tract from that described in the Edwards deed in view of the existence of such mistake. Some doubt whether the two deeds, in evidence, executed the same day by Mrs. Martin, one to C. A. Keller and the other to Tarleton & Keller, did not actually cover the same land, seems to have arisen from the testimony of Mrs. Martin, then 85 years old, that she did not recall giving but one deed and that was to Keller for services rendered by the firm of Tarleton & Keller. If they did, it would conform the description in the deeds sought to be reformed to the tract intended. But this seems to have been an afterthought, not presented by the pleadings, and, though her statement is undisputed, it is immaterial in the status of the record.

[2] Under plaintiff's allegations the deeds from Mrs. Martin down passed no title to the property involved, since purporting to convey an entirely different tract. The agreement of the parties must, however, control in determining what land was actually bought and sold; and there can be no question but that with proper parties before the court and proof establishing mutual mistake in the different links in the chain of title as alleged by plaintiff, she would be entitled to have such correction effectuated by judgment. *Clark v. Gregory*, 87 Tex. 189, 191, 27 S. W. 56; *Moore v. Haslewood*, 67 Tex. 624, 4 S. W. 215; *Laufer v. Moppins*, 44 Tex. Civ. App. 472, 99 S. W. 109; *Silliman v. Taylor*, 85 Tex. Civ. App. 490, 80 S. W. 651; *Metcalf v. Lowenstein*, 35 Tex. Civ. App. 619, 81 S. W. 362. In such event the judgment would pass the title to the land as the deeds would have done had they reflected the true agreement of the parties. The judgment actually rendered in this case, however, fails to cure the want of title affirmatively alleged by plaintiff (and admitted by defendant Lott) by reforming the deeds on back to Mrs. Martin, but instead reforms only the deed of the Edwardses to Lott and Harrigan. The question thus arising on the record is whether, in view of this and of plaintiff's affirmative allegation of an actual want of title in the Edwardses to the tract intended to be conveyed to Lott and Harrigan, the judgment awarding recovery on the notes and foreclosure of lien against Lott and Harrigan is erroneous.

[3] Lott's record admission of plaintiff's cause of action, it should be remarked, has no bearing on this question. Its effect was to operate as an abandonment of his purely defensive pleadings as contradistinguished from those in avoidance, and to admit every fact alleged in the petition which it was necessary for Mrs. Dashiell to establish in the first instance in order to enable her to recover. *Smith v. Bank*, 74 Tex. 541, 548, 12 S. W. 221. This would admit—as far as

Lott is concerned and no further—the fact of mutual mistake on the part of Mrs. Martin and Isabella Steves in the description in the deed from the former to the latter, as well as the ensuing mutual mistake in the successive deeds (following same description) on down to and including the deed to Lott and Harrigan, all as alleged in plaintiff's petition. It would not relieve plaintiff of her onus of establishing these facts as against the other parties to these various deeds, who were obviously necessary parties to their correction. But since it appears beyond question from the allegations of the petition as to the status of the title that it is essential to plaintiff's right of recovery on her notes with foreclosure of lien that she reform all the deeds from Mrs. Martin on down, there is no basis for the contention that Lott's record admission justifies judgment on the notes and foreclosure of lien against him without such complete reformation and correction of title. His admission goes no further than her allegations, and they defeat themselves, that is, the right of recovery, in the absence of proper parties and proof establishing the alleged and admitted mutual mistake throughout said chain of title as to description and identity of the property.

We have found no case, nor have we been cited to any, that sufficiently resembles this to guide us in the determination of the question as to error resulting from the affirmative showing by plaintiff of a failure of title. Under the principle, though, of the peculiar rule applied in this state in cases of failure of title when set up by defendant, the result would seem to follow necessarily that such judgment is fundamentally erroneous. The situation is simply this: The plaintiff shows that the tract described in plaintiff's notes, and deed reserving vendor's lien securing same, is a totally different tract from the tract sought to be foreclosed upon, and that the title to the latter tract is outstanding in Mrs. Martin; that the Edwardses, vendors, and Lott and Harrigan as vendees, undertook to buy and sell Mrs. Martin's land in mutual ignorance of its ownership; that the Edwardses by their deed conveyed to their vendees no title to this tract whatsoever, and consequently that plaintiff, without reformation of the various deeds, had no lien thereon and would get no title under foreclosure and sale; that no one had any idea at the time that by reason of an incorrect description of the land the Edwardses conveyed one tract when all parties intended that they should convey another; though the jury found that Lott was not ignorant of the real condition of the title when he accepted same, this could only refer to the matters set up by Lott and covered in Terrell, Walthall & Terrell's opinion on the abstract, because the plaintiff specifical-

ly alleged this mutual mistake on the part of the grantees of the Edwardses, and the undisputed evidence shows that this mistake was not discovered until long after the suit was filed, and just a few weeks before the trial (Harrigan's testimony, S. F. p. 6). Vendees may assume the risk of defects in title, but common sense repels the idea that they ever knowingly buy from one person a title plainly vested in another, and Lott's ignorance of this fatal mistake in description explains his actions in the premises.

[4] It is true that there is nothing to indicate a threat of eviction by Mrs. Martin, or any one else, but there need be nothing more than an actual claim under an outstanding paramount title, or else danger of eviction by it. *Cook v. Johnson*, 20 Tex. 209, and cases cited supra. The Edwardses by their deed conveyed no title of any character—not simply an inferior title—but by it merely assigned to their vendees the chance to have the deed to their father, W. C. Edwards, and the prior deeds, reformed against the parties thereto by showing mutual mistake. Mrs. Dashlell by her pleading proclaims these facts, showing that beyond question Lott and Harrigan must surrender the land to Mrs. Martin, or her successors in right, whenever they choose to claim it. Under such circumstances, there would seem to be an ever-present danger of eviction, and the very fact of mutual mistake might explain the nonassertion of any claim.

In the leading case of *Tarpley v. Poage*, 2 Tex. 139, it was said, through Chief Justice Hemphill:

"The vendee must, by competent and sufficient evidence, establish the existence and validity of the outstanding title [which the plaintiff has herself done in this case]—but when that is done, there is no reason why his remedy should be delayed until disturbed in the enjoyment of the land—and this even when the defendant is in possession."

Where, through mutual mistake in deed, there is a conflict with recognized senior surveys, a like rule is applied and the vendee not required to show ouster. *Doyle v. Hord*, 67 Tex. 621, 4 S. W. 241; *Gass v. Sanger*, 30 S. W. 502.

It was said by Chief Justice Willie in *Haralson v. Langford*, 66 Tex. 111, 114, 18 S. W. 339, 340, that "danger of eviction does not exist when there is no certainty that the title has wholly or partly failed." The converse of this must be equally true; that is, where title has certainly failed (as alleged by plaintiff in this cause and admitted by defendant Lott) there is danger of eviction. How possibly can plaintiff Dashlell contend there is no danger of eviction in the light of her pleading?

The rule laid down in these cases is recognized by Judge Denman in *Land Co. v. North*, 92 Tex. 72; 45 S. W. 994, where it is remarked

that they proceed upon the principle that a court of equity will not ordinarily lend its aid to compel the vendee to perform his contract by paying over the purchase money when it appears that the vendor conveyed him no title; and it is thus that the court distinguishes such defenses from actions at law for breach of warranty, with respect to the necessity of showing at least a constructive eviction. Even in warranty cases it is generally held that there is a virtual eviction upon delivery of deed where the grantor is without any title (15 C. J. pp. 1287, 1288, section 58, p. 1289). Besides, in an action by a nonresident or insolvent vendor to enforce a lien for purchase money, the purchaser may rely upon a breach of the covenant of warranty in his deed, though there has been no eviction. *Little v. Bishop* (Ky.) 61 S. W. 464; *Walker v. Robinson*, 163 Ky. 618, 174 S. W. 503; *Ison v. Sanders*, 163 Ky. 605, 174 S. W. 506; *Elder v. Bank*, 43 S. W. 19.

In the instant case the grantors are both nonresidents of the state, the deed conveyed no title to the land intended, and, until the covenants of warranty are made good by proper judgment of reformation, they are unavailable to the vendees (*Shaw v. O'Neill*, 45 Wash. 98, 88 Pac. 111); and to make this case still stronger all these facts are set up affirmatively by plaintiff.

Of course, such outstanding title might be defeated by Lott and Harrigan by a showing of mutual mistake against all parties back to the source of the fatal error in description. Yet surely the law will not relegate them to this mere chance to make title, which Mrs. Dashiell herself assumed in this case but failed to make good, and permit her to collect the price of such a "chance" against them.

[5] In the case of *Laux v. Laux*, 19 Tex. Civ. App. 693, 50 S. W. 213, it is held that one making a sale of land (and Mrs. Dashiell is, of course, in no different attitude from the Edwardses, as vendors) to which he has no title cannot foreclose a vendor's lien for the price; and we can conceive of no case in which a vendor may go into court, confessing that he conveyed no vestige of title, and at the same time collect the purchase money from his vendees, and foreclose his lien against a third person's land, the intended subject of his sale. Yet that is exactly what has been here done, and we see no escape from the conclusion that the judgment in this respect is fundamentally erroneous, and must therefore be reversed as to both Lott and Harrigan, notwithstanding the latter's virtual default.

To be sure, any error in this matter would be vitiated by an affirmative showing of title in the Edwardses, either by limitation or else by virtue of the correction deed; but as a matter of fact the record contradicts any such title in them.

[6] Though the possession of Mrs. Norton,

who took care of the property for Isabella Steves, perfected limitation title in Isabella Steves, still such limitation title did not pass from her heirs to their assigns under deeds erroneously describing the land so held; for nothing passes by a deed except what is described in it, whatever the intention of the parties may have been. *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665, 669; *Browne v. Gorman*, 208 S. W. 385. Of course, a perfected limitation title is a full legal title, which in the instant case the jury found to be in Isabella Steves, and it would require deed from her or her heirs to pass such title. *Campbell v. Castle*, 204 S. W. 484, 485.

[7] As for the correction deed executed by Mrs. Martin in March, 1920, to her daughter, Isabella Steves, "her heirs or assigns," 13 years after the grantee's death, the general rule is that such deeds are void for want of a grantee. *Wm. Cameron & Co. v. Trueheart*, 165 S. W. 58, 61; *Vineyard v. Heard*, 167 S. W. 22, 25, 26; *Nilson v. Hamilton*, 53 Utah 594, 174 Pac. 624, 626; *Baker v. Lane*, 82 Kan. 715, 109 Pac. 182, 28 L. R. A. (N. S.) 405 and note; *Devlin on Real Estate*, § 187. Cases sustaining deeds made to the "heirs" or the "estate" as such of a dead grantee, who is known by the grantor to be dead, are clearly distinguishable; such unnamed grantees being capable of identification. *Hill v. Jackson*, 51 S. W. 357; *Black v. Brown*, 129 Ark. 270, 195 S. W. 673, 674. It may be conceded, however, as a modification of this rule—since its correctness is not necessarily here at issue—that where the intention of the parties is clear, and the persons intended by the term "heirs or assigns" of the grantee are ascertainable beyond a doubt, the fact that the grantee is dead should not defeat such intention. *City Bank v. Plank*, 141 Wis. 653, 124 N. W. 1000, 135 Am. St. Rep. 62, 18 Ann. Cas. 869.

The only explanation in the record of the circumstances under which this correction deed was given is contained in the testimony of the defendant Harrigan, who says that when Mrs. Dashiell's attorney, shortly before the trial, suggested the error in the description of the land involved herein, he obtained this correction deed from Mrs. Martin. This deed shows upon its face that it is a correction or substitute deed, and since Isabella Steves, the grantee, was Mrs. Martin's daughter, it may be assumed that the grantor knew that the grantee was dead when she made the deed. The intention, it seems, was to carry into effect the purpose of the original deed to Isabella Steves by conveyance to her heirs or assigns. If the technical words used in the deed—"heirs or assigns"—be considered, in accordance with this intention and contrary to the usual rule, as words of purchase, instead of limitation, and even if it be assumed without any showing of any special benefit to the heirs that they consented to



such correction (*Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108), nevertheless this deed could not possibly vest title in the Edwardses, because they were not assigns of Isabella Steves as to the tract of land covered by the correction deed, but were her remote assigns as to a totally different tract. Thus the correction deed is seen to be unavailing as curing the error in the judgment.

[8] With further reference to said correction deed, though possibly not passing legal title to the heirs of Mrs. Steves, it was and would be sufficient to estop Mrs. Martin and her heirs from claiming title to the land intended originally to be conveyed, and also as an admission upon her part as to the mistake of description in her original deed, and therefore admissible in evidence, not being affected by the fact that it was executed after the institution of this suit (*Milby v. Hester*, 94 S. W. 178, 181), and when supplemented by proof of consent of the Steves heirs to take under this correction deed, would cure that link in the title. Lott's seventeenth assignment of error is therefore not sustained.

[9] Upon another trial, in our opinion, as already indicated, if reformation is still desired, it will be necessary to correct the title back to the source of the error. Mrs. Martin's deed, in effect to the heirs of Isabella Steves, will, under the condition stated, eliminate her, and should also serve to put aside any question as to the right of reformation against her, because of the voluntary character of Mrs. Martin's original deed to her daughter, Isabella Steves. All of the other deeds in the title, however, should be reformed by the judgment, thus passing the title to the proper tract, which in the present attitude of the case has never gotten beyond the Steves heirs. *Browne v. Gorman*, 208 S. W. 385. Of course, all of the parties to these deeds would be necessary parties to any such proceeding. *McNeill v. Cage*, 38 Tex. Civ. App. 45, 85 S. W. 57; *Alfalfa Lbr. Co. v. Mudgett*, 199 S. W. 337, 340; *Gates v. Union Co.*, 92 Miss. 227, 45 South. 979.

It can serve no useful purpose to consider the assignments as to the insufficiency of evidence to support the findings of the jury affecting the plaintiff in error Lott alone. In view of another trial, however, we will briefly consider his objections to jury instructions or issues, and to admission or exclusion of evidence.

[10] The questions submitted in special charge A as to the intention of the Edwardses and Lott and Harrigan as to the property to be covered by their respective deed and notes should not have been submitted to the jury, because there was not, under Lott's record admission, Harrigan's confession of liability, and the Edwardses' default, any issue to be determined by it.

In our opinion the question, "Did the defendants Lott and Harrigan, or either of them, accept the title tendered to them by

W. R. & B. K. Edwards?" is not a proper question under the evidence, and it is not likely to become so. Lott could not be bound by what Harrigan may have done in the premises subsequent to their dissolution of partnership, and the evidence is uncontroverted that Lott handled the transaction for both of them prior to such dissolution. Harrigan, having made no issue with reference to failure of title by his general denial, and having virtually waived even this answer by his testimony, special issues as to acceptance of title and like questions, as well as jury instructions on title questions, should not include his name, either conjunctively or disjunctively with Lott's. Patently the attitude of these parties is antagonistic, and Lott should not be held bound by Harrigan's course of action.

[11] Lott's eighteenth assignment complains of the rejection of evidence sought to be elicited from Harrigan on cross-examination, to the effect that in two other matters in which he and Lott were involved Harrigan had procured Mrs. Dashiell as a mere dummy to purchase the notes of Mrs. Jones and of J. M. Wadson and enforce them against Lott. It is contended that this showing as to other similar transactions was admissible as circumstantial evidence that a like course had been followed by Harrigan and Mrs. Dashiell in this instance. If this actually occurred as to the notes involved herein, it would have effected a merger to the extent of one-half of the amount of said notes, and this entirely without reference to any possible malice on the part of Harrigan as dictating his action. We therefore think the court properly excluded this testimony, for it is only where the intent prompting an act in issue is material that it is competent to resort to a showing of similar acts as circumstantial proof of the act in issue as part of a system or scheme. *Goree v. Bank*, 218 S. W. 620, 623, 624.

[12] We overrule Lott's nineteenth assignment, which complains of the admission in evidence of the sheriff's deed to John W. Smith. It was admissible against both interveners and Lott in rebuttal of their common claim of title in the former. The title derived from Mrs. Martin is claimed to be deraigned under this sheriff's deed.

[13] Lott's twentieth and twenty-first assignments are overruled. The court's instruction that the suit of *Rodriguez v. Smith* did not break Merrick's peaceable possession is correct. This suit was settled, and not prosecuted to final effect to the ouster of Merrick, and, with reference to the agreed judgment finally entered in that suit, it was well said in the subsequent case involving the same land (*Smith v. Lee*, 82 Tex. 124, 129, 17 S. W. 598, 600:

"A proper disposition of the Merrick tract, in the absence of pleadings on his part for title and subpartition, was to leave the title as it

stood between him and the representatives of J. W. Smith, and that is what was done by the court. This action of the court inured to the benefit of Merrick to the full extent of whatever right he had against the Smiths."

[14] Besides, the interests of the interveners were not before the court in the Rodriguez suit, and limitation would continue to run as against their interests. *Miller v. Gist*, 91 Tex. 335, 340, 43 S. W. 263; *Cobb v. Robertson*, 99 Tex. 138, 147, 86 S. W. 746, 87 S. W. 1148, 122 Am. St. Rep. 609.

[15] The action of trespass to try title injected into this suit by the interveners, Sandoval et al., also plaintiffs in error herein, was opposed alone by the plaintiff below Mrs. Dashiell, who as owner of a vendor's lien on the land held the superior and legal title thereto. It was her right and her duty in this capacity to protect the title both for herself and the vendees, Lott and Harrigan. Lott in defense to her suit on the vendor's lien notes had set up interveners' claim of title, and if Mrs. Dashiell's defense against the interveners would not protect Lott's title, he could by willful default to interveners defeat her recovery on the notes against him.

Even if it be conceded that interveners made a prima facie case as to their claim of a one-half interest in the property as the heirs of Maria de Jesus Carvajal, wife of Mariano Rodriguez when he acquired title from Cavino Valdez in 1809, still the findings of the jury on the various questions as to possession and limitation submitted are conclusive of the fact that these heirs have slept on their rights. In our opinion the evidence both as to Mrs. Norton's possession for Isabella Steves and M. L. Merrick's possession in his own right sustain the findings of the jury on these matters. There is evidence showing that Merrick went into possession of the 500-acre tract, including the land in controversy, in 1851, when his bond for title from Mrs. Lee was made and registered, and further showing that he remained in continuous possession and use of the land until his death in 1874 or 1875. Thus there was ample time for him to acquire title, excluding the period of statutory suspension of limitation from 1861 to 1870, as the jury was instructed to do. There is also evidence showing that Mrs. Norton was in possession of the property in controversy from prior to 1892 on to the time of the purported sale to Lott and Harrigan, and that from about 1892 she claimed and held same under Isabella Steves, until the latter's death about 1908.

In their first five assignments interveners question the propriety of the issues submitted concerning the Steves limitation and the legal sufficiency of the jury's answers as supporting the judgment. In their sixth and seventh assignments they make similar objections concerning the Merrick limitation.

[16] Intervenors are correct in the view

that both of these limitation titles are merely outstanding titles with which no connection is shown by Mrs. Dashiell; for such limitation titles to the tract of land here involved, whatever the intention of the parties may have been, were never conveyed to the Edwardses. Mrs. Dashiell, however, specially pleaded an outstanding 10-year limitation title in M. L. Merrick, and this as sustained by the jury's finding would in itself defeat interveners' recovery on their title of prior origin, however remote from the present time Merrick's adverse possession may have ended. *Burton v. Carroll*, 96 Tex. 320, 325, 326, 72 S. W. 581; *Branch v. Baker*, 70 Tex. 190, 194, 7 S. W. 808.

[17] Merrick's bond for title to the 500-acre tract was sufficient memorandum of title to comply with the 10 years' statute. *Wille v. Ellis*, 22 Tex. Civ. App. 462, 54 S. W. 922, 925. This bond, though it refers to the land as a part of the estate of John W. Smith, former husband of Mrs. Lee—thus recognizing the interests of the heirs of said Smith (*Smith v. Lee*, 82 Tex. 124, 130, 17 S. W. 598)—obligated Mrs. Lee to convey the entire title, thereby repudiating the claim or cotenancy of every one else. *Miller v. Gist*, 91 Tex. 335, 340, 43 S. W. 263; *Naylor & Jones v. Foster*, 44 Tex. Civ. App. 599, 99 S. W. 114.

We have carefully considered and overrule all of interveners' assignments of error. Since theirs is a severable cause of action, it is not affected by the disposition of the suit as between the other parties hereto. We therefore affirm the judgment of the trial court as against interveners, in which Special Associate Justice DICKSON concurs, and otherwise reverse and remand the cause for new trial, as to which latter disposition Special Associate Justice DICKSON does not concur, and will file dissenting opinion.

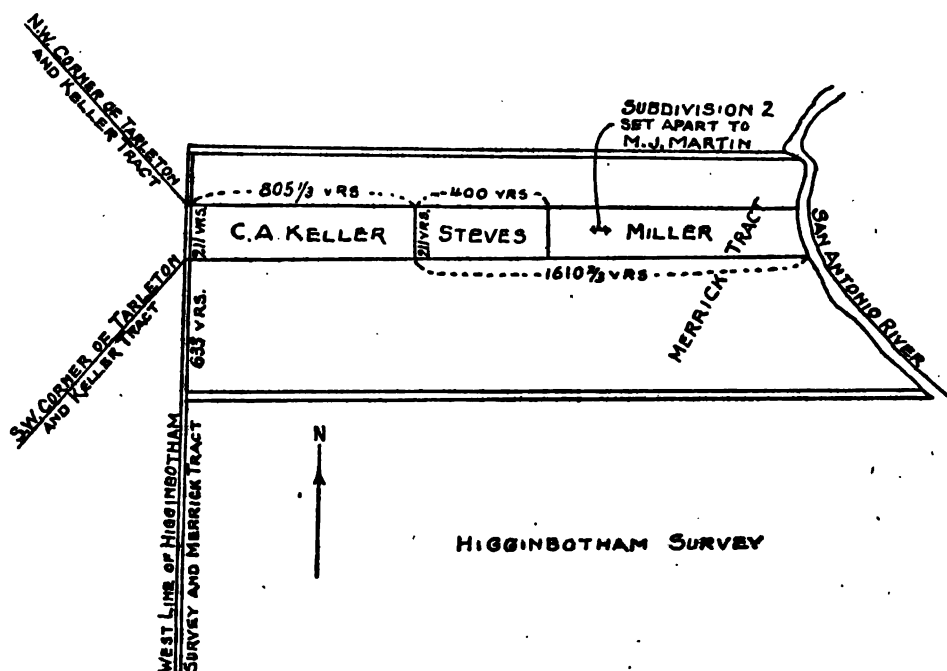
DICKSON, Special Justice (dissenting). I concur in the affirmance of this case as to the interveners, F. S. Sandoval et al., but am unable to agree with the majority opinion that the cause should be reversed and remanded as to plaintiff in error Lott, D. D. Harrigan, and W. R. and B. K. Edwards.

To the statement of the case made in the majority opinion it should be added that plaintiff in error Lott also pleaded that he and the defendant Harrigan formed a partnership for the purchase, subdivision, and sale of the land in controversy; that the \$4,000 note represented the agreed purchase price of the land, and the \$500 note represented cash advanced by the Edwardses to Lott and Harrigan to enable the latter to improve the land; it being understood that both said notes should be secured by a lien retained in the deed.

Before entering into a discussion of the fundamental reasons why I cannot agree with the majority opinion, I shall endeavor to show that the record does not bear out

the contention of plaintiff in error Lott, and that the deed from the Edwardses as originally executed conveyed one tract of land and said deed as reformed by the judgment of the trial court conveys an entirely different and distinct tract of land. The following sketch compiled from data in the statement of facts shows the location of the land involved in this suit:

beginning. As the northwest corner of the two tracts are identical, manifestly it is impossible to go "east" to the northwest corner of the O. A. Keller tract. If, however, in the Tarleton & Keller deed we reverse the call for the "northwest" corner of the C. A. Keller tract and make it read "northeast" corner of the C. A. Keller tract, then the description in the Tarleton & Keller deed and in the O.



It is true that the original description places the Steves tract immediately east of the "Tarleton and Keller tract," while the reformed description places the Steves tract immediately east of the C. A. Keller tract. However, both the original and the reformed description of the Steves tract are otherwise the same, and a careful examination of the statement of facts leads to the inevitable conclusion that the description contained in the Edwards deed as originally executed describes no land whatsoever or else it describes identically the same land as the reformed description, although the descriptions may be different in verbiage.

The evidence definitely establishes that the Tarleton & Keller tract and the C. A. Keller tract have for their west boundary line identically the same line. The southwest corner of the Tarleton and Keller tract is also the southwest corner of the C. A. Keller tract. The northwest corner of the Tarleton & Keller tract is also the northwest corner of the C. A. Keller tract. The Tarleton & Keller description, after taking us to the northwest corner of the tract intended to be conveyed, calls to go "east" to the northwest corner of the C. A. Keller tract; thence south to a given point; thence west to the place of

A. Keller deed will describe identically the same land. Therefore we are forced to the conclusion that the Tarleton & Keller deed describes no land whatever, or else it describes the O. A. Keller tract as shown on the foregoing sketch. Furthermore, if the Tarleton & Keller deed does not describe any land, then it follows that the Edwards deed as originally executed does not describe any land. On the other hand, if the Tarleton & Keller deed and the C. A. Keller deed describe the same land, then it is immaterial whether the Steves tract be described as being immediately east of the Tarleton & Keller tract (as in the deed from the Edwards) or as being immediately east of the C. A. Keller tract (as reformed by the judgment of the trial court). M. J. Martin, who appears to have executed both the Tarleton & Keller deed and the C. A. Keller deed, testified on the trial of the case that she did not convey but one tract. Harrigan, a surveyor, testified that the Tarleton & Keller tract could not be located on the ground because said tract and the O. A. Keller tract had the same line for their west boundary line and that the southwest corner of the two tracts was identical and the northwest corner of the two tracts was identical.

There is ample authority for reversing the call in the Tarleton & Keller deed from the "northwest corner" to the "northeast corner," and it is also well established that parol evidence is admissible to explain a latent ambiguity in a deed and identify the particular tract intended to be conveyed. Coffey v. Hendricks, 66 Tex. 676, 2 S. W. 47; Mansel v. Castles, 93 Tex. 414, 53 S. W. 559; Poitevent v. Scarborough, 103 Tex. 111, 124 S. W. 87.

I am utterly unable to agree with my associates as to the effect which should be given to Lott's admission, which was made under rule No 31 governing the district and county courts. Lott's admission as set forth in the judgment is as follows:

"The defendant J. N. Lott admits that plaintiff has a good cause of action as set forth in her petition, except in so far as it may be defeated in whole or in part by the facts of the answer of J. N. Lott constituting a good defense, which may be established."

What was the plaintiff's cause of action as set forth in her petition? Simply this: That B. K. and W. R. Edwards in May, 1914, executed a general warranty deed to Lott and Harrigan covering 13½ acres of land as described in the petition; that as the purchase price for said land Lott and Harrigan executed to said Edwardses the two notes aggregating \$4,500; that a vendor's lien was retained in the deed and acknowledged in the notes to secure the payment of said notes; that said notes and lien were transferred to and were owned by the plaintiff and were past due and unpaid; that through mutual mistake on the part of B. K. and W. R. Edwards and Lott and Harrigan there was an error in the description of the land; that the Edwardses intended to convey, and Lott and Harrigan intended to buy, the 13½-acre tract immediately east of the O. A. Keller tract; "that said last described 13½-acre tract was the tract which Lott and Harrigan actually purchased from said B. K. and W. R. Edwards; that on or about May, 1914, the said defendants, Harrigan and Lott, took actual possession of said last-described 13½-acre tract and held possession of same and are now in possession of same.

Certainly if Lott's admission is to be given any effect whatsoever, it must be held that Lott admitted all of the foregoing facts, for all of said facts are essential to plaintiff's recovery. If, after Lott made said admission, neither party had introduced any evidence, the plaintiff would as a matter of law be entitled to judgment against Lott. Smith v. Bank, 74 Tex. 541, 12 S. W. 221, cited in the majority opinion, holds:

"An admission made in the very language of the rule must be construed to mean that the defendant admits every fact alleged in the petition which it is necessary for the plaintiff to establish in the first instance to enable him to recover." And further the defendant "does

not purport to admit the allegations of the petition, but merely to admit that the plaintiff has a prima facie case."

In Sanders v. Bridges, 67 Tex. 93, 2 S. W. 663, it is said:

"The contemplation of the rule is that the admission shall be such that if no evidence be introduced by either party the plaintiff must recover to the extent of the claim made in his pleadings."

In Taylor v. Reynolds, 47 Tex. Civ. App. 344, 105 S. W. 65, it is held:

"Having admitted the appellee's cause of action, and that admission reaching to the entire cause of action, the appellants cannot question the insufficiency of the evidence in proof of the appellee's cause of action."

Again in Berry Bros. v. Fairbanks, 51 Tex. Civ. App. 538, 112 S. W. 427, it is held:

"The contemplation of the rule is that the admission relieves the appellees of proving the case, and to allow them to recover to the extent of the claim made in their pleadings. \* \* \* The admission reaches to the entire cause of action pleaded, and appellants cannot question failure to offer evidence on any material allegation."

In Meade v. Logan, 110 S. W. 188, it is held:

"When the admission contemplated by this rule is filed and entered of record, the plaintiff is thereby relieved from the burden of proving any fact material to his recovery in the action pending. The proceedings are placed in such a status that, if neither party offered any evidence, judgment would be rendered as a matter of law in favor of the plaintiff."

See, also, Workman v. Ray, 186 S. W. 291.

From what has been said, it necessarily follows that the judgment of the trial court should be affirmed as to the defendant Lott, unless he has defeated plaintiff's cause of action in whole or in part by establishing the facts of his answer constituting a good defense. Has Lott under his answer established a good defense to the cause of action he has admitted to be good? It seems very certain to me that he has not.

The contract sued upon was evidenced by the deed from B. K. and W. R. Edwards to Lott and Harrigan and by the notes executed by the latter to the former. The deed and the notes constituted the final written contract into which all previous negotiations and agreements were merged, and these instruments must be held to determine the rights of the parties in the absence of fraud or mistake. Luckenbach v. Thomas, 166 S. W. 99; Manley v. Noblitt, 180 S. W. 1154.

In order for Lott to defeat plaintiff's cause of action it was necessary for him to show three things:

(1) That the title to the land had failed in whole or in part.

(2) That there was danger of eviction, which is shown by establishing definitely that there is a paramount title outstanding in a third person and the land is actually claimed under such paramount title.

(3) Such circumstances as would repel the presumption that at the time of the purchase he knew and intended to run the risk of the defects. *Tarpley v. Poage*, 2 Tex. 139; *Cooper v. Singleton*, 19 Tex. 267, 70 Am. Dec. 333; *Cook v. Jackson*, 20 Tex. 209; *Haralson v. Langford*, 66 Tex. 111, 18 S. W. 339; *May v. Ivie*, 68 Tex. 379, 4 S. W. 641; *Ogburn v. Whitlow*, 80 Tex. 289, 15 S. W. 807.

According to the rule laid down in the cases cited, Lott has failed to establish a good defense. As stated by the majority opinion in the present case:

"Clearly plaintiff in error Lott did not discharge his peculiar burden of proof, under this rule, in such manner as would entitle him to peremptory instruction, and his first assignment is overruled. In order to make ourselves plain in the subsequent discussion, we will even go further and say that under the jury's findings on some issues and the undisputed testimony on others, Lott failed to establish the defense pleaded by him so as to defeat plaintiff's right to the judgment rendered."

In view of the above finding made in the majority opinion, it is unnecessary for me to enter into a detailed discussion of the evidence. However, it may be well to state that for some years prior to the conveyance by the Edwardses to Lott and Harrigan, Lott was engaged in the real estate business in San Antonio, the Edwardses residing outside the state, that all the negotiations leading up to the sale were by correspondence, that Lott was requested by the Edwardses to sell and dispose of said land for them, that Lott interested Harrigan in the land, and Lott and Harrigan formed a partnership for the purpose of purchasing, subdividing, and reselling said land, that before the deed and notes were executed Lott at the expense of the Edwardses obtained an abstract of title, which was examined by the law firm of Terrell, Walthall & Terrell, and said firm under date of March 17, 1914, gave an opinion on the title, which Lott received before the execution of the deed and notes, which opinion is in part as follows:

"We have examined the abstract of title to about 13½ acres of land out of subdivision 2 of the Merrick subdivision of the G. Martinez survey No. 28 in the city of San Antonio, Bexar county, Tex., and find the title good in William R. Edwards and Benjamin K. Edwards, subject to the following objections:

"At your suggestion we have assumed the title to be good in M. J. Martin. In a deed shown, on page 73, from M. J. Martin to Isabella Steves, the description calls to begin at the southeast corner of a tract of land conveyed to Tarleton & Keller. The tract sought to be conveyed is described as being 400 varas

by 211 varas. As a matter of fact, on February 23, 1887, M. J. Martin conveyed to C. A. Keller 30 acres directly east of the tract conveyed to Tarleton & Keller, and the deed to Isabella Steves dated March 2, 1887, and the property sought to be conveyed had already been conveyed to C. A. Keller. The same objection applies almost all through the balance of the abstract."

The opinion also states further objections not necessary to quote.

Lott testified that the reason he went on through with the transaction and took the deed from the Edwardses and executed the notes sued on, after this opinion had been rendered by Terrell, Walthall & Terrell, was because witness had sent the opinion to the Edwardses and the other matters had been agreed upon, and he got a letter back from the Edwardses to go ahead with the transaction just as though all papers were fixed up.

Harrigan testified in substance that he knew the location of the C. A. Keller tract on the ground; that he made a plat of it to show the location on the ground of the Steves tract and the Miller tract; that immediately east of the C. A. Keller tract is the Steves tract, the one that witness and Lott bought; that east of the Steves tract is the Miller tract; that witness and Lott bought this Steves tract in the early part of 1914, made a survey of it at that time, and began to clear it; that it was fenced in and is still fenced; that Edwards claimed to own it and that witness and Lott bought from Edwards and had rented it since continually; that witness had surveyed the land at the time they bought it; that witness had been previously employed as a surveyor to survey a tract of land immediately west of it; that this was the C. A. Keller tract; that when witness surveyed the tract he found that the northwest corner of the Tarleton & Keller tract was identical with the northwest corner of the C. A. Keller tract and that the west line of the two tracts was identical and that there was no Tarleton & Keller tract that he could locate; that at the time witness and Lott bought the land they had the opinion setting forth the objections raised by Terrell & Terrell; that Edwards got the releases of the legacies that were required under the opinion, which releases have been offered in evidence, and that they found the Steves release of record, which cured that, and the elimination of the Tarleton & Keller tract cured that; that this was what he and Lott did at the time they bought; that at the time they bought the controversy about the Keller tract had been eliminated, and about that time all other matters had been cleared up; that witness had satisfied himself as to the title of the land before ever having signed the notes back in 1914; that the way witness satisfied himself that the objections were not valid

objections to the title was that they got the releases to the legacies to the Morris Pratt Institute and Katherine Tobey and they secured the release from the Steves heirs; that the Steves release was on record at the time; that Lott told witness the title was good; that Lott and witness went to see Earnest Steves, who was the guardian of the Steves minors, and he said, "Why, these are paid and forgotten long ago," that witness asked him for a release, and he said, "That release is on record or ought to be. I furnished it." That they afterwards found the release; that defendant Lott at the time Lott spoke to witness about going in to buy this land said that he had had the Stewart Title Company examine it and Lott told witness that the title to it was good; that from the time they got a release up to the time of filing of this suit witness never heard Lott make any claim about the title not being good; that before witness and Lott bought the land there was rumored that a Mrs. Norton claimed the land; that Lott told witness that Mrs. Norton claimed all that land out there at one time, kind of an indefinite claim, and witness and Lott went to see her.

From the foregoing it seems to me that it is necessary to conclude that even though it be found that the title is defective, still Lott and Harrigan cannot defeat recovery on the notes, for they held under a general warranty deed, are in undisturbed possession of the land, no danger of eviction is shown, and it was known by them, at the time the deed and notes were executed, that the title was defective.

The opinion of the majority that the judgment of the trial court is fundamentally erroneous is based on the theory that the plaintiff's petition affirmatively alleges facts which defeat her recovery, but with this view I am unable to agree. The plaintiff does not affirmatively allege that the Edwardses had no title to the land, which they sold to Harrigan and Lott. At most, she merely alleges a defect in description such as to make the record title imperfect. She does not allege that the Edwardses did not have a good limitation title. She does not allege that there is a paramount title outstanding in a third person under which the land is claimed, nor does she allege any fact which would show any danger of eviction. She does not allege that Lott and Harrigan were ignorant of the defect and did not intend to run the risk of the same. Before she can be held to have defeated her own recovery, it must appear that she has by her allegations admitted all the facts it was necessary for Lott to establish in order to resist payment of the notes. The plaintiff's petition contains no such allegation.

For the reasons above stated, I cannot agree with the majority opinion that there

is fundamental error requiring that this cause should be reversed and remanded as to the plaintiff in error Lott and the defendants D. D. Harrigan and B. K. and W. R. Edwards. I therefore respectively enter my dissent.

### HINES, Director General of Railroads, v. PLATT. (No. 2390.)

(Court of Civil Appeals of Texas. Texarkana. July 1, 1921. Rehearing Denied Oct. 6, 1921.)

Railroads  $\Rightarrow$  5½, New, vol. 6A Key-No. Series—Director General not suable for negligence occurring before government control.

Where sweet potatoes shipped November 5, 1917, were damaged by failure to deliver at destination until November 10, a suit brought against the Director General of Railroads was not maintainable; the government not having taken over control until December 28, 1917, at which time the cause of action had arisen.

Appeal from Navarro County Court; H. E. Traylor, Judge.

Action by J. K. Platt against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Appellee's suit was against appellant as the Director General of Railroads. It was to recover damages appellee claimed he suffered by reason of negligence on the part of the St. Louis Southwestern Railway Company of Texas in handling a shipment of sweet potatoes delivered to it at Athens, November 5, 1917, for carriage to Corsicana. He alleged and proved that the potatoes were not transported to and delivered at the latter place until November 10, 1917, when they were in bad condition because, the jury thought, of the delay and a failure to properly ventilate the car they were in. The appeal is from a judgment in appellee's favor for \$267.50.

Richard Mays, of Corsicana, for appellant.

Simkins & Simkins, of Corsicana, for appellee.

WILLSON, C. J. (after stating the facts as above). We think the trial court erred when he refused appellant's request that he instruct the jury to find in his favor. The federal government did not take over the control of railroads until December 28, 1917. 1919 Supp. U. S. Comp. St. p. 494. Appellee's cause of action arose before that time, and his suit should have been against the railroad company. For reasons stated in

Bolton v. Hines, 143 Ark. 601, 221 S. W. 459, it was not maintainable against the Director General.

The judgment will be reversed and judgment will be here rendered that appellee take nothing by his suit against appellant.

# GREAT SOUTHERN SULPHUR CO. v. RITTER et al. (No. 1239.)

(Court of Civil Appeals of Texas. El Paso. Oct. 13, 1921.)

## 1. Money lent $\Rightarrow$ 6—Defendant held not entitled to deduction for transaction not pleaded.

In an action for money loaned and advanced in which defendant denied borrowing, it was not entitled to a deduction from the recovery of a sum it alleged was paid to plaintiff by defendant's manager without authority or right on her claim for boarding officers and employees of defendant where it had not pleaded such payment, or asked that it be set off.

## 2. New trial $\Rightarrow$ 102(3)—Affidavits held not to disclose diligence as to newly discovered evidence.

Where in an action for money loaned plaintiff's evidence showed that a telegram was received from M. that defendant's plant was short on funds, and that plaintiff drew her check for \$500, which was cashed, and the money given to H., defendant's employee, who took the money to the plant, and it was spent for supplies therefor, no diligence was shown by affidavits for new trial for newly discovered evidence in which H. affirmed he did not wire plaintiff for money, and did not receive any and M. averred that he did not receive any money from plaintiff for H., the statements not meeting plaintiff's evidence, and no sufficient excuse being offered for not having the available evidence at trial.

## 3. Corporations $\Rightarrow$ 399(8)—Liable for money borrowed by manager only having apparent authority.

Though the general manager of a corporation did not have express authority to borrow money for it, but was clothed with apparent authority, and the money was expended for its benefit, it was liable therefor.

Appeal from District Court, El Paso County; B. Coldwell, Judge.

Action by Isabella Ritter and husband against the Great Southern Sulphur Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Turney, Burges, Culwell, Holliday & Polard, of El Paso, for appellant.

Hudspeth, Wallace & Harper, of El Paso, for appellees.

HARPER, C. J. Appellee, joined by her husband pro forma, brought this suit for the following sums of money alleged to have been

loaned or advanced to appellant: \$2,581.85 on or about May 15, 1920; \$3,000 due as wages to her husband for the months of May, June and July, 1920, assigned to her; \$1,000 on April 28, 1920; \$1,000 on April 30, 1920; \$1,000 on May 26, 1920; \$500 on June 18, 1920.

Defendant answered, denying the allegations of the petition; specifically that it never borrowed any money from plaintiff, nor authorized any one else to do so for it, and if this was done same was without the knowledge or consent of defendant, not accepted nor ratified. The cause was submitted to the court without jury, and judgment entered for plaintiff for the sum of \$2,510, from which this appeal.

### [1] First assignment:

"The evidence shows a disbursement to plaintiff by her husband of funds belonging to the company in the sum of \$1,000 paid to her by him on or about July 7, 1920, and this sum, belonging as it did to the defendant, should be deducted from the amount of the recovery, as the evidence clearly shows that the husband of plaintiff had no right or authority to pay her said sum of money for the account on which it was paid; that it was not liable to her on that account; that it had never employed her nor obligated itself in any way to pay said sum of money for the reasons as testified by her, to wit, for board of officers of the company; that on said account same was a misapplication of funds; but, as that amount was actually received by her, and the court has found that the company was liable to her for moneys advanced, this sum should be credited on the amount found by the court to be due to her, and defendant now asks a credit to that extent; or if the court shall be unwilling to do this, then defendant avers that it should be awarded a new trial on account of the error of the court in the premises."

### First proposition under first-assignment of error:

"The evidence shows that the husband of appellee gave to her \$1,000 of appellee's money on or about July 7, 1920, in alleged settlement of her claim for board of officers and employees at El Paso. The evidence further shows that the payment to her of said sum was wholly unauthorized; that there was no authority for said expenditure; that the company was not obligated therefor, and that it did not know of any such payment and the account thereof until the trial of this cause. It was therefore entitled to have said sum treated as for money had and received and the amount of the recovery in favor of plaintiff herein should have been reduced to the extent thereof. The court erred in not so holding and concluding."

The court made and filed the following only as findings of fact:

"(1) The \$2,500 prayed for by plaintiff, as loaned to defendant, I find was loaned to Dr. Ritter, and not to the defendant.

"(2) I find that the plaintiff advanced and loaned to the company the sum of \$2,510, all of which is unpaid."

The appellant has not pleaded that this item was improperly paid to plaintiff for any reason, nor has it prayed that the claims of plaintiff be offset by it.

[2] Second assignment is that:

"The judgment should be set aside because of newly discovered evidence as to the item of \$500."

The plaintiff's evidence as to this item is: She testified that a telegram was received in El Paso from one Mills at the plant in Culberson county, Tex., to the effect that they were short on funds; that she drew her personal check for \$500, which was cashed, and the money delivered to an employee by the name of Hart, and that he took the money to the plant, and that it was thereafter spent for supplies for the plant. In its motion for a new trial it sets up certain affidavits of the said Hart and Mills as newly discovered evidence, and upon which it relied for a new trial, which was refused.

No diligence is shown in that these affidavits do not meet or contradict the plaintiff's evidence in the case; in that Hart says he did not wire the plaintiff to send any money; that he did not receive any from Mills; and Mills' affidavit is that he did not receive the \$500 from plaintiff, or any other sum to take to Hart. And, further, the defendant had access to these same employees before the trial, and no sufficient excuse is offered for not having their evidence before the court at the trial.

[3] The third and fourth are that the evidence is too uncertain to be the basis for a recovery against the defendant as to any item sued for, first, because Ritter had no authority to borrow money for his principal; second, the company did not know that he had done so. The evidence in this case is virtually undisputed that Dr. E. W. Ritter was general manager of the defendant, a foreign corporation; that the money, at least the amount for which judgment was rendered, was borrowed by him for the plaintiff (appellee), and that it was used or expended for the benefit of the defendant corporation. There is positive evidence that he (Ritter), as general manager, did not have express authority to borrow money for the corporation, but, as we view the facts of this case, he was clothed with the apparent authority to do so, and the moneys so borrowed having been expended for the benefit of the defendant, appellee should recover. *Booker-Jones Oil Co. v. National Ref. Co.*, 63 Tex. Cr. R. 142, 181 S. W. 623, 182 S. W. 816; R. C. L. vol. 21, § 112, p. 933.

Affirmed.

## MEMORANDUM DECISIONS

**ROACH et al. v. TEXAS EMPLOYERS' INS. ASS'N et al.** (No. 1771.) (Court of Civil Appeals of Texas, Texarkana, June 29, 1921. Rehearing Denied July 2, 1921.) Appeal from District Court, Hopkins County; Wm. Pierson, Judge. Action by T. W. Roach and wife against the Texas Employers' Insurance Association and another. Judgment for defendants, and plaintiffs appealed to the Court of Civil Appeals, which reversed as to the named defendant (195 S. W. 328), and such defendant brought error to the Supreme Court, which reversed and remanded to the Court of Civil Appeals for further disposition of the remaining assignments of appellant. Assignments overruled, and judgment affirmed. R. D. Allen, of Sulphur Springs, for appellants. Harry P. Lawther, of Dallas, for appellees.

**LEVY, J.** This cause is remanded to this court for the further disposition of the remaining assignments of the appellant. (Com. App.) 222 S. W. 159. The remaining assignments undisposed of in the opinion on writ of error relate to the trial of the case on the facts. We conclude that these assignments should be overruled. As there is not reversible error, and the verdict of the jury has support in the evidence, the judgment is affirmed.

**WERTH v. TEVIS et al.** (No. 637.) (Court of Civil Appeals of Texas, Beaumont, June 23, 1921.) Appeal from Jefferson County Court; D. P. Wheat, Judge. Suit by Eva Tevis and husband against Abe Werth. Judgment for plaintiffs, and defendant appeals. Affirmed. Sam C. Lipscomb, of Beaumont, for appellant. David E. O'Fiel, of Beaumont, for appellees.

**O'QUINN, J.** Suit by Mrs. Eva Tevis, joined pro forma by her husband, G. W. Tevis, against Abe Werth for damages to her automobile. Judgment for plaintiff, and defendant appeals. The following "statement of the nature and result of the suit" is taken from appellant's brief, which appellees concede to be correct: "Statement of the Nature and Result of the Suit. This suit was instituted by the appellee, Mrs. Eva Tevis, wife of George Tevis, against the appellant, Abe Werth, to recover damages sustained by reason of a collision between an automobile owned by Mrs. Tevis and an automobile owned by the appellant. The collision occurred on Park street in the city of Beaumont, Tex., about August 19, 1919. The evidence showed that Mrs. Tevis' car was at a standstill on the right-hand side of the street at the time of the collision, and there was no showing of contributory negligence on the part of Mrs. Tevis. The undisputed proof showed that the appellant, Abe Werth, was the owner of the car which collided with the Tevis car, and that the Werth car, at the time of the accident, was being driven by Maurice Werth, appellant's son. In her petition appellee alleged that she was the owner of the injured car in her separate right; that the defendant, by and through



his servants and agents, negligently and carelessly ran into and collided with plaintiff's automobile with a truck which defendant was operating and causing to be operated at said time, damaging and injuring said car \* \* \* in the sum of \$500." The defendant answered by general denial and plea of not guilty. The case was tried before the court without a jury, and judgment rendered for appellee for \$300. Motion for new trial was overruled, and appellant brings the case to this court for review. The court did not file his findings of fact and conclusions of law, nor does it appear that he was requested to do so. Appellant presents two assignments of error, both of which assail the court's rendering judgment for appellee on the ground that the evidence failed to show that the driver of appellant's car, Maurice Werth, appellant's son, was at the time of the collision the agent and servant of appellant and acting in the furtherance of appellant's business. This is the only contested point in the case. All others are conceded. The court, after hearing all the testimony, found against appellant, and we think the record sustains the finding. *Dawson v. Bank*, 181 S. W. 553; *Corrigan v. Goss*, 160 S. W. 652; *Bank v. Hill*, 160 S. W. 1099; *Moore v. Robb*, 159 S. W. 85; *League v. Rice Institute*, 152 S. W. 1182. The assignments are overruled. Finding no error in the record, the judgment is affirmed.

**BASS v. CLARKSON.** (Supreme Court of Arkansas. June 18, 1921.) Appeal from Circuit Court, Clay County, Western District; R. H. Dudley, Judge.

PER CURIAM. Appeal dismissed on appellee's motion.

**CHARTON v. STATE.** (Supreme Court of Arkansas. June 27, 1921.) Appeal from Circuit Court, Conway County; J. T. Bullock, Special Judge.

PER CURIAM. Appeal dismissed on ground that no final judgment was rendered in lower court.

**CITY OF DERMOTT et al. v. BELSER et al.** (Supreme Court of Arkansas. Oct. 11, 1920.) Appeal from Chicot Chancery Court; M. G. Hammock, Chancellor.

PER CURIAM. Appeal dismissed for non-compliance with rule 9.

**CITY OF DE WITT et al. v. ST. LOUIS SOUTHWESTERN RY. CO.** (Supreme Court of Arkansas. Jan. 17, 1921.) Appeal from Circuit Court, Pulaski County, Second Division; Guy Fulk, Judge.

PER CURIAM. Appeal dismissed on appellant's motion.

**CLIMBER MOTOR CORPORATION v. SCHUTTE.** (Supreme Court of Arkansas. Oct. 4, 1920.) Appeal from Circuit Court, Pu-

laski County, Third Division; W. G. Hendricks, Judge.

PER CURIAM. Settled, and appeal dismissed, by consent.

**DANIELS v. STATE.** (Supreme Court of Arkansas. Jan. 10, 1921.) Appeal from Circuit Court, Jefferson County; W. B. Sorrells, Judge.

PER CURIAM. Appeal dismissed for failure to perfect appeal within the time prescribed by law.

**DANIELS v. STATE.** (Supreme Court of Arkansas. March 28, 1921.) Appeal from Circuit Court, Jefferson County; W. B. Sorrells, Judge.

PER CURIAM. Appeal dismissed for failure to lodge transcript within the time required by law.

**DAVIS et al. v. NEWSUM et al.** (Supreme Court of Arkansas. Sept. 19, 1921.) Appeal from Woodruff Chancery Court, Northern District; A. L. Hutchins, Chancellor.

PER CURIAM. Appeal dismissed on appellant's motion.

**GAMMILL et al. v. CORDER et al.** (Supreme Court of Arkansas. July 11, 1921.) Appeal from Jefferson Chancery Court; John M. Elliott, Chancellor.

PER CURIAM. Settled, and appeal dismissed, by consent.

**GOLIGHTLY et al. v. THOMPSON.** (Supreme Court of Arkansas. April 4, 1921.) Appeal from Woodruff Chancery Court, Northern District; A. L. Hutchins, Chancellor.

PER CURIAM. Settled, and appeal dismissed, on appellant's motion.

**HAWN v. BRADSHAW et al.** (Supreme Court of Arkansas. Nov. 22, 1920.) Appeal from Searcy Chancery Court; Ben F. McMahon, Chancellor.

PER CURIAM. Appeal dismissed for non-compliance with rule 9.

**HARMON v. HENDERSON.** (Supreme Court of Arkansas. July 11, 1921.) Prohibition to Garland Chancery Court; J. P. Henderson, Chancellor.

PER CURIAM. Petition overruled orally.

**JACK v. YOUNT.** (Supreme Court of Arkansas. Feb. 7, 1921.) Appeal from Circuit Court, Washington County; W. A. Dickson, Judge.

PER CURIAM. Appeal dismissed for non-compliance with rule 9.

**LOUIS RICH CONST. CO. v. CULVER.** (Supreme Court of Arkansas. Sept. 20, 1920.) Appeal from Circuit Court, Yell County, Danville District; A. B. Priddy, Judge.

**PER CURIAM.** Settled, and appeal dismissed, on appellant's motion.

**MARSH v. WESSON.** (Supreme Court of Arkansas. Oct. 25, 1920.) Appeal from Circuit Court, Prairie County, Northern District; George W. Clark, Judge.

**PER CURIAM.** Settled, and appeal dismissed, on appellant's motion.

**MORTON v. HUSSEY et al.** (Supreme Court of Arkansas. Nov. 29, 1920.) Appeal from St. Francis Chancery Court; A. L. Hutchins, Chancellor.

**PER CURIAM.** Appeal dismissed in accordance with stipulations filed.

**NANCE v. LOGAN.** (Supreme Court of Arkansas. Sept. 19, 1921.) Appeal from Circuit Court, Jackson County; Dene H. Coleman, Judge.

**PER CURIAM.** Appeal dismissed on appellant's motion.

**NEW YORK LIFE INS. CO. v. HUGHES.** (Supreme Court of Arkansas. Nov. 15, 1920.) Appeal from Circuit Court, Ouachita County; C. W. Smith, Judge.

**PER CURIAM.** Appeal dismissed on appellant's motion.

**PATTERSON v. LEA.** (Supreme Court of Arkansas. Oct. 11, 1920.) Appeal from Circuit Court, Pulaski County, Second Division; Guy Fulk, Judge.

**PER CURIAM.** Appeal dismissed on appellant's motion.

**PEAY v. CITY OF NORTH LITTLE ROCK.** (Supreme Court of Arkansas. May 2, 1921.) Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

**PER CURIAM.** Affirmed, on appellee's motion, for noncompliance with rule 9.

**PERRY et al. v. MISSOURI PAC. R. CO. et al.** (Supreme Court of Arkansas. Sept. 19, 1921.) Appeal from Circuit Court, Hempstead County; George R. Haynie, Judge.

**PER CURIAM.** Settled, and appeal dismissed, on appellants' motion.

**PRICE et al., County Com'rs, v. CORNISH et al.** (Supreme Court of Arkansas. Jan. 1, 1921.) Appeal from Howard Chancery Court; James D. Shaver, Chancellor.

**PER CURIAM.** Appeal dismissed for noncompliance with rule 9.

**REIDINGER v. STATE.** (Supreme Court of Arkansas. Feb. 7, 1921.) Certiorari to Circuit Court, Jefferson County; W. B. Sorrells, Judge.

**PER CURIAM.** Judgment refusing bail affirmed.

**RICHARDSON et al. v. SOUTHERN SURETY CO. et al.** (Supreme Court of Arkansas. June 6, 1921.) Appeal from Clay Chancery Court, Western District; Archer Wheatley, Chancellor.

**PER CURIAM.** Affirmed, on appellees' motion, for noncompliance with rule 9.

**RILEY v. STATE.** (Supreme Court of Arkansas. Feb. 7, 1921.) Certiorari to Circuit Court, Jefferson County; W. B. Sorrells, Judge.

**PER CURIAM.** Judgment refusing bail affirmed.

**ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN COUNTY v. HARGROVE et al.** (Supreme Court of Arkansas. June 27, 1921.) Appeal from Franklin Chancery Court; J. V. Bourland, Chancellor.

**PER CURIAM.** Appeal dismissed on the ground that the same matters involved in this appeal were disposed of in case numbered 6860, brought up on certiorari.

**SAFFORD v. BOONE.** (Supreme Court of Arkansas. March 21, 1921.) Appeal from Circuit Court, Miller County; George R. Haynie, Judge.

**PER CURIAM.** Affirmed, on appellee's motion, pursuant to rule 7.

**ROBERTS v. WIEGEL et al.** (Supreme Court of Arkansas. Dec. 20, 1920.) Appeal from Circuit Court, Pulaski County, Second Division; Guy Fulk, Judge.

**PER CURIAM.** Appeal dismissed on appellant's motion.

**ST. FRANCIS RIVER PLANTATION CO. et al. v. HORTON.** (Supreme Court of Arkansas. May 2, 1921.) Appeal from St. Francis Chancery Court; A. L. Hutchins, Chancellor.

**PER CURIAM.** Settled, and appeal dismissed, by consent.

**ST. JOE & WITTS SPRING ROAD IMPROVEMENT DISTRICT et al. v. CASH et al.** (Supreme Court of Arkansas. March 21, 1921.) Appeal from Searcy Chancery Court; B. F. McMahan, Chancellor.

**PER CURIAM.** Appeal dismissed for noncompliance with rule 9.

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PER CURIAM. Appeal dismissed for non-compliance with rule 9.

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PER CURIAM. Appellant pardoned by Governor; appeal dismissed.

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PER CURIAM. Appeal dismissed on appellants' motion.

WATKINS v. STATE. (Supreme Court of Arkansas. Oct. 11, 1920.) Appeal from Circuit Court, Boone County; J. M. Shinn, Judge.

PER CURIAM. Appellant pardoned by Governor, and appeal dismissed.

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WESTERN UNION TELEGRAPH CO. v. DE WITT RICE MILL CO. et al. (Supreme Court of Arkansas. Nov. 15, 1920.) Appeal from Circuit Court, Pulaski County, Second Division; A. F. House, Judge.

PER CURIAM. Appeal dismissed on appellant's motion.

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WILLIAMS v. CHERRY. (Supreme Court of Arkansas. June 13, 1921.) Appeal from Circuit Court, Jefferson County; W. B. Sorrella, Judge.

PER CURIAM. Appeal dismissed, on appellee's motion, pursuant to rule 7.

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It Supplements the Decennial Digests, the Key-Number Series and  
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1	224	513	79	225	53	179	225	521	277	225	377	349	227	188	437	227	668
7	224	510	82	225	53	183	225	532	281	225	538	349	227	320	438	227	302
10	225	165	84	225	169	194	225	514	288	225	1103	354	227	190	444	227	668
13	224	1093	87	225	177	196	225	523	293	225	1096	358	227	189	447	227	483
17	224	894	98	225	55	200	225	517	294	225	1094	360	227	192	451	227	947
17	224	1109	101	225	187	202	225	525	295	225	536	364	226	408	452	227	949
21	224	893	104	225	56	208	225	374	300	226	1078	367	227	188	457	227	671
23	224	890	106	225	172	209	225	528	301	225	751	368	227	317	462	227	1106
24	224	899	109	225	57	211	225	374	304	226	412	372	227	489	465	227	1104
28	224	890	112	225	59	212	225	516	306	226	410	377	227	186	466	227	1104
29	224	892	114	224	1088	214	225	173	307	226	414	380	227	670	468	227	1102
30	224	888	122	224	901	220	225	748	309	226	411	382	227	305	470	227	679
31	224	888	126	224	1102	222	225	750	310	226	405	389	227	308	485	227	1107
32	224	891	129	224	1092	225	224	1110	311	226	405	402	227	316	488	228	230
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55	224	1105	154	225	261	262	225	1095	333	226	685	421	227	322	512	228	566
60	224	1098	155	225	256	264	225	1106	335	226	683	422	227	194	518	228	564
61	224	1087	156	225	261	265	225	1093	337	226	687	432	227	328	520	227	673
64	224	1108	157	225	262	268	225	1096	340	226	686	433	227	485	525	228	1097
68	224	1109	159	225	511	269	225	1098	342	227	486	433	227	1108	529	228	199
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